APPENDIX

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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1 (b)
File Name: 23a0011 p.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHEILA MIKEL,

Plaintiff-Appellant,

v. — No. 22-5329

MARGIE QUIN, Commissioner of the Department of Children's Services, in her official capacity; JENNIFER NICHOLS, in her individual capacity; TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES; OMNI VISIONS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.
No. 1:20-cv-00345—Curtis L. Collier, District Judge.
Argued: October 19, 2022

Decided and filed: January 19, 2023

Before: SUTTON, Chief Judge; BOGGS and KETHLEDGE, Circuit Judges.

COUNSEL ARGUED: William Neil Thomas III, THOMAS & THOMAS, Chattanooga, Tennessee, for Appellant. Jordan K. Crews, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for state of Tennessee Appellees in their official capacities. Jeffrey M. Beemer, DICKINSON WRIGHT PLLC, Nashville, Tennessee, for Appellee Omni Visions. ON BRIEF: William Neil Thomas 111, THOMAS & THOMAS, Chattanooga, Tennessee, for Appellant. Jordan K. Crews, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for state of Tennessee Appellees in their official capacities. Jeffrey M. Beemer, Daryl D. Choe, DICKINSON WRIGHT PLLC, Nashville, Tennessee, for Appellee Omni Visions.

App. 3

OPINION

SUTTON, Chief Judge. Sheila Mikel claims that the Tennessee Department of Children's Services took her two foster children without due process of law. She sued the Department, its Commissioner, and a private Department subcontractor, seeking damages along with declaratory and injunctive relief. The district court dismissed Mikel's claims against the Department and Commissioner for want of jurisdiction and held §that Mikel had failed to state a claim against the subcontractor. We affirm.

I.

The Tennessee Department of Children's Services supervises Tennessee's foster care system. *See* Tenn. Code Ann. §§ 37-5-105(3), 37-5-106(a)(1), (3). An appointed Commissioner, now Margie Quin and previously Jennifer Nichols, leads the Department. The Department subcontracts much of its day-to-day work to private foster care agencies, including Omni Visions, Inc.

Plaintiff Sheila Mikel is a resident of Tennessee. In June of 2016, Mikel took custody of two Tennessee girls—"AK," then twelve years old, and "SK," then nine years old—as a foster parent. Mikel describes her relationship with AK and SK as "pre-adoptive," R.I at 3, meaning that she had planned to adopt the girls after taking custody of them. Omni approved Mikel's home as a foster home and oversaw Mikel's relationship with the girls.

All was well until December 2017, when Mikel submitted her adoption papers to Omni. Omni removed the girls from Mikel's custody three days later, alleging emotional abuse. About a week after that, Omni "clos[ed] [Mikel's] home as a foster home." *Id.* at 6. Mikel says that she never abused the girls, that Omni's removal was pretextual and in violation of Tennessee law, and that neither Omni nor the Department gave her notice or an opportunity to be heard before commencing the removal process.

After unsuccessfully appealing Omni's removal administratively and in state court, Mikel filed this action against Omni, the Department, and then-Commissioner Nichols. In her complaint, Mikel alleged claims arising under Tennessee tort law and 1983. She demanded damages from Omni, costs and expenses, and two injunctions—one limiting the defendants' rights to remove future foster children, one preventing the defendants from "assisting in any adoption" of the girls. *Id.* at 11. She also sought declaratory relief.

The Department, Nichols, and Omni filed motions to dismiss. The district court granted the motions. It held that Tennessee's sovereign immunity blocked Mikel's suits against the Department and Nichols in her official capacity, that Mikel had not properly served process on Nichols in her individual capacity, and that Mikel had failed to state a claim against Omni under § 1983. It then declined to exercise supplemental jurisdiction over Mikel's state-law claims. Mikel appealed.

II.

Sovereign immunity generally bars lawsuits against States or their agencies. *See, e.g., Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2461—62 (2022). While a State may waive its immunity from suit, *Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 618—19 (2002*),* Mikel does not claim that Tennessee has waived anything here. And while Congress can abrogate a State's sovereign immunity to enforce the Fourteenth Amendment, it did not do so when it enacted 1983. *Quern v. Jordan,* 440 U.S. 332, 342—43 (1979). State entities in fact are not "persons" under 1983 in the first place. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989). Thus, to the extent Mikel seeks relief against Tennessee agencies, her lawsuit fails twice over—first due to sovereign immunity, second due to the inapplicability of § 1983.

Sovereign immunity also limits, but does not entirely prohibit, lawsuits against state officials in their official capacity. Under *Ex parte Young, 209 U.S.* 123, 159—60 (1908), federal courts may award injunctive and declaratory relief against state officials when the relief is "designed to end a continuing violation of federal law." *Green v. Mansour,* 474 U.S. 64, 68 (1985); *see, e.g., Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437—38 (2004). They may not, however, entertain actions that essentially seek a monetary recovery from a State. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Put differently, *Ex parte* Young applies only when a plaintiff targets "an ongoing violation of federal law and seeks" prospective relief.

Verizon Md., Inc. v. Pub. Serv. Comm 'n of Md., 535 U.S. 635, 645 (2002) (quotations omitted).

As to Mikel's lawsuit against the Department, there is little room to maneuver. The Department is a state agency. *Gean v. Hattaway*, 330 F.3d 758, 766 (6th Cir. 2003). Sovereign immunity thus protects it, frill-stop. *Id.* Plus, the Department is not a "person" under the statute anyway. *Will*, 491 U.S. at 71.

The same is not true for the current Commissioner, Quin. True, if Mikel had sought money damages from Quin in her official capacity, sovereign immunity would have stood in her way. *E.g., Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (en banc). But Mikel's complaint did not demand damages from Quin or otherwise seek recovery of money from the State of Tennessee. Mikel instead alleged that Quin violated federal law in depriving Mikel of her foster children and sought declaratory and injunctive relief. That kind of claim sits well within the heartland *of Ex parte Young*.

It makes no difference whether Mikel's §1983 claim fails on the merits. To ascertain whether sovereign immunity defeats an action seeking injunctive relief against a state official, we ask only whether the action alleges an ongoing violation of federal law. *Verizon*, 535 U.S. at 646. We do not ask whether the allegation is true. Because Mikel's complaint seeks to state a claim for a violation of federal law, it falls outside the scope of Tennessee's sovereign immunity.

Nor is it true that Mikel failed to allege an "ongoing ' violation of federal law. She alleges that Quin and the Department unlawfully took AK and SK from her, surely an "ongoing" or "continuing" action. *See In re Flint Water Cases*, 960 F.3d 303, 334 (6th Cir. 2020). The girls indeed remain outside Mikel's custody to this day. Just as state officials may commit "ongoing" violations when they unconstitutionally retain possession of a person's identifiable property, *see, e.g., Tindal v. Wesley*, 167 U.S. 204, 221—22 (1897); *Fla. Dep't of Slate v. Treasure Salvors, Inc.,* 458 U.S. 670, 697—98 (1982) (plurality op.), so the same may be hue when they keep children they allegedly have no right to keep.

All in all, while sovereign immunity bars Mikel's suit against the Department, it does not bar Mikel's claims against Quin.

III.

That leaves Mikel's claims against Quin and Omni. These claims run into another hurdle standing—one Mikel can clear with respect to 0m.ni but not with respect to Quin. Standing requires (1) an actual injury (2) caused by a defendant's challenged conduct (3) that a favorable decision likely will redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560—61 (1992). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env. Ser-vs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

Damages and attorney's fees. Mikel seeks damages only from Omni, and she has standing to pursue them. When Omni took AK and SK away from Mikel, Mikel suffered an injury. *Chafin v. Chafin*, 568 U.S. 165, 172—73 (2013). Omni inflicted that injury by participating in the removal process. And even a dollar in damages would help mitigate the injury that Omni inflicted. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801—02 (2021). That adds up to standing.

Mikel's standing to seek costs and attorney's fees follows from her standing to seek damages. An interest in recovering litigation expenses, to be sure, does not create standing on its own. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). When a litigant has standing to seek damages, however, she has standing to recover fees and costs as well. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107—08 (1988). Because Mikel has standing to seek damages, she has standing to seek attorney's fees too.

Injunctive relief. Mikel also seeks two injunctions: one limiting "further activity" by the defendants "[i]nvolving the removal of children from foster homes," and another barring the defendants from "assisting in" any future adoption of AK or SK. R.1 at 11. But these injunctions would not redress Mikel's injuries, meaning Mikel lacks standing to seek them.

Injunctions redress "present ongoing" or "imminent future" injuries. *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) (per curiam). Injuries are "present" when they have

already come about, and "imminent" when they are certain or perhaps substantially likely to occur in the future. *Id.* at 981—82; *compare Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401-02 (2013), *with Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 158 (2014).

A "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7. When a litigant seeks to remedy a procedural wrong, she instead needs only to show "some possibility" that an injunction will afford her redress. *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 579 (6th Cir. 2014) (quotations omitted). But "a bare procedural violation, divorced from any concrete harm," is not a present or imminent injury that an injunction can redress. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341—42 (2016).

These principles create problems for Mikel's demands for injunctive relief against Quin and Omni. Start with Mikel's injuries. Mikel suffered a present, ongoing injury when she lost custody of her girls. That loss, however, is the only injury supporting Mikel's standing theory. Among other things, Mikel has not pled that she plans to foster more children going forward. As a result, she cannot argue that she faces "imminent" risks of losing future foster children. *Cf Clapper*, 568 U.S. at *Driehaus*, 573 U.S. at 158. Likewise, although the defendants allegedly deprived Mikel of custody over her girls without adequate process, Mikel did not suffer a separate injury from the inadequate process she received. Divorced from

AK and SK, such an injury would be a "bare procedural violation" insufficient for standing by itself. *Spokeo*, 578 U.S. at 341-42.

Losing custody of AK and SK, in turn, is not an injury that either of Mikel's proposed injunctions against Quin and Omni could redress. Recall that Mikel sought an injunction restricting removal of future foster children and another preventing the defendants from "assisting in" any adoption of the girls. R.1 at 11. Neither injunction, however, creates even "some possibility" of returning AK or SK to Mikel. *Klein*, 753 F.3d at 579 (quotations omitted). AK and SK have already been removed, so limiting future foster-child removals would not alter AK or SK's custody status. And while barring Omni or Quin from assisting in AK or SK's adoption might prevent AK or SK from being adopted, this outcome would not return them either. Mikel has not said that she presently intends to adopt AK or SK and has not otherwise explained how an injunction against adoption would protect her concrete interests. Given this reality, whether AK and SK get adopted or not, they will still remain outside Mikel's hearth and home.

Declaratory relief Mikel requests two declaratory judgments: one establishing that the contract between Omni and the Department is void and another announcing "a violation of 42 U.S.C. § 1983." R.1 at 11 . Both requests fail.

Declaratory judgments are not get-out-of-standing-free cards. Because federal courts may not issue advisory opinions, all declaratory judgments

must have "a conclusive character." *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 241 (1937). A declaratory judgment, put differently, may issue only when "it is substantially likely" to redress a plaintiff's actual or imminent injuries. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality op.); *see, e.g., Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 75—76 & n.20 (1978); *Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 971 (6th Cir. 2009) (explaining that a declaratory judgment must "affect[l]the behavior of the defendant towards the plaintiff' (emphasis omitted) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)).

