APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1868

JONATHAN R., minor, by Next Friend, Sarah Dixon; ANASTASIA M., minor, by Next Friend, Cheryl Ord; SERENA S., minor, by Next Friend, Sarah Dixon; THEO S., minor, by Next Friend, L. Scott Briscoe; GARRETT M., minor, by Next Friend, L. Scott Briscoe; GRETCHEN C., minor, by Next Friend, Cathy L. Greiner; DENNIS R., minor, by Next Friend, Debbie Stone; CHRIS K., CALVIN K., and CAROLINA K., minors, by Next Friend, Katherine Huffman; KARTER W., minor, by Next Friend, L. Scott Briscoe; ACE L., minor, by Next Friend, Isabelle Santillion; and individually and on behalf of all others similarly situated,

Plaintiffs - Appellants,

v.

JIM JUSTICE, in his official capacity as the Governor of West Virginia; BILL CROUCH, in his official capacity as the Cabinet Secretary of the West Virginia Department of Health and Human Resources; JEREMIAH SAMPLES, in his official capacity as the Deputy Secretary of the Department of Health and Human Resources; LINDA WATTS, in her official capacity as the Commissioner of

the Bureau for Children and Families; WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Defendants - Appellees.

WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS; NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN; CHILDREN'S ADVOCACY INSTITUTE; ADVOKIDS; YOUTH LAW CENTER; NATIONAL CENTER FOR YOUTH LAW; MOUNTAIN STATE JUSTICE; NATIONAL CENTER ON ADOPTION AND PERMANENCY; CHILD AND DISABILITY NON-GOVERNMENTAL ORGANIZATIONS,

Amici Supporting Appellants.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Thomas E Johnston, Chief District Judge. (3:19-cv-00710)

Argued: March 9, 2022 Decided: July 20, 2022

Before HARRIS and RUSHING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed in part, reversed in part, and remanded by published opinion. Senior Judge Floyd wrote the opinion, in which Judge Harris joined. Judge Rushing wrote a separate opinion dissenting in part and concurring in the judgment.

ARGUED: Marcia Robinson Lowry, A BETTER CHILDHOOD, New York, New York, for Appellants. Philip Peisch, BROWN & PEISCH PLLC, Washington, D.C., for Appellees. **ON BRIEF:** Richard W. Walters, J. Alexander Meade, SHAFFER & SHAFFER, PLLC, Charleston, West Virginia, for Appellants. Steven R. Compton, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia; Caroline M. Brown, Julia M. Siegenberg, Kendra Doty, BROWN & PEISCH PLLC, Washington, D.C., for Appellees. Tobias S. Loss-Eaton, Mark P. Guerrera, SIDLEY AUSTIN LLP, Washington, D.C., for Amici Washington Lawyers' Committee for Civil Rights and Urban Affairs, National Association of Counsel for Children, Children's Advocacy Institute, Advokids, Youth Law Center, National Center for Youth Law, Mountain State Justice, and the National Center for Adoption and Permanency. Jonathan M. Smith, Kaitlin Banner, Marja Plater, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, Washington, D.C., for Amicus Washington Lawyers' Committee for Civil Rights and Urban Affairs. Amy C. Harfield, Children's Advocacy Institute, UNIVERSITY OF SAN DIEGO SCHOOL OF LAW, San Diego, California, for Amicus Children's Advocacy Institute. Lydia C. Milnes, MOUNTAIN STATE JUSTICE, INC., Morgantown, West Virginia, for Amicus Mountain State Justice. J. Michael Showalter, James D. Cromley, SCHIFF HARDIN LLP, Chicago, Illinois, for Amici Child and Disability Non-Governmental Organizations.

FLOYD, Senior Circuit Judge:

This case brought on behalf of thousands of West Virginia's foster children challenges the State's administration of child welfare services. Plaintiffs describe an ineptly structured program, beleaguered city employees trying their best to provide necessities while plagued with unmanageable caseloads, staff shortages, and budgetary constraints, and the resultant tragedies for West Virginia's children relegated to entire childhoods in foster-care drift. But this appeal is not about any of that. Invoking *Younger v. Harris*, 401 U.S. 37 (1971), the court below abstained from hearing the case in deference to parallel state-court proceedings. Because West Virginia courts retain jurisdiction over foster children until they leave state custody, the court reasoned, any federal intervention into that process would undermine our fundamental notions of comity and federalism and reflect negatively upon the state court's ability to enforce constitutional principles.

We reverse. In this case, principles of federalism not only do not preclude federal intervention, they compel it. Plaintiffs bring federal claims, and federal courts "are obliged to decide" them in all but "exceptional" circumstances. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72, 73 (2013) (citation omitted). And this case presents none of those circumstances.

But our decision is based on more than mere syllogism. *Younger*'s narrow scope safeguards Plaintiffs' rights, bestowed on them by Congress in the Judiciary Act of March 3, 1875, to present their claims to a federal tribunal. 28 U.S.C. § 1331. Plaintiffs allege that a federal class action is the most—if not the only—effective way to achieve the kind of systemic relief they seek. And history builds out those allegations. For years, West Virginia's

response to any foster-care orders entered as part of the individual state hearings seems to have been to shuffle its money and staff around until the orders run out, entrenching rather than excising structural failures. *See In re Carlita B.*, 408 S.E.2d 365, 375 (W. Va. 1991) (lamenting, as far back as 1991, the foster children "left to languish in a limbo-like state during a time most crucial to their human development"); *State v. Michael M.*, 504 S.E.2d 177, 186 (W. Va. 1998) (reiterating the court's "frustration over any unwarranted delays caused by the" State (emphasis omitted)); *In re Brandon H.S.*, 629 S.E.2d 783, 786, 789–90 (W. Va. 2006) (still deploring the State's inability to "solv[e] the staffing crisis"). Forcing Plaintiffs to once more litigate their claims piecemeal would get federalism exactly backwards.

I.

A.

West Virginia entrusts to its Department of Health and Human Resources (DHHR or the Department) the care of all children in the custody of the State. W. Va. Code Ann. § 49-4-113(a)–(b). Roughly 90% of those children come to the Department by way of traditional abuse-and-neglect proceedings following parental maltreatment. J.A. 210–11, 13. But 10% are adjudicated into its custody through juvenile delinquency and statusoffense hearings, the state courts possessing authority to place children in the Department's care when they require a middle ground between in-home supervision and full-fledged imprisonment. *See* W. Va. Code Ann. §§ 49-4-706(a)(3), 49-4-708(a)(4).

But regardless of how a child becomes a ward of the Department, the State bears the same responsibility to

"determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care." *Id.* § 49-4-110(a); *see also id.* §§ 49-4-406(a), (b), (d)(2)(4), 49-4-712(a), 49-4-714(f). That is, as far as the State is concerned, all children within the Department's guardianship are "foster children" and the Department must mete out appropriate care to them all. *See* Resp. Br. 4 & n.1 (citing DHHR, *Foster Care Policy* (Aug. 2021), https://dhhr.wv.gov/bcf/policy/Documents/Foster%20Care%20Policy%20 August%202021%20%281%29.pdf).

But the buck does not stop with the Department; state circuit courts conduct "quarterly status reviews" to ensure the Department places children "in the least restrictive setting available" and generally acts in their "best interests." W. Va. Code Ann. §§ 49-4- 110(a), 49-4-404(a), 49-4-604(a)(2), 49-4-714(b). Broadly speaking, the courts "examine the proposed case plan," "determine if the department has made reasonable efforts to finalize the permanency plan," approve out-of-state placements, and review "[t]he appropriateness of the current educational setting" and any "[s]ervices required to meet the child's needs." *Id.* §§ 49-4-108, 49-4-408(b), 49-4-608(b), (d)–(e).

To sum up, the Department maintains responsibility for planning and delivering the care, the circuit courts for supervising it.

However effective this arrangement appears on paper, Plaintiffs assert the Department has made a mockery of it in practice. Rather than take children away from abuse and neglect, Plaintiffs charge, the Department only compounds it. It houses children in inadequate and outright dangerous environments, deprives them of badly-

needed social and mental-health services, and, when all else fails—which it often does in West Virginia—simply institutionalizes the children for years, segregating them from the outside world at the time socialization matters most.

Take just two of the named Plaintiffs. Jonathan, fifteen at the time of filing, had suffered repeated physical, sexual, and emotional abuse at the hands of his biological parents. When he became suicidal and aggressive, they voluntarily gave him up for adoption. And though the Department was aware of the circumstances, it did nothing to vet their decision—or the adoptive parents who soon committed Jonathan to a psychiatric hospital. When Jonathan returned from the hospital, so did the abuse, prompting several calls from mandatory school reporters. Still, the Department did not intervene. Only when Jonathan was locked away in the psychiatric hospital for the second time—now, on his adoptive parents' accusations that he had sexual contact with another child—did the Department step in. But it made no effort to place Jonathan in a foster home, simply parking him at an out-of-state facility in Georgia. After Georgia came Nashville and its mandatory treatment for adjudicated juvenile sex offenders, never mind that no one had investigated the adoptive parents' claims or that the State had never even charged Jonathan with a crime. And after three years, the Department sloughed him off to yet another facility, for a total of seven years behind closed and locked institutional doors. Finally, the Department delivered Jonathan to his biological grandmother. But it offered no social or financial services or any other meaningful support that would aid in her care for the post-traumatic-stress, attention-deficit, and reactive-attachment disorders Jonathan had developed along the way. *See* J.A. 90–93.