Neither of Mikel's proposed declaratory judgments has a "conclusive character." *Haworth*, 300 U.S. at 241. For starters, declaring that Omni's contract with the Department is void would not redress any injuries Mikel has suffered. Omni issued AK and SK's removal notice long ago. Hence voiding Omni's contract would not lead AK and SK to return to Mikel. And because Mikel does not operate a foster home now and has not suggested that she intends to do so later, Mikel lacks a legally cognizable interest that could support an award of prospective relief. *Cf City of Los Angeles v. Lyons*, 461 U.S. 95, 105—06 (1983).

So too for a "[d]eclaration of a violation of 42 U.S.C. § 1983." R.1 at 11. The problem, as before, is that Mikel does not explain how a declaratory judgment of this sort would offer her redress. Entering the realm of the possible and the hypothetical, we suppose, it could be said that a declaratory judgment

could raise the odds that the Department would return the children. But Mikel's complaint made no such suggestion, leaving this many other speculative possibilities. Because Mikel has not argued anything to this effect, we see no good reason to tread where Mikel has not.

All in all, while Mikel has standing to seek attorney's fees and damages from Omni, she lacks standing to seek injunctive or declaratory relief against Omni or Quin.

IV.

Jurisdictional brambles cleared, we turn to the merits. Mikel sought damages only from Omni, the last party standing as it were. And the only claim left against Omni is Mikel's due process claim under § 1983.

"No state," the Due Process Clause says, shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. To violate the guarantee, a "State" must "deprive" a "person" of "liberty" or "property." *Id.* Omni does not argue that it is not a "State" for Due Process purposes, and Mikel does not allege that she had a property interest in her status as a foster parent. As a result, we need ask only whether Omni deprived Mikel of "liberty" when it took AK and SK away from her.

Protected liberty interests can arise either from the Constitution itself or from state law. Neither

source in this instance gave Mikel a liberty interest in her relationship with AK and SK.

The Constitution. The Fourteenth Amendment's promise of "liberty" encompasses, among other things, "those privileges long recognized … as essential to the orderly pursuit of happiness by free men." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). What these privileges are has never been clear, perhaps because free men pursuing happiness tend to disagree over what "long," "recognized," "essential," and "orderly" mean or ought to mean. Nor do today's facts bring things into focus: the Supreme Court has explicitly declined to decide whether foster parents have liberty interests in their relationships with foster children. *Smith v. Org. of Foster Fam. for Equal. & Reform*, 431 U.S. 816, 846-47 (1977).

Where the Supreme Court has drawn blurred lines, however, our circuit has drawn comparatively crisp ones. The key case is *Renfro v. Cuyahoga County Department of Human Services*, 884 F.2d 943 (6th Cir. 1989). A family had fostered a girl for more than six years, starting when the girl was fourteen months old. *Id.* at 944. Child services took the girl away, alleging abuse. *Id.* We held that the family lacked a liberty interest in its relationship with the child. *Id.*"[T]he foster care relationship," we explained, was "a temporary arrangement created by state and contractual agreements," one which (under Ohio law) vested "limited" legal rights in the foster family. *Id.*

For that reason, the family's foster relationship did not create a constitutional liberty interest. *Id.*

Mikel took custody of AK and SK under a contract with Omni and the Department. As in Renfro, her foster relationship with her girls was a "temporary arrangement created by state and contractual agreements," *id.;* Mikel had not adopted the girls, or for that matter come particularly close to consummating their adoption, and had not otherwise established a permanent legal relationship with them. *Id.* As in *Renfro,* that means Mikel lacked a constitutional liberty interest in her status as a foster parent. *Id.*

Mikel seeks to distinguish *Renfro* in three ways, none persuasive. First, Mikel says, her relationship with her girls was "pre-adoptive" rather than "temporary." But under Tennessee law, foster relationships, pre-adoptive or not, are designed to be temporary. Dawn Coppock, *Coppock on Tennessee Adoption Law* 226—27 (7th ed. 2017). The temporary nature of Tennessee foster placements "provides sufficient notice" to foster parents like Mikel "that their rights are limited." *Renfro*, 884 F.2d at 944.

Second, Mikel continues, a court had terminated the girls' biological parents' rights before Mikel took custody of them. Terminating the girls' parents' rights is a necessary step on the path to adoption. Diminishing the girls' biological parents' rights, however, does not greatly expand Mikel's. Mikel's relationship with the girls remains "created by

state and contractual agreements" regardless of the girls' biological parents' rights. *Id*.

Third, Mikel concludes, Tennessee law gives foster parents preference in adoption proceedings. Undeniably, Tennessee law affords greater protections to foster parents than the Ohio rules at issue in *Renfro*. But the first preference to adopt that Tennessee law gives to foster parents does not, on our view, entitle them to the same constitutional protections as natural or adoptive parents. It also does not change the reality that Mikel's relationship is circumscribed by state and contractual agreements.

Out-of-circuit cases do not change this conclusion. Mikel relies most heavily on *Elwell v. Byers*, 699 F.3d 1208, 1217 (10th Cir. 2012), where a foster family had "cared for [a foster child] nearly his entire life and [was] on the verge of adopting him," and a state court had previously approved the family's "adoption plan." *Id.* The Tenth Circuit held that this arrangement created a liberty interest. *Id.* But to recite these facts distinguishes them. Mikel did not care for the girls for their entire lives, and her adoption plan did not make it out of the starting gate. We need not decide whether a different conclusion would apply if the facts changed so materially.

Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982), is further afield. In *Rivera*, a woman had fostered her half-brother and sister. *Id.* at 1024. She had lived "as a family" with the children for many years before entering into a formal foster arrangement, and the biological mother had "expressly asked" the claimant

to parent the children. *Id.* The Second Circuit found a constitutional liberty interest. *Id.* at 1024—25. Here, by contrast, Mikel neither lived with nor shared a blood relationship with the girls before taking custody of them as a foster parent.

Mikel's other out-of-circuit cases, if anything, cut against her position. *See, e.g., Lofton v. Sec 'y of Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 814 (l1th Cir. 2004) (rejecting view that foster parents possess liberty interests in foster relationships because, in regulating foster relationships, "the state is not interfering with natural family units that exist independent of its power, but is regulating ones created by it"). Other out-of-circuit cases squarely reject views analogous to Mikel's. *See, e.g., Rodriguez v. McLoughlin*, 214 F.3d 328, 337 (2d Cir. 2000) (holding that no liberty interest arises in foster arrangements between "biologically unrelated" persons, and distinguishing Rivera because it involved a blood relationship).

Tennessee law. Tennessee law also vest Mikel with a liberty interest in foster parenting. "State-created liberty interests arise when a state places substantive limitations on official discretion." *Tony L. ex rel. Simpson v. Childers*, 71 F.3d 1182, 1185 (6th Cir. 1995) (quotations omitted). A statute places substantive limits on official discretion when it (1) contains mandatory language (2) requiring specific substantive outcomes (3) when specific substantive predicates are met. *See, e.g., Fields v. Henry County*, 701 F.3d 180, 186 (6th Cir. 2012).

Mikel offers no rule of Tennessee law that passes this test. Mikel principally cites statutes and Department rules that, she says, required the Department to offer notice and a hearing before taking away the girls. *See* Tenn. Code Ann. § 37-2-415(a)(16); Tenn. Dep't Childs. Servs. Admin. Pol'ys & Procs. 16.27. Bare notice or hearing requirements, however, do not make substantive outcomes contingent on substantive predicates. *See, e.g., Fields*, 701 F.3d at 186 (hearing); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993) (notice). They make substantive outcomes contingent on procedural predicates—the adequacy of notice or a hearing. Even if Omni violated Mikel's procedural rights under Tennessee law, that did not mean it violated her federal due process rights.

Mikel also says that Omni lacked authority under Tennessee law to remove the girls, that its removal lacked an evidentiary basis, and that it justified its removal using testimony that would have been inadmissible under the Federal and Tennessee Rules of Evidence. Even if Mikel were right as to each point, none of these facts helps her state a claim under 1983. *See,e.g., Stanley v. Vining,* 602 F.3d 767, 769 (6th Cir. 2010) ("[V]iolation of a state statute or regulation is insufficient alone to make a claim cognizable under § 1983.").

We affirm.

APPENDIX B

FILED
Jan 19, 2023
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 22-5329

SHEILA MIKEL,

Plaintiff-Appellant,

v.

MARGIE QUIN, Commissioner of the Department of Children's Services, in her official capacity; JENNIFER NICHOLS, in her individual capacity; TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES; OMNI VISIONS, INC.,

Defendants-Appellees.

Case No. 1:20-CV-345
Judge Curtis L. Collier

Before: SUTTON, Chief Judge; BOGGS and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA

SHEILA MIKEL,

Plaintiff,

Case No. 1:20-CV-345
Judge Curtis L. Collier

JENNIFER NICHOLS, Commissioner of the Department of Children's Services, et al.,

Defendants.

MEMORANDUM

Before the Court are two motions to dismiss the complaint of Plaintiff, Sheila Mikel, which asserts claims under 42 U.S.C. § 1983 and Tennessee law arising from the removal of two foster children from her care. (Docs. 12, 15.) Defendants Tennessee Department of Children's Services ("DCS") and its Commissioner, Jennifer Nichols (the Commissioner"), move to dismiss Plaintiffs complaint for lack of subject-matter jurisdiction and insufficiency of service of process or, in the alternative, failure to state a claim on which relief may be granted. (Doc. 12.) Defendant

Omni Visions, Inc. ("Omni") moves to dismiss Plaintiff's complaint for failure to state a claim on which relief may be granted. (Doc. 15.) Plaintiff has responded in opposition to both motions (Docs. 17, 19), and Defendants have replied (Docs. 18, 20). For the reasons set out below, the Court will **GRANT** both motions to dismiss.

1. BACKGROUND[1]

Plaintiff became the pre-adoptive foster mother of two minor girls (the "Children") on June 30, 2016. (Doc. 1 ¶¶8-9). Plaintiff had previously provided therapy to the Children while they were in the foster care of others. were in the foster care of others. (*Id.* ¶ 10.) On December 4, 2017, Plaintiff submitted paperwork to Omni, a contractor with DCS to provide custodial services for children in DCS's custody, for its assistance in completing her adoption of the children. (*Id.* ¶¶ 7, 13.) Three days later, on December 7, 2017. Omni issued a notice of removal taking the Children from Plaintiffs care as of December 6, 2017. (*Id.* ¶ 15.) The notice relied on a purported imminent threat to the Children's emotional well-being. (*Id.*)

On December 8, 2017, Plaintiff appealed the notice of removal. (*Id.* ¶ 22.) On December 13, 2017, Omni sent Plaintiff a letter closing her home as a foster home in good standing, subject to her request

[1] This summary of the facts accepts all the factual allegations in Plaintiffs complaint as true, see Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009).

for reopening. (*Id.* ¶ 23.) Plaintiff's appeal was dismissed on April 19, 2018. (*Id.*¶ 29.) She then filed an appeal with the DCS Commissioner, who affirmed the dismissal. (*Id.* ¶ 33).

Plaintiff alleges numerous violations of Tennessee laws and regulations occurred in the removal of the Children and the subsequent administrative proceedings. (*See id*. ¶¶1, 15-20, 22, 24, 25, 27, 29.)

Plaintiff filed a complaint in the Chancery Court for Bradley County, Tennessee, which was dismissed as moot on July 10, 2019, in that Plaintiff's foster home was no longer open and the Children could therefore not be returned to her care. (*Id.* ¶ 34 & at Ex. E.) She appealed to the Tennessee Court of Appeals, which affirmed. (*Id.* ¶ 35 & at Ex. F.) The Tennessee Supreme Court denied her application for permission to appeal on November 18, 2020. (*Id.* ¶ 36 & at Ex.G.)