Anastasia, eleven when Plaintiffs filed the complaint, first entered foster care at four years of age. The Department placed her in a foster home with five other children but removed her shortly after upon allegations of abuse. Anastasia spent the next six months shuttled between seven different placements, only to be returned to her original foster mother—who promptly deposited her in a psychiatric hospital. After some months, Anastasia returned to her foster home, but at age ten was caught shoplifting with her foster sister. The Department immediately took custody of both girls, placed Anastasia in a succession of emergency shelters, and, when Anastasia sprayed Lysol on a staff member, handed her over to the police to be charged with assault. The result: three months at a juvenile detention center that Anastasia spent sleeping on a bare mattress on a cement floor among adolescents aged fifteen and older. Abruptly, the charges were then dropped, and Anastasia was shipped off to an out-of-state facility for children with psychiatric issues. She resides there still, even as the facility has made several less-than laudable appearances in the news, including when its admissions coordinator was charged with sexual assault of a suicidal, fourteen-year-old patient. Anastasia suffers from several psychological disorders. *See id.* at 93–95.

These stories are shocking and yet, according to Plaintiffs, shockingly common among West Virginia's foster children. The Department, of course, does not bear responsibility for it all. Plaintiffs observe West Virginia is the fourth poorest state in the Nation. *Id.* at 78. In 2017, its rate of child deaths related to abuse and neglect was more than double the national average. *Id.* at 77. And since 2017, the State has had the highest rate of foster-care entries for youths between fourteen and seventeen years of age (1.4% as compared to the 0.3% national average).

Id. at 78. But the crux of Plaintiffs' complaint is that the Department has failed to do anything meaningful to stave off this crisis. For years, it has been leaving almost a quarter of its positions unstaffed, has failed to recruit anywhere near enough foster-care families, and has not bothered to educate the families it had, turning instead to institutionalization to manage the case load. *Id.* at 77–79 (reporting that 71% of youth between ages twelve and seventeen have been institutionalized, with 327 children sent out of state). And while these problems undeniably trickle down to each child's individual case, Plaintiffs insist they can only be remedied through systematic, structural change. Plaintiffs accordingly bring this class action, seeking to represent the nearly 7,000 foster children in the Department's care.

For their one General Class, Plaintiffs seek, among others: increases in staffing so that caseloads do not exceed fifteen children per case worker, development of detailed plans for recruiting foster homes, and prompt submissions of individualized case plans to the appropriate state court. *See id.* at 174–77. Plaintiffs also propose three subclasses, to reflect foster populations they believe require more nuanced reform: a Kinship Subclass for children placed with relatives who lack resources and general know-how of raising children with developmental difficulties, an ADA Subclass for children with physical and mental disabilities, and an Aging-Out Subclass for children approaching adulthood and in need of special transition planning. *Id.* at 177–78. Plaintiffs also request a neutral monitor to oversee the Department's compliance with district-court orders. *Id.* at 179.

To be clear, Plaintiffs do not challenge any state statutes or any state-court judgments. They object only to Department practices that have allegedly resulted in

severe delays, inadequate care, and outright abuse on grounds that they violate the Due Process Clause, the First Amendment "right to familial association," the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670 et seq., the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. §§ 705(20), 794. J.A. 165–74.

B.

Plaintiffs filed their complaint on September 30, 2019, and West Virginia moved to dismiss on November 26 of that same year. The State urged two procedural grounds: lack of subject-matter jurisdiction under *Rooker-Feldman*[1] and *Younger* abstention, both on the theory that Plaintiffs impermissibly "seek federal review and ongoing oversight over" West Virginia's courts' quarterly foster-care hearings. *Jonathan R. v. Justice*, No. 3:19-CV-00710, 2021 WL 3195020, at *5 (S.D. W. Va. July 28, 2021); J.A. 256. West Virginia also argued that, substantively, all five of Plaintiffs' counts failed to state a claim. *Jonathan R.*, 2021 WL 3195020, at *5. Soon after West Virginia filed its motion, COVID-19 arrived in the United States. By the time the district court picked the motion back up in July 2021, six of the named Plaintiffs had left foster care, and West Virginia had filed additional motions to dismiss their claims as moot.

The district court sided with West Virginia. Starting with mootness, the court found "no dispute that these six Plaintiffs are no longer in the [Department's] custody"

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[1] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), prohibit federal district courts from sitting in actual or constructive appeal of state-court judgments. *See infra* Part IV.

and so concluded they "lack a legally cognizable interest in the outcome of this case." *Id.* at *5– 6 (cleaned up) (quoting *Incumaa v. Ozmint*, 507 F.3d 281, 286 (4th Cir. 2007)). Plaintiffs asked the court to consider the capable-of-repetition-yet-evading-review exception, but on court's view, the marginal probability that the six Plaintiffs would reenter foster care was not enough to qualify the claims as such. *Id.* at *6–7. The court also rejected the special class-action exception whereby eventual class certification may "relate back" to the filing of the complaint. *Id.* at *8. That exception concerns only "inherently transitory" claims, the court reasoned, but "Plaintiffs have failed to show that these children have been moved so quickly in and out of [Department] custody that their claims are effectively unreviewable." *Id.* (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013)). The court thus dismissed the six Plaintiffs' claims as moot.

Because six other Plaintiffs remained, the court then turned to West Virginia's Younger contentions. It found this case to resemble *Moore v. Sims*, 442 U.S. 415 (1979), where the Supreme Court abstained from resolving a foster-care dispute over parental rights. *See id.* at *9. Like *Moore*, this case concerns "state civil proceedings that are akin to criminal prosecutions," the court explained. *Id.* (quoting *Sprint*, 571 U.S. at 78). And beyond the mere similarity in form, the district court found traditional justifications for abstention—risk of interfering with state-court decisions, substantial state interest, and adequate opportunity to present those same challenges in the state proceedings, *see Middlesex Cnty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982)—compelled it to follow *Moore*'s course. The court thus granted West Virginia's motion to dismiss, without reaching the State's arguments about *Rooker-Feldman* or

failure to state a claim and without ruling on class certification.

Plaintiffs now appeal both rulings; the State defends the district court's judgment and once more presses *Rooker-Feldman* in alternative. We think Plaintiffs have the better of the argument on all three grounds. We reverse and remand so that the district court can consider West Virginia's substantive arguments for dismissal and, if appropriate, Plaintiffs' motion for class certification.

II.

Like the district court, we begin with mootness. The parties relegate this issue to the backburner, believing the case can go on so long as *some* named Plaintiffs continue to have a personal stake in the dispute. But since the district court's ruling, two more named Plaintiffs have aged out of foster care. And without them, no Plaintiff can represent either the Kinship or the Aging Out Subclass. So if we affirm the district court's reasoning, Rule 23(a) will preclude certification of those Subclasses. *See E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (explaining that a named plaintiff must belong to the class); Fed. R. Civ. P. 23(c)(5) (explaining that the subclasses "are each treated as a class" and must meet the same certification requirements). True, the Plaintiffs' dismissal would not necessarily end the suit—their counsel could supplement the complaint—but it would needlessly slow the resolution of their essential and urgent claims, perhaps several times over. So we think it more prudent to resolve mootness up front. Because "the relevant jurisdictional facts are not in dispute," we consider the issue de novo. *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017).

Mootness doctrine is grounded in Article III's "case-or-controversy limitation on federal judicial authority," *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), which requires a cognizable interest in the outcome of the action to bring suit. But its demands extend past the filing of the complaint, insisting on "an actual controversy . . . at all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Still, the doctrine is "flexible," recognizing several settled exceptions. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980). Plaintiffs invoke two of them: the general "capable of repetition yet evading review" and the class-action specific "relation back."

Plaintiffs cannot succeed on the first, for it applies only when "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (cleaned up) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990)). Plaintiffs posit there is about a 7.5% chance one of the adopted children will return to state custody. Reply Br. 25 n.10. But even if accurate, 7.5% simply does not convey a sense of "reasonable expectation." *Spencer*, 523 U.S. at 17. Not to mention that the now-adult Plaintiffs can never reenter foster care again. The district court appropriately declined to apply this first exception.

It was wrong, however, to reject the second. Where a named plaintiff's individual claim becomes moot before the district court has an opportunity to certify the class, the certification may "relate back" to the filing of the complaint if *other* class members "will continue to be subject to the challenged conduct and the claims raised are . . . inherently transitory." *Genesis*, 569 U.S. at 76 (cleaned up) (citation omitted).