Meanwhile, Plaintiff filed an action in this Court on June l, 2018, which was dismissed under the doctrine of abstention on November 20, 2018. (*Id.* ¶¶ 31-32 & at Ex. D.)

Plaintiff filed her current complaint in this Court on December 10, 2020, asserting three causes of action: Count One asserts claims under 42 U.S.C. § 1983 against all Defendants; Count Two seeks punitive damages against Omni for outrageous conduct; and Count Three seeks an injunction against Defendants to prevent them from helping another

foster family adopt the Children. (*Id.* ¶¶ 43—55.) The relief Plaintiff seeks is "[a] permanent injunction against the Defendants from further activity [i]nvolving the removal of children from foster homes until it submits a plan satisfactory to this Court that the acts and conduct complained of herein will not recur"; a declaration that Defendants have violated Plaintiff's rights under § 1983; a declaration that the contract between DCS and Omni is invalid; compensatory and punitive damages from Omni; and injunctive relief "prohibiting Defendants from assisting in any adoption of" the Children. (*Id.* at 11.)

II. STANDARD OF REVIEW

Defendants' motions to dismiss rely variously on Rules 12(b)(l), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure.

A. Rule 12(b)(1)

When a defendant moves to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction. *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007). A Rule motion may present either a facial attack, which questions the sufficiency of the pleadings, or a factual attack, which challenges the factual existence of subject-matter jurisdiction. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). "When reviewing a facial attack, a district court takes the allegations in the complaint as true," though conclusory allegations and legal conclusions will not prevent dismissal.

Gentek Bldg. Prods. v. Sherwin-Williams Claims, 491 F.3d 320, 330 (6th Cir. 2007)

B. Rule 12(b)(5)

When a defendant moves to dismiss for insufficient service of process under Rule 12(b)(5), "the plaintiff bears the burden of proving that proper service was effected." *Frederick v. HydroAluminum S.A.,* 153 F.R.D. 120, 123 (E.D. Mich. 1994) (citing *Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc.,* 635 F.2d 434. 435 (5th Cir. 1981)); *see also Shires v. Magnavox Co.,* 74 F.R.D. 373, 377 (E.D. Tenn. 1977) (citing 5 Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Procedure: Civil* 528 1353 (burden is on party serving process to establish its validity). To resolve a motion to dismiss for insufficient service of process, "[t]he court must look to matters outside the complaint to determine what steps, if any, the plaintiff took to effect service." *SignalQuest, Inc. v. Tien-Ming Chou*, 284 F.R.D. 45, 46 (D.N.H. 2012) (quoting *C3 Media & Mtg. Grp., LLC v. Firstgate Internet, Inc.,* 419 F. supp. 2d 419, 427 (S.D.N.Y. 2005)).

C. Rule 12(b)(6)

A defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss under Rule 12(b)(6), a court must accept all of the factual allegations in the complaint as true and construe the complaint in the light most favorable to the plaintiff. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (quoting *Hill v. Blue Cross & Blue*

Shield of Mich., 49 F.3d 710, 716 (6th Cir. 2005)). The court is not, however, bound to accept bare assertions of legal conclusions as true. *Papasan v. Allain,* 478 U.S. 265, 286 (1986).

In deciding a motion under Rule 12(b)(6), a court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 677—78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)), this statement must nevertheless contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Id.* at 678. Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'— 'that the pleader is entitled to relief. *Id.* at 679 (alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

III. DISCUSSION

The Court will address each of Plaintiffs 1983 claims in turn: first as to DCS, then the Commissioner in her official capacity, the Commissioner in her

individual capacity, and Omni.The Court will then address Plaintiff's state-law claim for outrageous conduct against Omni.

A. Section 1983 Claim Against DCS

DCS moves to dismiss Plaintiffs claim against it based on sovereign immunity from suit under the Eleventh Amendment and on the grounds that it is not a "person" amenable to suit under § 1983. (Doc. 13 at 7—8.) In response, Plaintiff argues that an exception to Eleventh-Amendment immunity applies to DCS. (Doc. 17 at 7.) Plaintiff does not respond, however, to DCS's argument that it is not a "person" amenable to suit under § 1983.

DCS's motion under Rule 12(b)(l) implicates the Court's subject-matter jurisdiction, and Plaintiff therefore bears the burden of proving subject-matter jurisdiction exists. *See Davis*, 499 F.3d at 594.

> Section 1983 provides in part as follows:
>
> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (emphasis added). A state does not come within the definition of a "person" who may be sued under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) ("a State is not a person within the meaning of 1983"). An agency of the state is treated as the state for purposes of § 1983, and it is thus also not a "person" who may be sued under § 1983. *Reese v. Indus. Comm'n of Ohio*, 3 Fed. App'x 340, 342 (6th Cir. 2001) ("state agencies . . are not considered a 'person' for purposes of liability under 1983"); *see also Graham v. Nat 'l Collegiate Athletic Ass'n*, 804 F.2d 953, 960 (6th Cir. 1986) (state university "is a state agency cloaked with Eleventh Amendment immunity"). As an agency of the state, DCS cannot be sued under § 1983.

Plaintiff does not address these principles. She argues instead that DCS is subject to an exception to Eleventh Amendment immunity under *Ex parte Young*, 209 U.S. 123 (1908)[2] (Doc 7.) The *Ex parte Young* exception applies only to state officials, not to states or state agencies. *Lawson v. Shelby Cnty., Tenn.*, 211 F.3d 331, 335 (6th Cir. 2000*); see also MacDonald v. Vill. of Norport, Mich.*, 164 F.3d 964, 970 (6th Cir. 1999) (explaining *Ex parte Young*

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[2] Plaintiff asserts that DCS "concedes" it is subject to the *Ex parte Young* exception. (Doc. 17 at 7.) DCS denies having made such a concession. (Doc. 18 a 1.) The Court has closely reviewed DCS's motion and memorandum (Docs. 12, 13) and sees no such concession.

doctrine as applying to state officials who are sued in their official capacities). This is true because "[t]he idea behind [the *Ex parte Young*] exception is that a suit against a state officer is not a suit against the state when the remedy sought is an injunction against an illegal action, for an officer is not acting on behalf of the state when he acts illegally." *Lawson*. 211 F.3d at 335. The rationale for *Ex parte Young* cannot apply to states or state agencies, who have no other capacity in which to act.

DCS, as a state agency, is not subject to suit under 1983. The Court will therefore **GRANT** DCS's motion to dismiss Plaintiff's claim against it. Because DCS's motion implicates the Court's subject-matter jurisdiction, the Court will dismiss Plaintiff's claim against DCS without prejudice.

B. Section 1983 Claim Against the Commissioner in Her Official Capacity

The Commissioner moves to dismiss Plaintiff's claim against her in her official capacity based on immunity from suit under the Eleventh Amendment. (Doc. 13 at 8—9.) She argues that the *Ex parte Young* exception does not apply to her, both because "Plaintiff has not alleged the violation of a recognized federal right" and because "Plaintiff has not alleged an ongoing violation of federal law." (*Id.* at 9 (emphasis in original).) More specifically, the Commissioner argues that there is no federal right at stake because "foster parents do not have a constitutionally protected liberty interest in a continued relationship

with their foster child." (*Id.* at 9, 14—15.) Plaintiff responds that such a federal right does exist and that the relief Plaintiff seeks is prospective injunctive relief, as allowed under *Ex parte Young*. (Doc. 17 at 7, 1 1—13.)

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XII. Although the language of the Eleventh Amendment only forbids federal suits against a state by non-citizens of that state, the bar of the Amendment also extends to federal suits against a state by its own citizens. *Papasan*, 478 U.S. at 276.

Under the exception established by *Ex parte Young*, however, a federal court may hear an action against a state official in his or her official capacity if the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur D 'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). As stated in the previous section, the theory behind the *Ex parte Young* "exception is that a suit against a state officer is not a suit against the state when the remedy sought is an injunction against an

illegal action, for an officer is not acting on behalf of the state when he acts illegally."[3]

Lawson, 211 F.3d at 335. The law the state official is alleged to have violated must be a federal law, not a state law, for *Ex parte Young* to apply: "Case law is legion that the Eleventh Amendment . . . directly prohibits federal courts from ordering state officials to conform their conduct to state law." *Johns v. The Supreme Ct. of Ohio*, 753 F.2d 524, 526 (6th Cir. 1985) (citing *Pennhurst v. Halderman*, 465 U.S. 89 (1984)).

The Commissioner argues that "the Due Process Clause does not give rise to a constitutionally protected liberty interest in the foster-care relationship." (Doc. 13 at 14.) Plaintiff responds that the cases on which the Commissioner relies are distinguishable and the Commissioner ignores on-point authority that recognizes such an interest.

Because the Commissioner's motion goes to the Court's subject-matter jurisdiction, Plaintiff bears the burden of proving jurisdiction exists. See *Davis*, 499 F.3d at 594. In other words, Plaintiff bears the burden of establishing that a constitutionally protected

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[3] Thus, an official-capacity action against a state actor seeking prospective relief, such as an injunction, is not treated as an action against the state, and a state official sued in an official capacity therefore is a "person" under 1983 in a suit for injunctive relief. *Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992).

liberty interest exists in her foster-care relationship with the Children.

The Commissioner relies on *Renfro v. Cuyahoga County Department of Human Services*, in which the Court of Appeals for the Sixth Circuit declined to recognize a constitutionally protected liberty interest in a six-year-long foster-care relationship that had begun when the child was fourteen months old. 884 F.2d 943, 944 (6th Cir. 1989). Although the Court of Appeals "recognize[d] the strong emotional bond that might evolve in a foster care situation," it "hesitate[d] to characterize this relationship as a constitutionally protected liberty interest." *Id.* The Court of Appeals further noted that "[t]he nature of the foster care relationship is distinctly different from that of the natural family" in that "it is a temporary arrangement created by state and contractual arrangements." *Id.*

Plaintiff distinguishes *Renfro* on the grounds that it involved Ohio law, under which the foster parents had no mechanism to challenge their foster child's removal. (Doc. 17 at 11.) This distinction does not help Plaintiff. The question is whether a foster parent has a constitutionally protected liberty interest in his or her relationship with the foster child. The *Renfro* Court declined to find such an interest in a relationship four times longer than Plaintiffs relationship with the Children. Whether Ohio law provided greater or lesser procedural protections to foster parents than Tennessee law is irrelevant to whether a federal liberty interest exists.

The Commissioner also relies on *Zak v. Pilla*, in which plaintiffs sued an adoption agency under 1983 for failing to act on their adoption application, charging a denial of their due-process and equal-protection rights under the Fifth and Fourteenth Amendments. 698 F.2d 800 (6th Cir.1982). The Court of Appeals upheld the dismissal of the action, holding the district court lacked jurisdiction over the action. *Id.* at 801. The Court of Appeals pointed out that "[e]ven where parents have enjoyed temporary custody of an adoptive child under state adoption agency procedures, they do not necessarily acquire a constitutionally protected interest so as to invoke federal jurisdiction." *Id.*

Plaintiff distinguishes *Zak* on the grounds that it was a per curiam opinion. (Doc. 17 at 11.) A per curiam opinion is simply one "attributed to the entire panel of judges who have heard the appeal and not signed by any particular judge on the panel." *Per Curiam, Black's Law Dictionary* (11th ed. 2019). The per curiam nature of an opinion does not diminish its precedential value. Rather, it is this Court's understanding that per curiam opinions are employed where the propositions of law involved are straightforward and uncontroversial. Plaintiff also attempts to distinguish *Zak* on factual grounds, in that it involved an agency's refusal to act on the plaintiffs' adoption application, rather than the removal of a foster child from the plaintiffs' care. (Doc. 17 at 11.) The Court is unable to discern how this factual difference undermines the relevance of *Zak's* statement that having temporary custody of an

adoptive child does not necessarily create a constitutionally protected interest in the relationship.