The State objects Plaintiffs' claims are not so transitory: Plaintiffs themselves complain that children languish in foster care for years. But that misapprehends the exception. As the Court explained in *Gerstein v. Pugh*, what matters most is that the lifespan of state guardianship "cannot be ascertained at the outset," that "[i]t is by no means certain that any given individual, named as plaintiff, would be in . . . custody long enough for a district judge to certify the class." 420 U.S. 103, 110 n.11 (1975). Circuit courts, too, find "the essence of the exception" in the "uncertainty about whether a claim will remain alive." *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (finding Indiana prisoners eligible for conditional release fairly within the exception); *see also Unan v. Lyon*, 853 F.3d 279, 287 (6th Cir. 2017) (Medicaid recipients); *Thorpe v. D.C.*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013) (nursing-home residents). And courts find the exception particularly fitting when defendants create "a significant possibility that any single named plaintiff would be [dismissed] prior to certification." *Olson*, 594 F.3d at 582 (quoting *Zurak v. Regan*, 550 F.2d 86, 92 (2d Cir. 1977)); *see also Unan*, 853 U.S. at 287. As well as when the court may "safely assume that [counsel] has other clients with a continuing live interest in the case." *Gerstein*, 420 U.S. at 110 n.11.

All of these principles apply with full force here. Foster-care placements are exceedingly unpredictable. Even if *some* children will spend a long-enough period in the system, requiring Plaintiffs to predict *which* child will asks too much. And as in *Gerstein*, "the constant existence of a class of persons suffering the deprivation is certain" on the facts alleged. Id. Finally, as with the prisoners in *Olson*, "[t]he duration of" Plaintiffs' claims remains largely "at the discretion of the" State. 594 F.3d at 583. Just like Indiana was able to move its prisoners to a

different facility, West Virginia can push through adoption and family reunification. But unlike prison transfers (presumably to better-equipped facilities), unsuitable adoptions or premature reunification with parents unprepared to take on the responsibility can devastate entire childhoods. We decline to create such perverse incentives for the States.

The State leans heavily on *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), and *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), as holding similar foster-care claims moot. But *31 Foster Children* never considered relation back. 329 F.3d at 1263. And *J.B.* declined to certify the class. 186 F.3d at 1290. Nor does this case involve a dilatory plaintiff, which might dictate a different outcome. *E.g., Espenscheid v. DirectSat USA*, LLC, 688 F.3d 872, 874 (7th Cir. 2012). We find nothing abnormal in waiting several months to move for class certification—especially in light of the pandemic. *Cf. Rensel v. Centra Tech, Inc.*, 2 F.4th 1359, 1366 n.3 (11th Cir. 2021) (noting that "between 2000 and 2018, the median time from the filing of the initial complaint to the class certification decision" in certain complex class actions spanned "two-and-a-half years"); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 103 (1996) (reporting that in 75% of class actions surveyed, "the time from the filing of the complaint to the filing of a motion to certify ranged from more than 6.5 to more than 16.3 months").

We hold Plaintiffs' claims fit comfortably within *Gerstein*'s inherently transitory exception. If, on remand, the district court decides to certify the class, the certification will "relate back to the filing of the

complaint," preserving Plaintiffs' class claims. *Genesis*, 569 U.S. at 76 (cleaned up) (citation omitted).[2]

III.

The parties' main disagreement centers on abstention. *Younger*, the pathmaking case here, required federal courts to stay their hand when criminal prosecution was pending in state court. 401 U.S. at 41. In keeping with "the basic doctrine of equity jurisprudence," *Younger* reasoned

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[2] Our dissenting colleague suggests we have improperly employed the "inherently transitory" exception because it applies only where "*no* plaintiff possesse[s] a personal stake in the suit long enough for litigation to run its course." *See infra* p. 44 (emphasis added) (quoting *Genesis*, 569 U.S. at 76). While that is certainly one circumstance where the exception applies, it is not the only one. As we explain, *Gerstein* allowed relation back where it was "by no means certain that any given individual, named as plaintiff," would suffer a deprivation "long enough for a district judge to certify the class." 420 U.S. at 110 n.11. *Genesis*, for its part, reaffirms *Gerstein* and itself notes the exception may be appropriate where a deprivation "*likely* would end prior to the resolution" of plaintiffs' claims, so long as "it is 'certain that other persons similarly situated' will continue to be subject to the challenged conduct." 569 U.S. at 76 (emphasis added) (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991)). True, *Genesis* rejected the exception in the end, but it did so only because "respondent's complaint" in that case "requested statutory damages" and not "injunctive relief"—a claim that "cannot evade review." *Id.* at 77. We accordingly read *Genesis* to continue to apply *Gerstein*'s "inherently transitory" exception as it has always been understood, allowing relation back whenever the "nature of the challenged conduct" creates a significant probability that "a named plaintiff's individual claim [will] become[ ] moot before the district court has an opportunity to rule on the certification motion," *Genesis*, 569 U.S. at 75–76—even where it "cannot be ascertained at the outset" *which* individual plaintiff would need to drop out, *Gerstein*, 420 U.S. at 110 n.11. The mere fact that *some* named plaintiffs remain three years into this litigation, then, does not defeat the exception.