The Commissioner cites two other cases as to which Plaintiff makes no argument. In *Sherrard v. Owens*. the Court of Appeals declined to make a broad determination of "whether foster parents have a constitutionally protected liberty interest in the relationship between them and foster children placed in their homes," but held that plaintiffs holding a temporary six-month license for a foster home did not have a constitutionally protected liberty interest in continuing as foster parents to two children placed with them. 644 F.2d 542, 543 (6th Cir. 1981). In *Ballard v. Johnson,* the district court for the Eastern District of Michigan reviewed Sixth Circuit and other decisions on the subject, concluding that "[t]he nature and extent of the liberty interests possessed by foster families, if any, must . . . be derived from 'the expectations and entitlements of the parties' under state law, and not the Due Process Clause." Civ. No. 15-11039, 2017 WL 1151166. at *6 (6th Cir. Mar. 28, 2017) (quoting *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 845—46 (1977)). Neither of these cases ends the inquiry, because *Sherrard* does not make a decision beyond its facts and *Ballard*, as a district-court opinion, is not controlling. Nevertheless, they are persuasive, and they add weight to the Commissioner's argument that Plaintiff

does not have a constitutionally protected liberty interest in her relationship with the Children.[4]

Plaintiff relies on two cases to show the existence of a constitutionally protected liberty interest in her relationship with the Children. She describes these rights as 'the substantive and procedural due process rights of a pre-adoptive mother not to be deprived of her children." (Doc. 17 at 12.) She points first *to Smith*, in which the Supreme Court stated that "biological relationships are not [the] exclusive determination of the existence of a family," noting that the marriage relationship is not biological and yet is "[t]he basic foundation of the family in our society" and "its importance has been strongly emphasized in our cases." 431 U.S. at 843. Plaintiff notes that Smith went on to state that the Court "cannot dismiss the foster family as a mere collection of unrelated individuals." *Id.*at 844. Plaintiff acknowledges that Smith does "not specifically hold[] that the status of a foster parent is constitutionally protected." (Doc. 17 at 12.)

There is a significant gap between saying a foster family is not just a collection of unrelated individuals and saying foster parents have a

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[4] The Commissioner also cites a number of opinions from courts of appeals for other circuits finding no constitutionally protected liberty interest in the foster-care relationship. (See Doc. 13 at 15 n. 13.) The Court finds it unnecessary to consider these cases as additional support for the Commissioner's position given the relevant controlling cases and the arguments of the parties.

constitutionally protected liberty interest in their relationships with their foster children. The Supreme Court in *Smith* ultimately found it unnecessary to resolve the "complex and novel questions" involved in whether there is a constitutionally protected liberty interest in the foster-care relationship. *Id.* at 847. Before moving on to its specific decision, however, the Supreme Court pointed out the significant distinctions between the foster family and the natural family. First, in a foster family, "the claimed interest derives from a knowingly assumed contractual relation with the State," such that "it is appropriate to ascertain from state law the expectations and entitlements of the parties." *Id.* at 845—46. This cuts significantly against Plaintiff as it regards the *Ex parte Young* exception, which requires the violation of a federal law, not a state law, if the exception is to apply. *See Johns*, 753 F.2d at 526. Second, the Supreme Court in Smith noted that "ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another," but in a foster-parent relationship, tension between the rights of natural parents and foster parents is "virtually unavoidable." *Smith*, 431 U.S. at 846. While *Smith* does not foreclose Plaintiff's argument for the existence of a constitutionally protected liberty interest, it does not strongly support it, either.

In the second case on which Plaintiff relies, the Court of Appeals for the Tenth Circuit recognize[d] that the typical foster care arrangement generally does not create a liberty interest in familial association." *Elwell v. Byers*, 699 F.3d 1208, 1217

(10th Cir. 2012). It nevertheless held that the plaintiffs had a constitutional liberty interest in their relationship with their foster child under the specific circumstances of that case. *Id.* at 1216—17. Those circumstances included the facts that the rights of the child's biological parents had been terminated; the plaintiffs were the only parents the child had known, since he had been with the plaintiffs for nearly his entire life, from the age of three months old; and they were only a month away from an adoption hearing when the child was removed from their custody. *Id.* at 1211, 1216—17. The Tenth Circuit declined to "define precisely where the liberty interest threshold falls on this spectrum, but conclude[d] that the [plaintiffs] fall on the protected side of that line under the facts of this case." *Id.* at 1217. *Elwell* does not persuade the Court that Plaintiff has a protected liberty interest in her foster-care relationship with the Children. Like the Sixth Circuit cases discussed above, *Elwell* declined to find that the typical foster-care relationship creates a constitutional liberty interest. Even if the Court were to follow the reasoning of this non-binding, out-of-circuit case, Plaintiff has not shown her circumstances are sufficiently close to the plaintiffs' in *Elwell* for its reasoning to apply. There, the child was placed with the plaintiffs at three months old and had known no other parents; here, the Children were placed with Plaintiff when they were old enough to have been in therapy with Plaintiff before the placement, staying with her for a year and a half before their removal. There, the removal took place a month before the scheduled adoption hearing; here, the removal took place three days after Plaintiff submitted her adoption papers.

Because this is a jurisdictional matter, Plaintiff bears the burden of proving she has a constitutionally protected liberty interest such that the *Ex parte Young* exception applies. *See Davis*, 499 F.3d at 594. Considering *Elwell* along with *Smith* and the Sixth Circuit decisions in *Renfro, Zak*, and *Sherrard,* the Court concludes Plaintiff has not shown she has a constitutionally protected liberty interest in her foster-parent relationship with the Children. The Court will accordingly **GRANT** the Commissioner's motion to dismiss Plaintiff's claim against her in her official capacity. Because the Commissioner's motion implicates the Court's subject-matter jurisdiction, the Court will dismiss this claim without prejudice.

C. Section 1983 Claim Against the Commissioner in Her Individual Capacity

The Commissioner moves to dismiss Plaintiff s claim against her in her individual capacity under Rule 12(b)(5) on the grounds of insufficient service of process. (Doc. 13 at 11—12.) She notes that the only return of service for her shows service on the Tennessee Attorney General's Office. (Id at 12 (citing Doc. 10 at l).) Service on the Tennessee Attorney General is not a permitted method of service on an individual. *See* Fed. R. Civ. P. 4(e).

Plaintiff does not respond to the Commissioner's argument regarding service on the Commissioner in her individual capacity. (*See* Doc. 17.) It is Plaintiffs burden to prove she effected proper

service of process. *See Frederick*, 153 F.R.D. at 123. Plaintiff has not shown she has done so. Therefore, the Court will **GRANT** the Commissioner's motion to dismiss Plaintiff's claims against her in her individual capacity and dismiss Plaintiff's claim against the Commissioner in her individual capacity without prejudice under Rule 12(b)(5).

D. Section 1983 Claim Against Omni

Omni moves to dismiss Plaintiff's § 1983 claim against it for failure to state a claim on which relief may be granted under Rule 12(b)(6). (Doc. 16 at 4—5.) Omni argues Plaintiff cannot state a claim under 1983 because she did not have a constitutionally protected liberty interest in her relationship with the Children, citing many of the cases relied on by the Commissioner, among others. (*Id.*) Plaintiff, as with the Commissioner's motion, seeks to distinguish or discredit Omni's cases and relies on *Smith and Elwell* to show she has a constitutionally protected liberty interest in her relationship with the Children. (Doc. 19 at 1—6.)

To state a claim under 42 U.S.C. § 1983, a plaintiff must "demonstrate that a person acting under color of state law 'deprived [him] of rights, privileges or immunities secured by the Constitution or laws of the United States.'" *Barker v. Goodrich*, 649 F.3d 428, 432 (6th Cir. 2011) (alteration in original) (quoting *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005)). Unlike the context of *Ex parte Young*, where the right in question must arise from

federal law to avoid Eleventh Amendment immunity, the right in a 1983 action may arise either from the Due Process Clause or from the laws of a state. *See Ky. Dep 't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (receded from on other grounds by *Sandin v. Conner*, 515 U.S. 472 (995))).

The Court has already concluded Plaintiff does not have a constitutionally protected liberty interest in her foster-parent relationship with the Children. *See supra §* III(B). Plaintiff offers no new support for her position in her response to Omni's motion; the new arguments she offers focus on distinguishing out-of-circuit cases cited by Omni. The Court accordingly adopts for purposes of Omni's motion its conclusion above, that Plaintiff does not have a constitutionally protected liberty interest in her foster-parent relationship with the Children.[5]

Plaintiff points to the safeguards enacted by the state of Tennessee for the foster parent relationship as establishing a liberty interest: "presumption of preference in adoption for foster families with a duration of twelve months, notice before removal, no

[5] Although the burden of proof is different in considering Omni's motion to dismiss than the Commissioner's, as Omni's motion is brought under Rule 12(b)(6), this shift in the burden is not enough to persuade the Court that a constitutionally protected liberty interest exists when the Court of Appeals for the Sixth Circuit has consistently declined to find one and when the factual circumstances in *Elwell,* on which Plaintiff places strong reliance.

removal without threat of physical injury, and the requirement of foster parent conferencing." (Doc. 19 at 6.) To create a protected liberty interest, a state must place substantive limits on official discretion, mandating particular substantive outcomes if certain criteria are met. *Tony L. v. Childers*, 71 F.3d 1182. explain how the Tennessee provisions on which she relies—a presumption of preference as to adoption, 1185 (6th Cir. 1995) (quoting *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983)). "State-created procedural rights that do not guarantee a particular substantive outcome are not protected by the Fourteenth Amendment, even where such procedural rights are mandatory." *Id.* (citing *Pusey v. City of Youngstown,* 11 F.3d 652, 656 (6th Cir. 1993)). Plaintiff does not explain how the Tennessee provisions on which she relies—a presumption of preference as to adoption, notice before removal, restrictions on removal, and conferencing requirements—mandate particular substantive outcomes.[6] (See Doc. 19 at 6.)

Because Plaintiff has not shown the existence of a constitutionally protected liberty interest in her

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[6] Plaintiff does not address the substantive-outcome standard for a state to create a protected liberty interest in her response to Omni's motion to dismiss. (*See generally* Doc. 6.) She also does not respond to the Commissioner's explicit arguments on this standard in her response to the Commissioner's motion. (*Compare* Doc. 13 at 15-18 (explaining standard and arguing why each of the state laws or regulations on which Plaintiff relies fail to meet it) *with* Doc. 17 at 8 (asserting without explanation that the "Constitution affords [Plaintiff] protection under Tennessee law) and 11-13 (arguing existence of constitutionally protected interest solely on federal constitutional grounds).)

relationship with the Children, her complaint fails to state a claim on which relief can be granted against Omni under 1983. Therefore, the Court will **DISMISS** Plaintiff's § 1983 claim against Omni with prejudice.