federal injunctions improper "when the moving party has an adequate remedy at law and will not suffer irreparable injury." *Id.* at 43–44. But "an even more vital consideration" prompting abstention was "the notion of 'comity,' that is, a proper respect for state functions" and a corresponding recognition that our Nation "will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44. In the years following Younger, the Court has extended the doctrine to certain civil proceedings where federal interference is "likely to be every bit as great as" in criminal ones. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). At the same time, the Court stayed resolute that "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint*, 571 U.S. at 72. "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) (*NOPSI*). And federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

West Virginia and the district court both view this case as falling on the abstention side of the scale because state circuit courts "retain[ ] exclusive jurisdiction over the setting in which the child is placed and over any subsequent requests for modification to that placement" through the individual periodic hearings. Resp. Br. 25 (cleaned up) (citations omitted). Any federal relief, they alert, would interfere with those hearings and, worse, would demand near-constant supervision of state courts.

Reviewing de novo, *see VonRosenberg v. Lawrence*, 781 F.3d 731, 734 (4th Cir. 2015), we cannot agree.[3] Whether we look to their form or their function, the quarterly state-court hearings are simply not "of the sort entitled to Younger treatment." *Sprint*, 571 U.S. at 79 (cleaned up) (citation omitted). They do not fit any historical precedent applying the doctrine. And abstaining here would forward none of the comity interests our federalist system holds dear. But more than that, we see no reason to dismiss the case en masse before the district court has even had the opportunity to sketch out potential contours of relief. If Plaintiffs succeed on the merits, the court can draw careful lines so as not to interfere with individual state-court decisions. But for now, we reverse.

A.

In *Younger*'s formative years, the Court entertained a variety of arguments about when federal courts should abstain, probing the bounds of the doctrine and the wisdom of discarding the jurisdiction Congress prescribed. It considered the type of state proceeding and the magnitude of state interest and sifted through functional arguments like whether plaintiffs had a genuine

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[3] Both parties suggest we review the district court's decision for abuse of discretion. But Plaintiffs do not challenge the court's exercise of discretion, they argue this case does not "satisf[y] the basic requirements of abstention." *E.g.*, *VonRosenberg*, 781 F.3d at 734. That is to say, Plaintiffs question whether the district court had authority to abstain—a legal inquiry courts always conduct "de novo." *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622 (9th Cir. 1993); *see also Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 68 (1st Cir. 2005) (explaining that the court's "review of whether [*Younger* conditions] have been met is de novo"); *see generally Sprint*, 571 U.S. 584 (applying *Younger* without deference to the courts below).

opportunity to raise the same claims before the state court—all with an eye toward understanding precisely when a federal disposition would "unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44.

Cases like *Huffman*, *Juidice*, and *Middlesex*, exemplify this early era. In *Huffman*, the Court debated whether to extend *Younger* past the criminal context to civil matters "in aid of and closely related to criminal statutes" such as a civil enforcement proceeding to abate the showing of obscene movies. 420 U.S. at 604. The Court's majority found abstention appropriate because federal injunctions in such quasi-criminal cases would disrupt "the very interests which underlie [state] criminal laws." *Id.* at 605. Building on those deliberations, *Juidice v. Vail* then applied *Younger*'s principles to federal challenges of state contempt orders because the contempt process is how the State "vindicates the regular operation of its judicial system"—another critical state interest. 430 U.S. 327, 335– 36 (1977). In *Middlesex*, too, the Court found the State retained an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses" and, perhaps even more importantly, that the federal plaintiff could easily have "raise[d] his federal constitutional challenge" "in the state disciplinary proceedings" but chose not to. 457 U.S. at 434–35. Fundamental "principles of comity and federalism" thus called out for abstention. *Id.* at 436; *see also Moore*, 442 U.S. at 423; *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10–16 (1987) (all working through similar considerations).

But by 2013, the lay of the land had been established. Having surveyed dozens of cases, the Court could now

map out *Younger*'s heartland: "criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78 (cleaned up) (citations omitted). Unanimously, the Court held those three categories "define *Younger*'s scope," for capping abstention to those "exceptional circumstances" appropriately harmonized the comity interest Younger originally espoused with the federal courts' "obligation" to adjudicate federal questions. *Id.* at 77–78 (citation omitted).[4]

Sprint thus recast the earlier cases. Rather than establish anew in each case whether federal proceedings threaten important state interests or may interfere with state proceedings or whether litigants could have easily raised their federal claims in those state proceedings—the so-called *Middlesex* factors—*Sprint* directs courts to a rule of thumb: if the case falls into one of the three settled categories, courts should go on to determine if federal involvement will in fact put comity at risk, but if the case does not, courts need go no further, they can properly entertain their federal-question jurisdiction without worrying about stepping on state toes. *See id.* at 81 (describing the early Younger jurisprudence as providing "*additional* factors" courts consider); *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 610 (8th Cir. 2018) (announcing, after *Sprint*, that *Younger* "counsels federal-court abstention when there is a pending state proceeding of a certain type" and assessing whether "South Dakota's

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[4] *Sprint* itself concerned a lawsuit over a local telecommunications carrier's authority to charge for calls made via the Internet under the 1996 Telecommunications Act. *See* 571 U.S. at 73–74. Holding up the suit against the categories it had just identified, the Court found it did not fit them and reversed the lower courts' decision to abstain. *Id.* at 79–81.

temporary custody proceedings are civil enforcement proceedings to which *Younger* principles apply" (citation omitted)).

Applying this heuristic here, we conclude the quarterly state hearings do not require the district court to stand aside. West Virginia concedes the hearings are not criminal trials, but argues they are close enough so that we can shelve them alongside other civil enforcement proceedings. *Sprint* has characterized civil enforcement proceedings as cases "brought by the State in its sovereign capacity" following an "investigation" and upon "the filing of a formal complaint or charges." 571 U.S. at 79–80 (citations omitted). And West Virginia suggests that describes this case because children do not enter foster care unless courts find their parents abusive or neglectful or find the children themselves delinquent— either way, a process that requires investigation and a formal complaint by the State. As proof, the State points to *Moore*, which declined to hear a constitutional challenge to several Texas Family Code provisions undergirding the state court's decision to strip parents of custody. *See* 442 U.S. at 418–19.

We easily reject this comparison as to the children who have suffered abuse and neglect. *Moore* concerned the other side of the foster-care process: parental rights. No surprise, then, that the Court equated the initial child-removal proceeding with the publicnuisance adjudication in *Huffman*. *Id.* at 423; *see also Sprint*, 571 U.S. at 79 (explaining that "decisions applying *Younger* to instances of civil enforcement have generally concerned state proceedings" "initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act"). By contrast, the *ongoing* individual hearings here serve to protect the children who would be

plaintiffs in federal court. That is why they proceed in a "conciliatory" manner, engaging, in addition to State representatives, "parents, relatives, foster parents, shelter care facility personnel and others." *Tinsley v. McKay*, 156 F. Supp. 3d 1024, 1034 (D. Ariz. 2015) (discussing analogous foster-care hearings); *see* W. Va. Code Ann. § 49-4-110 (mandating participation of "the multidisciplinary treatment team"). It would turn decades of Supreme-Court jurisprudence—and logic—on its head to put these foster children in the shoes of the abusive parents in *Moore*, 442 U.S. at 423, the obscene-theater director in *Huffman*, 420 U.S. at 604–05, or the asset-concealing fraudsters in *Trainor*, 431 U.S. at 444.

We also have our doubts that *Moore* applies to claims involving the roughly 10% of children who arrive to state custody through the delinquency and status-offender proceedings, but both parties acknowledge the issue is not properly before us: The district court declined to resolve it because it lacked "[s]ufficient information" to determine if any named Plaintiffs were in those 10%, which is to say, the court could not determine if this constitutes a live issue in the case. *Jonathan R.*, 2021 WL 3195020, at *10 n.5. We leave that factfinding to the district court on remand.[5] We note, however, that West Virginia treats all foster children the same, whether they end up in foster care "as a result of a juvenile proceeding or as a result of a child abuse and neglect proceeding." W. Va. Code Ann. § 49-4-110; *see also id.* § 49-4-103 (no child may "be deemed a criminal by reason of the adjudication [under this chapter], nor may

[5] All the more so because this question closely intertwines with class certification and may resolve itself if the district court concludes no named Plaintiff can adequately represent children who enter the system as part of delinquency proceedings and Plaintiffs choose to go ahead with the Class as is rather than amend their complaint.

the adjudication be deemed a conviction"). So the operative "pending" state court proceedings likely do not encompass the initial (settled) orders adjudicating children into state custody. *See Tinsley*, 156 F. Supp. 3d at 1033–34. And in any event, the exercise of federal jurisdiction here would not threaten any of our comity obligations. *See infra* Part III.B.