E. Outrageous-Conduct Claim Against Omni

The dismissal of all of Plaintiffs federal-law claims leads to the question of the Court's subject-matter jurisdiction over her single remaining state-law claim against Omni for outrageous conduct. State-law claims brought in a federal-question case can only be heard through the exercise of supplemental jurisdiction. 28 U.S.C.. The discretionary. District courts may decline to exercise supplemental jurisdiction over a state-law claim if:

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. §1367(c). In making its discretionary decision, a district court should weigh "the values of judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350

(1988); accord *Landefeld v. Marion Gen. Hosp., Inc.,* 994 F.2d 1 178, 1 182 (6th Cir. 1993).

The third rationale of § 1367(c) applies here because the Court will dismiss all of the claims over which it has original jurisdiction. *See supra* § III(A)—(D). When all federal claims have been dismissed, the preferred disposition of state-law claims is dismissal. *Gamel v. City of Cincinnati*, 625 F.3d 949, 952 (6th Cir. 2010) (citing *Musson Theatrical, Inc. v. Fed. Exp. Corp.,* 89 F.3d 1244, 1254—55 (6th Cir. 1996)). Therefore, the Court will **DISMISS** Plaintiffs outrageous-conduct claim against Omni without prejudice.

IV. CONCLUSION

Defendants' motions to dismiss (Docs. 12, 15) will be **GRANTED**. The Court will **DISMISS** Plaintiff's § 1983 claim against Omni **WITH PREJUDICE** and will dismiss Plaintiff's remaining claims **WITHOUT PREJUDICE**, as they are being dismissed on jurisdictional grounds.

An appropriate order will enter.

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

SHEILA MIKEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	**1:20-cv-345**
JENNIFER NICHOLS, Commissioner of the Department of Children's Services, DEPARTMENT OF CHILDREN'S SERVICES, And OMNI VISIONS, Inc.,	)	
	)	
Defendants.	)	

[Filed December 10, 2020]

COMPLAINT

Plaintiff, Sheila Mikel, by her attorneys, Thomas & Thomas, for her Complaint, alleges:

1. This Complaint is brought for injunctive relief and damages as a result of the total disregard by the Department of Children's Services (hereinafter the "Department"), Omni Visions, Inc. (hereinafter "Omni") and their personnel of the statutory, regulatory, and constitutional mandates which govern their operations. This action involves the removal of

foster children from their foster mother by Omni, a private company independent from the Department, the foreclosure by Omni of any review of its conduct and the approval of the Department of the whole process by its denial of administrative review of what was done. By their refusal to acknowledge the constitutional and other rights of the Plaintiff, and there is evidence of such a systemic infirmity in its entire operation with respect to foster children that this Court should enjoin further operation of the Department with respect to the removal of foster children until it can submit a plan to this Court for a methodology with which these infirmities can be eliminated.

2. Plaintiff, Sheila Mikel (hereinafter "Sheila"), is a resident of Bradley County, Tennessee, residing in Cleveland, Tennessee.

3. Defendant, Jennifer Nichols (hereinafter "Nichols"), is the Commissioner of the Department of Children's Services of the State of Tennessee and is named as a defendant both in her official and in her individual capacity. She may be served at 315 Deadrick Street, Nashville, Tennessee 37242.

4. Defendant, Department, is part of the Executive Branch of the State of Tennessee and is located at 315 Deadrick Street, Nashville, Tennessee 37243.

5. Defendant, Omni, is a corporation organized and existing under the laws of the State of Tennessee with its principal place of business at 301

Perimeter Park Drive, Suite 235, Nashville, Tennessee 37211 and may be served there. Omni, either itself or through related corporations does business with the States of Tennessee, North Carolina, Georgia, and Kentucky in the operation of foster homes.

6. At all relevant times herein, either Nichols or Bonnie Homrich was responsible for the policies and operations of the Department.

7. Prior to, and on July 1, 2017, the Department and Omni entered into a contract for Omni to provide custodial services for children in the custody of the Department and the State of Tennessee (hereinafter the "Contract", a copy of which is attached as Exhibit A). Under the provisions of the Contract, Omni agreed, among other things, to abide by the regulations of the Department in connection with the children for whom it would provide foster care. To the extent that Defendants contend that the aforementioned Contract gives Omni the authority to engage in the conduct hereinafter referred to, it is illegal and contrary to the provisions of the authority given by the Legislature of the State of Tennessee only to the Department.

8. Prior to June 30, 2016, the custody of two girls, AK and SK (hereinafter The "K Girls"), was awarded to the Department by the Juvenile Court of Bradley County, Tennessee, pursuant to a finding of severe dependency and neglect.

9. Prior to June 30, 2016, Omni approved the home of Sheila as a pre- adoptive foster home, having been urged by Omni to become not just a foster mother but to become a pre-adoptive foster mother to adopt the girls.

10. On or about June 30, 2016, the Department transferred custody of the K Girls to Sheila as their pre-adoptive foster mother. Prior to that date Sheila had provided therapy treatment to the K Girls while they were in the foster care of others, and their transfer to Sheila was approved by the Department with its knowledge of the therapy having been provided by her.

11. From June 30, 2016, and through the summer of 2017 Sheila nurtured and cared for the K Girls with what she believed was support from the Department and from Omni, and she also continued to receive encouragement from Defendants to adopt the K Girls.

12. In the summer of 2017 Sheila experienced what she believed to be unusual experiences with one of the K Girls. As a result, she sought the advice of a psychiatrist who had been treating one of the K Girls with the approval of the Department. That psychiatrist diagnosed one of the K Girls with a syndrome known as Dissociative Identity Disorder ("DID"). Since its approved therapist had not made this diagnosis, the Department questioned the diagnosis and requested an independent diagnosis. Such an independent diagnosis was performed, and the diagnosis of the psychiatrist was partially

confirmed with a diagnosis of Post-Traumatic Stress Syndrome with Moderate Dissociation. The Department disagreed that this diagnosis was a diagnosis of DID and began to accuse Sheila with providing "therapy" to the K Girls for DID, which Sheila was not doing. The Department did continue to send the K Girls for therapy with its approved therapist, John Arias, whose further participation will be set forth below. While the psychiatrist referred to above who did diagnose one of the K Girls with DID was a licensed Doctor, John Arias was not.

13. At about the same time as the controversy began to arise with respect to the DID diagnosis, Sheila was preparing her papers for the adoption of the K Girls. All of those papers were submitted to Omni by December 4, 2017, for its assistance in completing the adoption.

14. During the period from July 1, 2016 to December 4, 2017, Omni had been receiving a minimum of $8,400 per month for the K Girls under its Contract with the Department, but Omni was paying Sheila only $2,100. If the K Girls were to be adopted, the payments to Omni for the K Girls would cease, so it was necessary for Omni to find a way to block the adoption, and, as described below, it did so, with the complicity of the Department.

15. On December 7, 2017, three days after she had completed the submission of her adoption papers, Omni, not the Department, hurriedly prepared and issued a Notice of Removal for the K Girls to be taken from Sheila. (A copy of the Notice is

attached hereto as Exhibit A.) The Notice, dated December 7, 2017, stated that the K Girls **would be taken** on December 6, 2017, the day **before** the issuance of the Notice of Removal. The Notice also provided that they were being taken immediately because of an imminent threat, not to their physical well-being, but to their emotional well-being. The Notice was based upon a letter, dated December 6, 2017, from John Arias. In addition to the fact that John Arias was not a medical doctor, his license as a therapist was suspended in June 2016, and he was placed on probation for a period of three years. It is not known whether his license was reinstated by the time of his December 6, 2017, letter.

16. Under the law of the State of Tennessee a Notice of Removal may only be issued by the Department. Nevertheless, an Omni representative, Steve Dunn, signed and issued a Notice of Removal for the K Girls.

17. As alleged above, the K Girls were removed immediately and without notice to Sheila under the pretext that Sheila presented an imminent threat to their emotional well-being. This pretext was supported **only** by the letter dated December 6, 2017, from a therapist although at least two psychiatrists had seen the K Girls.

18. Under Regulations promulgated by the Department a Child and Family Team Meeting (hereinafter "CFTM") is required to be held by the Department before the Department may remove a child from a foster parent. No such meeting was held

by the Department before December 6, 2017, in connection with the removal of the K Girls. In fact, no such meeting was ever held by the Department.

19. Under Regulations promulgated by the Department, a foster parent such as Sheila is required to be given fourteen days' notice of any CFTM meeting. No such notice was given to Sheila of any such meeting, since no such meeting was held.

20. On December 6, 2017, a representative of Omni, not the Department, removed the K Girls from Bowman Hills School, a private school for which Sheila was paying and from which one was expecting to graduate in May 2018. In removing the K Girls from their school, a representative of Omni lied to the school with respect to the reason for taking them, since at that time Omni had no Notice of Removal, which was not created until the next day. A representative of Omni stated to the school that the K Girls were being taken to a meeting.

21. Since their removal, the Department and Omni have refused to inform Sheila of the whereabouts of the K Girls.

22. On or about December 8, 2017, Sheila Mikel appealed from the Notice of Removal, and although the Department was required to complete its portion of the papers related to the appeal, it refused to do so without explanation.

23. On December 13, 2017, Omni sent a letter to Sheila closing her home as a foster home but

closing it in good standing, subject to her request that it be reopened.

24. Under Regulations promulgated by the Department, an appeal from a Notice of Removal would normally stay the effectivity of a removal. Although, as alleged above, an appeal was taken by Sheila from the Notice of Removal, the Department refused to stay proceedings and return the K Girls to her custody.

25. After the filing of the Appeal from the Notice of Removal, a hearing was Scheduled before an Administrative Law Judge, who, upon information and belief, is employed by the Department. In addition, correspondence from the Judge Is sent on Department stationary.

26. Sheila's Appeal was originally set for January 18, 2018, but on January 12, 2018, the Department filed a motion to dismiss Sheila's appeal on the grounds that the appeal was "moot" because her home had been closed by Omni and she had no home to which the K Girls could be returned. Sheila objected to that motion upon the grounds that her home had been closed in good standing. The Administrative Judge agreed and denied the motion. The hearing was rescheduled for March 27, 2018.

27. On March 21, 2018, the Department filed yet another "Emergency Motion" to Dismiss, raising the same grounds that had previously been raised and for which the motion had been denied. In support of this motion, however, the Department

stated that a "key" witness for it would be unavailable for the full hearing. That witness was Omni's Steve Dunn, the person from Omni who had signed the Notice of Removal and who, apparently, participated in the preparation of the letter of December 13, 2017, closing Sheila's foster home. A hearing was scheduled on the motion for April 11, 2018, and the March 27, 2018, hearing date was changed to April 19, 2018.

28. On April 11, 2018, a hearing was held on the Department's renewed Motion to Dismiss, and at the hearing Steve Dunn testified that the letter of December 13, 2017, sent by Omni to Sheila, closing her home in good standing, was false. In opposition to the motion Sheila argued that the matter should be heard on a full record and that the closure issue be heard with the evidence on the merits of the validity of the Notice of Removal. The Administrative Judge agreed, and the matter was scheduled for a plenary hearing on April 19, 2018.

29. When the parties convened on April 19, 2018, without a written motion or the receipt of further evidence, the Department renewed its motion to dismiss, and the Judge granted it. The Department, therefore, succeeded in having no public review of its conduct in connection with the removal of the K Girls from Sheila.

30. After her appeal was dismissed by the Administrative Judge, Sheila became concerned that the new foster parents, whose identity had been kept from her, would commence adoption proceedings for the K Girls. Since the commencement of such

proceedings may vest primary jurisdiction in the court in which it is filed, Sheila, through counsel, requested the identity of the new foster parents. By letter, dated May 16, 2018, that request was refused by counsel for the Department. (A copy of the letter is attached hereto as Exhibit C.) If adoption proceedings are commenced, the actions of the Defendants in assisting in those proceedings will impair Sheila's rights in this proceeding.