West Virginia alternatively proffers the third category, which *Sprint* defined as orders "uniquely in furtherance of the state courts' ability to perform their judicial functions." 571 U.S. at 78 (citation omitted). But it still misses the mark. As discussed, the Court first introduced this category in *Juidice*, declining to review a state contempt order so as not to intervene with a process that "lies at the core of the administration of a State's judicial system" and ensures the courts' "orders and judgments are not rendered nugatory." 430 U.S. at 335, 336 n.12. Neither *Sprint* nor *Juidice* defined this category further, and the Court has invoked it just one other time, in *Pennzoil*, 481 U.S. at 12–14, to reject a federal challenge to the constitutionality of Texas's appeal-bond provisions. Pennzoil, the Court explained, was like *Juidice* in that it "involve[d] challenges to the processes by which the State compels compliance with the judgments of its courts." *Id.* at 13–14. And enjoining that process would not only "interfere with the execution of state judgments, but . . . do so on grounds that challenge the very process by which those judgments were obtained." *Id.* at 14.

The foster-care periodic hearings, of course, are nothing of the sort. The state court's usual rulings during these hearings involve approving foster-care plans, ordering payments for medical or mental-health services, affirming out-of-state transfers, and generally ensuring the children's placements continue to be in their best

interest. *See* W. Va. Code Ann. §§ 49-4-108, 49-4-110, 49-4-404. Nothing about that implicates "the administration" of West Virginia's judiciary. *Juidice*, 430 U.S. at 335. To be sure, West Virginia's courts have the authority to hold the Department in contempt when it fails to abide those rulings. But this lawsuit does not challenge that authority—it does not challenge any state-court order at all. It asks instead to enjoin *the Department's* actions.[6] And settled jurisprudence teaches Younger does not "require[ ] abstention in deference to a state judicial proceeding reviewing legislative or executive action." *NOPSI*, 491 U.S. at 368; *accord Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 70 (1st Cir. 2005) (holding abstention improper where the state and federal lawsuits challenged "the Secretary of Health's failure to implement a [payment system], as federal law requires").

Determined, West Virginia insists the "90-day status hearings further 'the state courts' ability to perform their judicial function' of overseeing compliance with their initial orders in the abuse-and-neglect case"—that is, the

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[6] Plaintiffs' proposed relief includes requests to "[r]equire DHHR [to] ensure" that children are "placed in the least-restrictive, most-family like settings possible" or that children belonging to the ADA Subclass "receive foster care services in the most integrated setting appropriate to the child's needs." J.A. 177–78. We take Plaintiffs at their word, as requesting the district court to direct such relief at the Department only. The Department, for example, may need to increase the number of less-restrictive placements available or train existing caregivers to provide care for children with disabilities, as the district court sees fit. But such relief would not impact the determinations of state circuit courts with respect to any particular children, except to the extent that the state court may have more family-like placements to choose from if the Department changes its policies. See W. Va. Code Ann. § 49-4-404 ("*the court* shall review the proposed service plan to determine if implementation of the plan is in the child's best interests" (emphasis added)).

original dispositions regarding children's placements. Resp. Br. 33–34. Note the general tenor of this argument. West Virginia points to no specific pending contempt orders this suit would undermine; it argues only that federal jurisdiction here would undermine the state courts' "ability" to issue them. But if that sufficed to cram state-court proceedings into *Younger*'s third category, we would be hard pressed to find an order that would not do. Certainly, the same rationale would apply to any partial summary judgment. Or even a mine-run discovery dispute. A party resisting federal litigation would always be able to claim that future state orders *might* be necessary to "oversee[ ] compliance" with initial ones and that any parallel federal litigation *might* inhibit state authority to do so. Fortunately, we do not run our judicial system on maybes and what-ifs. We presume court orders will be obeyed. And only in the rare cases they are not—where a State's power to ensure "compliance with the judgments of its courts," *Pennzoil*, 481 U.S. at 13–14, or "vindicate[ ] the regular operation of its judicial system," *Juidice*, 430 U.S. at 335, is in jeopardy—do