31. After her appeal from the Notice of Removal was dismissed by the Administrative Law Judge, Sheila filed an action in this Court on or about June 1, 2018, bearing Case No. 18-cv-00117.

32. Upon motion of the defendants in that action, the complaint was dismissed under the doctrine of abstention, specifically without prejudice to re-commencement after review by the Tennessee courts. A copy of that order and decision is attached hereto as Exhibit D.

33. After her appeal from the Notice of Removal was dismissed, Sheila appealed to the Commissioner of the Department of Children's Services, who affirmed the dismissal of the Notice of Appeal on the grounds that it was moot on September 21, 2018.

34. After the affirmance by the Commissioner of the Department of Children's Services, Sheila commenced an action in the Chancery Court of Bradley County, Tennessee to review the decision of the Commissioner and to assert

independent grounds for the invalidity of the decision. Upon motion of the Defendants in that action, it was dismissed in a two-page opinion and order, entered July 9, 2019. A copy of that decision and order is attached as Exhibit E.

35. An appeal was taken from the decision of the Bradley County Chancery Court to the Court of Appeals of Tennessee, and that court affirmed the decision of the Chancery Court on July 21, 2020, without considering the independent grounds for reversal and the constitutional grounds raised. A copy of that decision is attached as Exhibit F.

36. An Application for Permission to Appeal from the decision of the Court of Appeals was made to the Supreme Court of the State of Tennessee, and on November 18, 2020, that Court denied the Application. A copy of that order is attached hereto as Exhibit G.

37. Omni and the Department have engaged in unlawful and illegal acts in removing the K Girls from Sheila for reasons other than the best interests of the K Girls. The conduct of the Defendants has denied Sheila procedural and substantive due process and has denied her constitutional right to mother the K Girls.

38. The conduct of the Defendants goes beyond the pale of the expectations of a civilized society operating under a system of governance in which the actions of the Executive Branch of the government must be scrutinized by the Judicial

Branch to ensure compliance with the requirements of the Constitutions of the State of Tennessee and the United States.

39. As a result of the unfettered, unlawful and illegal conduct of the Defendants, Sheila has suffered extreme emotional damage and has incurred substantial expense in defending herself and her foster children from the acts of the Defendants.

40. After all the conduct referred to above had been called to the attention of the Department and Omni, they have persisted in contending that they have done nothing wrong. This attitude is consistent with the attitude taken by the Department with respect to others, who cannot afford to fight it.

41. Unless restrained and preliminarily and permanently enjoined, Defendants will continue their illegal activities. Those activities also warrant the imposition of compensatory damages against all Defendants.

42. Plaintiff also seeks other relief in connection with her allegations. She is asking this Court, as a condition of the removal of any injunction issued, to require the Department to submit to it a plan to ensure that the conduct alleged herein, and all similar conduct, will not recur. Until then, the Department should be enjoined from further foster care removal activity, and those responsibilities transferred to another branch of government.

FIRST CAUSE OF ACTION

43. Plaintiff repeats and realleges the allegations of paragraphs 1-42.

44. Under the provisions of T.C.A. §37-2-4125 (20) the Tennessee legislature has mandated that after a child has been with a foster parent for twelve months, the foster parent is to be the first choice for adoption.

45. Under the Regulations of the Department a person who has been a foster parent for twelve or more months has a right to contest the removal of a foster child and is to be given fourteen days-notice of that removal and a right to contest the removal.

46. Sheila has a protectable family interest in maintaining her relationship with the K Girls.

47. The conduct of the Defendants has deprived Sheila of her constitutional Liberty right to a protectible family interest under color of state law in violation of 42 U. S. C. §1983.

48. Unless enjoined, the activity of the Defendants will continue.

49. Sheila has also suffered damage in an amount to be determined.

SECOND CAUSE OF ACTION

50. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 42 against Omni only.

51. The conduct of Omni in this and other similar situations is conduct outrageous as to shock the conscience of a reasonable person.

52. The conduct of Omni has resulted in emotional damage to Sheila in such a mount as may be determined by a jury.

53. The conduct of Omni is in such blatant disregard for the rights of Sheila and is so shocking as to warrant the imposition of punitive damages.

THIRD CAUSE OF ACTION

54. Plaintiff repeats and realleges the allegations contained in paragraphs 1-42.

55. Upon information and belief, because of the history of these proceedings it is believed that Defendants will encourage and assist the family with whom the K Girls have been placed to adopt them. All that is required to commence those proceedings is that the K Girls be in the possession of the new foster family for a period of 6 months. Unless restrained and enjoined from assisting the foster family to adopt the K Girls, the rights of Sheila may be permanently foreclosed.

WHEREFORE, Plaintiff demands relief and judgment as follows and a jury to try the case:

1. A permanent injunction against the Defendants from further activity Involving the removal of children from foster homes until it submits a plan satisfactory to this Court that the acts and conduct complained herein will not recur;

2. Declaration of a violation of 42 U.S.C. § 1983;

3. Declaration of the invalidity of the Contract between the Department and Omni;

4. An award of compensatory and punitive damages against Omni;

5. A restraining order and preliminary and permanent injunctions prohibiting Defendants from assisting in any adoption of the K Girls; and

6. Costs and expenses.

THOMAS & THOMAS

By: /s/ *W. Neil Thomas, III*

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APPENDIX D

The AFCARS Report
U. S. Department of Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau
https://www.acf.hhs.gov/cb
Preliminary FY1 2021 Estimates as of June 28, 2022 - No. 29

See Fold-Out Exhibits

U.S. Department of Health and Human Services, Administration for Children and Families,
Administration on Children, Youth and Families, Children's Bureau, https://www.acf.hhs.gov/cb

The AFCARS Report

Preliminary FY[1] 2021 Estimates as of June 28, 2022 - No. 29

SOURCE: Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2021 data[2]

Numbers at a Glance

Fiscal Year	2017	2018	2019	2020	2021
Number in foster care on September 30 of the FY	436,556	437,337	426,325	407,318	391,098
Number entered foster care during the FY	270,197	263,776	252,414	216,842	206,812
Number exited foster care during the FY	248,882	252,209	249,936	224,425	214,971
Number served by the foster care system during the FY	685,403	689,505	676,188	631,686	606,031
Number waiting to be adopted on September 30 of the FY	124,004	126,546	123,823	117,446	113,589
Number waiting to be adopted for whom parental rights (for all living parents) were terminated as of the last day of the FY	69,921	71,990	71,887	63,836	64,985
Number adopted with public child welfare agency involvement during the FY	59,491	63,094	66,208	57,881	54,240

Children in Foster Care on September 30, 2021 - N=391,098

Age as of September 30th	Years
Mean	8.0
Median	7.0

Age as of September 30th	Percent	Number
Less than 1 Year	7%	28,704
1 Year	9%	33,374
2 Years	8%	29,871
3 Years	7%	25,737
4 Years	6%	23,318
5 Years	5%	20,677
6 Years	5%	19,667
7 Years	5%	18,319
8 Years	4%	17,300
9 Years	4%	16,276
10 Years	4%	15,630
11 Years	4%	15,485
12 Years	4%	16,180
13 Years	4%	17,378
14 Years	5%	18,073
15 Years	5%	19,471
16 Years	5%	20,267
17 Years	5%	20,661
18 Years	2%	6,335
19 Years	1%	4,227
20 Years	1%	3,818

Sex	Percent	Number
Male	51%	199,969
Female	49%	191,037

Most Recent Placement Setting	Percent	Number
Pre-Adoptive Home	4%	16,381
Foster Family Home (Relative)	35%	133,873
Foster Family Home (Non-Relative)	44%	171,627
Group Home	4%	15,432
Institution	5%	19,929
Supervised Independent Living	2%	8,633
Runaway	1%	4,240
Trial Home Visit	4%	17,439

Case Plan Goal	Percent	Number
Reunify with Parent(s) or Primary Caretaker(s)	53%	201,297
Live with Other Relative(s)	3%	13,258
Adoption	28%	105,681
Long Term Foster Care	2%	7,046
Emancipation	5%	17,759
Guardianship	4%	15,797
Case Plan Goal Not Yet Established	6%	21,053

[1] 'FY' refers to the Federal Fiscal Year, October 1st through September 30th.

[2] Data from both the regular and revised AFCARS file submissions received by June 28, 2022 are included in this report. Missing data are excluded from each table. Therefore, the totals within each distribution may not equal the total provided for that subpopulation (e.g. number in care on September 30th may not match the sum across ages for that group). Note: Due to data quality concerns, many of which are associated with the lingering effects of Hurricane Maria, Puerto Rico's data are only included for the years 2018 through 2021 for both foster care and adoption. PR is in the process of addressing the quality of their data.

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	2%	9,393
Asian	1%	2,025
Black or African American	22%	86,645
Native Hawaiian/Other Pacific Islander	0%	987
Hispanic (of any race)	22%	85,215
White	43%	168,063
Unknown/Unable to Determine	2%	7,144
Two or More Races	8%	30,701

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

Time in Care	Months
Mean	21.7
Median	14.9

Time in Care	Percent	Number
Less than 1 Month	4%	17,322
1 - 5 Months	19%	74,976
6 - 11 Months	19%	73,046
12 - 17 Months	14%	52,956
18 - 23 Months	12%	45,310
24 - 29 Months	9%	35,287
30 - 35 Months	6%	23,296
3 - 4 Years	12%	45,410
5 Years or More	6%	23,493

Children Entering Foster Care during FY 2021 - N=206,812

Age at Entry	Years
Mean	6.7
Median	6.0

Age at Entry	Percent	Number
Less than 1 Year	21%	42,524
1 Year	7%	14,491
2 Years	6%	12,807
3 Years	6%	11,820
4 Years	5%	10,884
5 Years	5%	10,021
6 Years	5%	9,557
7 Years	4%	8,847
8 Years	4%	8,281
9 Years	4%	7,727
10 Years	4%	7,342
11 Years	4%	7,730
12 Years	4%	7,966
13 Years	4%	8,957
14 Years	5%	9,483
15 Years	5%	9,490
16 Years	4%	9,155
17 Years	3%	6,582
18 Years	1%	1,856
19 Years	0%	719
20 Years	0%	452

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	2%	4,622
Asian	1%	1,177
Black or African American	20%	40,902
Native Hawaiian/Other Pacific Islander	0%	605
Hispanic (of any race)	21%	43,293
White	46%	93,973
Unknown/Unable to Determine	3%	5,583
Two or More Races	8%	15,833

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

Circumstances Associated with Child's Removal	Percent	Number
Neglect	63%	130,289
Drug Abuse (Parent)	36%	73,921
Caretaker Inability To Cope	14%	28,083
Physical Abuse	12%	25,836
Housing	9%	19,406
Child Behavior Problem	7%	15,375
Parent Incarceration	6%	12,142
Alcohol Abuse (Parent)	6%	11,922
Abandonment	5%	9,758
Sexual Abuse	4%	8,329
Drug Abuse (Child)	2%	4,637
Child Disability	2%	3,840
Parent Death	1%	2,513
Relinquishment	1%	1,789
Alcohol Abuse (Child)	0%	707

NOTE: These categories are not mutually exclusive, so percentages will total more than 100% and counts will be more than the total number of entries.

Children Exiting Foster Care during FY 2021 - N=214,971

Age at Exit	Years
Mean	8.2
Median	7.0

Age at Exit	Percent	Number
Less than 1 Year	4%	8,361
1 Year	8%	17,269
2 Years	9%	18,292
3 Years	8%	15,950
4 Years	7%	14,043
5 Years	6%	12,675
6 Years	5%	11,620
7 Years	5%	10,692
8 Years	5%	9,916
9 Years	4%	8,923
10 Years	4%	8,587
11 Years	4%	8,321
12 Years	4%	8,258
13 Years	4%	8,213
14 Years	4%	8,387
15 Years	4%	8,214
16 Years	4%	8,553
17 Years	4%	8,278
18 Years	7%	15,015
19 Years	1%	1,473
20 Years	1%	1,261

Time in Care	Months
Mean	21.9
Median	17.5

Time in Care	Percent	Number
Less than 1 Month	7%	14,606
1 - 5 Months	12%	25,850
6 - 11 Months	16%	34,836
12 - 17 Months	17%	35,534
18 - 23 Months	14%	30,242
24 - 29 Months	10%	21,964
30 - 35 Months	7%	15,392
3 - 4 Years	12%	26,456
5 Years or More	5%	9,779

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	2%	4,812
Asian	1%	1,181
Black or African American	21%	44,545
Native Hawaiian/Other Pacific Islander	0%	636
Hispanic (of any race)	21%	45,391
White	46%	97,579
Unknown/Unable to Determine	1%	3,162
Two or More Races	8%	17,092

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

Reason for Discharge	Percent	Number
Reunification with Parent(s) or Primary Caretaker(s)	47%	100,004
Living with Other Relative(s)	6%	12,531
Adoption	25%	53,546
Emancipation	9%	19,130
Guardianship	12%	25,023
Transfer to Another Agency	1%	2,290
Runaway	0%	552
Death of Child	0%	368

Children Waiting to be Adopted[3] on September 30, 2021 - N=113,589

Age as of September 30th	Years
Mean	7.5
Median	7.0

Age at Entry into Foster Care	Years
Mean	4.8
Median	4.0

Age as of September 30th	Percent	Number
Less than 1 Year	3%	3,740
1 Year	9%	10,684
2 Years	9%	10,731
3 Years	8%	8,950
4 Years	7%	7,844
5 Years	6%	6,852
6 Years	6%	6,506
7 Years	5%	5,880
8 Years	5%	5,691
9 Years	5%	5,443
10 Years	5%	5,234
11 Years	5%	5,222
12 Years	5%	5,418
13 Years	5%	5,597
14 Years	5%	5,469
15 Years	5%	5,613
16 Years	4%	4,977
17 Years	3%	3,738

Age at Entry into Foster Care	Percent	Number
Less than 1 Year	27%	31,010
1 Year	8%	9,025
2 Years	7%	7,758
3 Years	6%	7,338
4 Years	6%	6,802
5 Years	6%	6,571
6 Years	6%	6,303
7 Years	5%	5,989
8 Years	5%	5,680
9 Years	5%	5,411
10 Years	4%	5,049
11 Years	4%	4,683
12 Years	4%	4,026
13 Years	3%	3,463
14 Years	2%	2,410
15 Years	1%	1,405
16 Years	0%	535
17 Years	0%	113

Placement Type	Percent	Number
Pre-Adoptive Home	13%	14,155
Foster Family Home (Relative)	28%	31,148
Foster Family Home (Non-Relative)	51%	57,416
Group Home	3%	3,589
Institution	5%	5,424
Supervised Independent Living	0%	105
Runaway	1%	642
Trial Home Visit	1%	604

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	2%	2,214
Asian	0%	469
Black or African American	21%	23,838
Native Hawaiian/Other Pacific Islander	0%	238
Hispanic (of any race)	23%	26,145
White	43%	49,325
Unknown/Unable to Determine	1%	1,355
Two or More Races	9%	9,825

Sex	Percent	Number
Male	52%	59,170
Female	48%	54,412

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

[3] Waiting children are identified as children who have a goal of adoption and/or whose parents' parental rights have been terminated. Children 16 years old and older whose parents' parental rights have been terminated and who have a goal of emancipation have been excluded from the estimate.

Time in Care	Months
Mean	33.7
Median	28.1

Time in Care	Percent	Number
Less than 1 Month	0%	468
1 - 5 Months	3%	3,215
6 - 11 Months	8%	8,946
12 - 17 Months	12%	14,064
18 - 23 Months	16%	17,727
24 - 29 Months	16%	17,699
30 - 35 Months	11%	12,423
3 - 4 Years	23%	26,381
5 Years or More	11%	12,666

Of Children Waiting for Adoption whose Parents' Parental Rights have been Terminated as of the Last Day of the FY (N=64,985), Time Elapsed since Termination of Parental Rights as of September 30, 2021

Time Since TPR	Months
Mean	19.0
Median	9.0

Children Adopted with Public Agency Involvement in FY 2021[4] - N=54,240

Age at Adoption	Years
Mean	6.1
Median	5.0

Age at Adoption	Percent	Number
Less than 1 Year	2%	831
1 Year	11%	6,015
2 Years	14%	7,622
3 Years	11%	5,918
4 Years	9%	4,790
5 Years	7%	4,029
6 Years	7%	3,598
7 Years	6%	3,203
8 Years	5%	2,838
9 Years	5%	2,511
10 Years	4%	2,305
11 Years	4%	2,148
12 Years	4%	1,945
13 Years	3%	1,713
14 Years	3%	1,485
15 Years	2%	1,147
16 Years	2%	1,101
17 Years	2%	905
18 Years	0%	101
19 Years	0%	14
20 Years	0%	12

Time Elapsed from Termination of Parental Rights to Adoption	Months
Mean	13.0
Median	9.6

Time Elapsed from Termination of Parental Rights to Adoption	Percent	Number
Less than 1 Month	3%	1,442
1 - 5 Months	28%	14,484
6 - 11 Months	30%	15,790
12 - 17 Months	17%	9,031
18 - 23 Months	10%	5,292
24 - 29 Months	5%	2,716
30 - 35 Months	3%	1,353
3 - 4 Years	4%	1,909
5 Years or More	1%	529

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	2%	916
Asian	0%	210
Black or African American	17%	9,087
Native Hawaiian/Other Pacific Islander	0%	168
Hispanic (of any race)	20%	10,991
White	50%	27,145
Unknown/Unable to Determine	1%	586
Two or More Races	9%	5,046

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

[4] Note that the adoption data reported in this section are from the AFCARS Adoption file. Therefore, the number of adoptions reported here may not equal the number reported as discharges to adoption from foster care.

Adoptive Family Structure	Percent	Number
Married Couple	68%	35,940
Unmarried Couple	4%	2,008
Single Female	25%	13,307
Single Male	3%	1,799

Relationship of Adoptive Parents to Child Prior to Adoption	Percent	Number
Non-Relative	10%	5,018
Foster Parent	55%	27,912
Stepparent	0%	100
Other Relative	34%	17,345

Sex	Percent	Number
Male	51%	27,664
Female	49%	26,561

Receive Adoption Subsidy	Percent	Number
Yes	93%	50,499
No	7%	3,679

FY 2021 AFCARS Foster Care Data Release

Definitions and additional supporting information relevant to the populations presented in this report can be found by clicking on the tabs above the area chart displayed when using this link:

https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption

Trends in Foster Care and Adoption: FY 2012 – 2021

Listen

Source: AFCARS data, U.S. Children's Bureau, Administration for Children, Youth and Families

Publication Date: November 1, 2022

Introduction

The report and data visualization below present national estimates related to children who experience time in foster care and who are adopted from the foster care system, relative to each Federal Fiscal Year shown. As states are permitted to resubmit AFCARS data, estimates may change over time. This reflects all AFCARS data received as of June 28, 2022 related to AFCARS reporting periods through September 30, 2021.

The national dataset and state data tables are available for download as well.

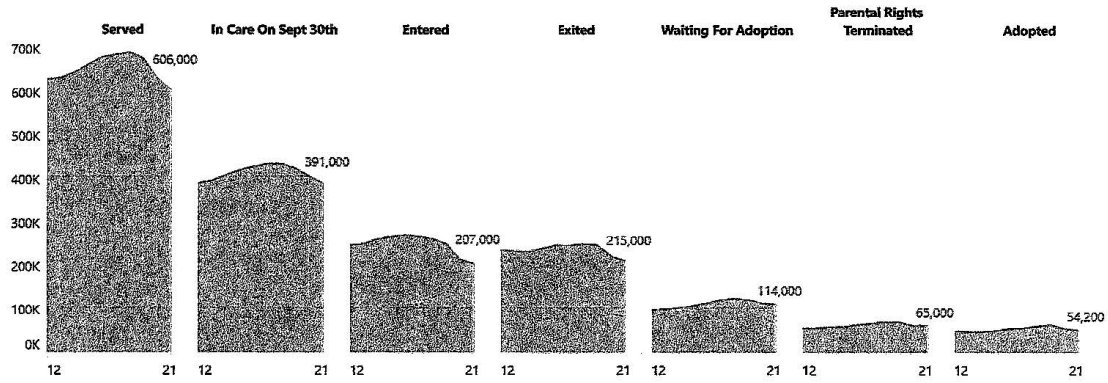
Trends in Foster Care and Adoption FY 2012 – 2021 (PDF — 760.41 KB)

National Dataset 2012 – 2021 (XLSX — 12.63 KB)

State Dataset 2012 – 2021 (XLSX — 70.04 KB)

Trends in Foster Care and Adoption

FY 2012 - FY 2021



Year	Served	In Care On Sept 30th	Entered	Exited	Waiting For Adoption	Parental Rights Terminated	Adopted
2012	630,000	392,000	250,000	238,000	99,600	58,400	52,000
2013	633,000	396,000	258,000	237,000	102,000	58,900	50,800
2014	646,000	411,000	264,000	235,000	106,000	61,200	50,700
2015	663,000	421,000	269,000	242,000	110,000	62,200	53,500
2016	680,000	430,000	273,000	250,000	117,000	65,500	57,200
2017	685,000	437,000	270,000	249,000	124,000	69,900	59,500
2018	690,000	437,000	264,000	252,000	127,000	72,000	63,100
2019	676,000	426,000	252,000	250,000	124,000	71,900	66,200
2020	632,000	407,000	217,000	224,000	117,000	63,600	57,900
2021	606,000	391,000	207,000	215,000	114,000	65,000	54,200

Source

U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. Adoption Foster Care Analysis Reporting System (AFCARS), FY 2012 - 2021. Submissions as of 6/28/2022.

Footnotes

FY = Federal Fiscal Year (October 1 - September 30). Note that for all of the years shown, some of the data may differ from that shown in earlier versions of this chart. This is due to the fact that some states have resubmitted their AFCARS data after addressing data quality issues. Note: Due to data quality concerns, many of which are associated with the lingering effects of Hurricane Maria, Puerto Rico's data are only included for the years 2018 through 2021 for both foster care and adoption. PR is in the process of addressing the quality of their data.

Topics:
Adoption , Foster care

Types:
report

Success Stories

U.S. Department of Health and Human Services, Administration for Children and Families,
Administration on Children, Youth and Families, Children's Bureau, https://www.acf.hhs.gov/cb

The AFCARS Report:

Tennessee

Preliminary FY[1] 2021 Estimates as of June 28, 2022 - No. 29

SOURCE: Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2021 data[2]

Numbers at a Glance: Tennessee

Fiscal Year	2017	2018	2019	2020	2021
Number in foster care on September 30 of the FY	8,558	8,929	9,290	8,839	9,227
Number entered foster care during the FY	6,679	6,888	6,719	5,860	6,185
Number exited foster care during the FY	4,688	5,241	5,081	5,835	5,331
Number served by the foster care system during the FY	13,248	14,170	14,371	14,674	14,558
Number waiting to be adopted on September 30 of the FY	1,322	1,625	1,743	1,829	1,872
Number waiting to be adopted for whom parental rights (for all living parents) were terminated as of the last day of the FY	1,067	999	1,014	982	1,072
Number adopted with public child welfare agency involvement during the FY	1,260	1,248	1,166	1,186	1,224

Children in Foster Care on September 30, 2021 - N=9,227

Age as of September 30th	Years
Mean	9.5
Median	10.0

Age as of September 30th	Percent	Number
Less than 1 Year	6%	565
1 Year	6%	573
2 Years	6%	551
3 Years	5%	467
4 Years	5%	458
5 Years	4%	411
6 Years	4%	404
7 Years	4%	353
8 Years	4%	326
9 Years	4%	345
10 Years	4%	367
11 Years	4%	346
12 Years	4%	395
13 Years	5%	491
14 Years	6%	551
15 Years	7%	645
16 Years	8%	739
17 Years	8%	766
18 Years	3%	266
19 Years	1%	131
20 Years	1%	76

Sex	Percent	Number
Male	54%	4,951
Female	46%	4,276

Most Recent Placement Setting	Percent	Number
Pre-Adoptive Home	3%	282
Foster Family Home (Relative)	12%	1,090
Foster Family Home (Non-Relative)	57%	5,253
Group Home	9%	796
Institution	7%	679
Supervised Independent Living	4%	380
Runaway	1%	135
Trial Home Visit	7%	604

Case Plan Goal	Percent	Number
Reunify with Parent(s) or Primary Caretaker(s)	68%	5,856
Live with Other Relative(s)	8%	718
Adoption	19%	1,651
Long Term Foster Care	4%	318
Emancipation	0%	0
Guardianship	1%	77
Case Plan Goal Not Yet Established	0%	5

[1] 'FY' refers to the Federal Fiscal Year, October 1st through September 30th.

[2] Data from both the regular and revised AFCARS file submissions received by June 28, 2022 are included in this report. Missing data are excluded from each table. Therefore, the totals within each distribution may not equal the total provided for that subpopulation (e.g. number in care on September 30th may not match the sum across ages for that group)

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	0%	15
Asian	0%	25
Black or African American	23%	2,113
Native Hawaiian/Other Pacific Islander	0%	1
Hispanic (of any race)	7%	595
White	63%	5,717
Unknown/Unable to Determine	1%	70
Two or More Races	7%	594

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

Time in Care	Months
Mean	16.0
Median	11.3

Time in Care	Percent	Number
Less than 1 Month	6%	524
1 - 5 Months	25%	2,325
6 - 11 Months	21%	1,957
12 - 17 Months	14%	1,250
18 - 23 Months	11%	996
24 - 29 Months	9%	810
30 - 35 Months	4%	394
3 - 4 Years	9%	790
5 Years or More	2%	181

Children Entering Foster Care during FY 2021 - N=6,185

Age at Entry	Years
Mean	9.2
Median	10.0

Age at Entry	Percent	Number
Less than 1 Year	14%	874
1 Year	5%	282
2 Years	4%	269
3 Years	4%	247
4 Years	4%	247
5 Years	4%	228
6 Years	4%	255
7 Years	3%	183
8 Years	3%	208
9 Years	3%	188
10 Years	3%	194
11 Years	3%	208
12 Years	4%	242
13 Years	5%	321
14 Years	6%	377
15 Years	8%	468
16 Years	9%	546
17 Years	7%	423
18 Years	6%	358
19 Years	1%	44
20 Years	0%	23

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	0%	11
Asian	0%	12
Black or African American	23%	1,371
Native Hawaiian/Other Pacific Islander	0%	4
Hispanic (of any race)	6%	388
White	63%	3,831
Unknown/Unable to Determine	1%	70
Two or More Races	6%	379

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

Circumstances Associated with Child's Removal	Percent	Number
Drug Abuse (Parent)	1%	2,197
Neglect	1%	2,154
Child Behavior Problem	1%	1,451
Caretaker Inability To Cope	0%	911
Housing	0%	737
Abandonment	0%	513
Physical Abuse	0%	448
Parent Incarceration	0%	409
Sexual Abuse	0%	225
Drug Abuse (Child)	0%	154
Alcohol Abuse (Parent)	0%	121
Relinquishment	0%	82
Parent Death	0%	77
Child Disability	0%	21
Alcohol Abuse (Child)	0%	19

NOTE: These categories are not mutually exclusive, so percentages will total more than 100% and counts will be more than the total number of entries.

Children Exiting Foster Care during FY 2021 - N=5,331

Age at Exit	Years
Mean	9.9
Median	10.0

Age at Exit	Percent	Number
Less than 1 Year	4%	225
1 Year	6%	318
2 Years	6%	335
3 Years	5%	283
4 Years	5%	253
5 Years	5%	267
6 Years	4%	228
7 Years	4%	208
8 Years	4%	189
9 Years	4%	212
10 Years	4%	195
11 Years	3%	175
12 Years	3%	174
13 Years	4%	214
14 Years	4%	226
15 Years	6%	298
16 Years	8%	399
17 Years	8%	444
18 Years	11%	585
19 Years	1%	44
20 Years	0%	19

Time in Care	Months
Mean	16.9
Median	13.5

Time in Care	Percent	Number
Less than 1 Month	8%	429
1 - 5 Months	17%	882
6 - 11 Months	20%	1,081
12 - 17 Months	18%	957
18 - 23 Months	12%	661
24 - 29 Months	9%	481
30 - 35 Months	6%	301
3 - 4 Years	9%	466
5 Years or More	1%	73

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	0%	4
Asian	0%	4
Black or African American	22%	1,147
Native Hawaiian/Other Pacific Islander	0%	10
Hispanic (of any race)	6%	308
White	66%	3,464
Unknown/Unable to Determine	0%	24
Two or More Races	6%	322

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

Reason for Discharge	Percent	Number
Reunification with Parent(s) or Primary Caretaker(s)	47%	2,382
Living with Other Relative(s)	14%	696
Adoption	24%	1,222
Emancipation	7%	336
Guardianship	8%	401
Transfer to Another Agency	1%	32
Runaway	0%	9
Death of Child	0%	8

Children Waiting to be Adopted[3] on September 30, 2021 - N=1,872

Age as of September 30th	Years
Mean	9.3
Median	10.0

Age as of September 30th	Percent	Number
Less than 1 Year	2%	42
1 Year	6%	121
2 Years	6%	116
3 Years	6%	109
4 Years	6%	118
5 Years	5%	90
6 Years	5%	85
7 Years	4%	77
8 Years	4%	73
9 Years	4%	78
10 Years	4%	84
11 Years	4%	84
12 Years	5%	93
13 Years	6%	119
14 Years	8%	150
15 Years	7%	131
16 Years	8%	154
17 Years	8%	148

Placement Type	Percent	Number
Pre-Adoptive Home	15%	280
Foster Family Home (Relative)	8%	155
Foster Family Home (Non-Relative)	60%	1,116
Group Home	9%	167
Institution	7%	126
Supervised Independent Living	0%	0
Runaway	1%	12
Trial Home Visit	1%	16

Sex	Percent	Number
Male	55%	1,025
Female	45%	847

Age at Entry into Foster Care	Years
Mean	6.7
Median	7.0

Age at Entry into Foster Care	Percent	Number
Less than 1 Year	19%	356
1 Year	6%	103
2 Years	6%	103
3 Years	5%	102
4 Years	4%	81
5 Years	5%	91
6 Years	4%	70
7 Years	5%	101
8 Years	5%	98
9 Years	5%	92
10 Years	6%	117
11 Years	6%	111
12 Years	7%	127
13 Years	6%	107
14 Years	5%	102
15 Years	3%	59
16 Years	2%	37
17 Years	1%	15

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	0%	3
Asian	0%	2
Black or African American	20%	372
Native Hawaiian/Other Pacific Islander	0%	0
Hispanic (of any race)	5%	96
White	68%	1,259
Unknown/Unable to Determine	0%	9
Two or More Races	7%	123

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

[3] Waiting children are identified as children who have a goal of adoption and/or whose parents' parental rights have been terminated. Children 16 years old and older whose parents' parental rights have been terminated and who have a goal of emancipation have been excluded from the estimate.

Time in Care	Months
Mean	31.6
Median	28.1

Time in Care	Percent	Number
Less than 1 Month	1%	12
1 - 5 Months	4%	75
6 - 11 Months	7%	137
12 - 17 Months	12%	227
18 - 23 Months	14%	264
24 - 29 Months	17%	314
30 - 35 Months	10%	184
3 - 4 Years	27%	505
5 Years or More	8%	154

Of Children Waiting for Adoption whose Parents' Parental Rights have been Terminated (N=1,072), Time Elapsed since Termination of Parental Rights as of September 30, 2021

Time Since TPR	Months
Mean	27.9
Median	10.0

Children Adopted with Public Agency Involvement in FY 2021[4] - N=1,224

Age at Adoption	Years
Mean	6.7
Median	6.0

Age at Adoption	Percent	Number
Less than 1 Year	2%	30
1 Year	12%	148
2 Years	12%	152
3 Years	8%	101
4 Years	7%	84
5 Years	7%	90
6 Years	5%	67
7 Years	5%	67
8 Years	4%	53
9 Years	5%	65
10 Years	5%	59
11 Years	4%	49
12 Years	4%	54
13 Years	4%	46
14 Years	3%	41
15 Years	3%	42
16 Years	4%	44
17 Years	3%	32
18 Years	0%	0
19 Years	0%	0
20 Years	0%	0

Time Elapsed from Termination of Parental Rights to Adoption	Months
Mean	8.8
Median	4.4

Time Elapsed from Termination of Parental Rights to Adoption	Percent	Number
Less than 1 Month	2%	18
1 - 5 Months	63%	707
6 - 11 Months	17%	192
12 - 17 Months	8%	93
18 - 23 Months	5%	62
24 - 29 Months	1%	10
30 - 35 Months	1%	10
3 - 4 Years	2%	24
5 Years or More	1%	15

Race/Ethnicity	Percent	Number
American Indian/Alaska Native	0%	0
Asian	0%	1
Black or African American	10%	128
Native Hawaiian/Other Pacific Islander	0%	4
Hispanic (of any race)	7%	82
White	75%	918
Unknown/Unable to Determine	0%	5
Two or More Races	7%	86

NOTE: All races exclude children of Hispanic origin. Children of Hispanic ethnicity may be any race.

[4] Note that the adoption data reported in this section are from the AFCARS Adoption file. Therefore, the number of adoptions reported here may not equal the number reported as discharges to adoption from foster care.

Adoptive Family Structure	Percent	Number
Married Couple	82%	964
Unmarried Couple	1%	9
Single Female	15%	179
Single Male	2%	27

Relationship of Adoptive Parents to Child Prior to Adoption	Percent	Number
Non-Relative	1%	17
Foster Parent	85%	1,036
Stepparent	0%	1
Other Relative	14%	170

Sex	Percent	Number
Male	52%	638
Female	48%	586

Receive Adoption Subsidy	Percent	Number
Yes	94%	1,150
No	6%	74

FY 2021 AFCARS Foster Care Data Release

Definitions and additional supporting information relevant to the populations presented in this report can be found by clicking on the tabs above the area chart displayed when using this link:

https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption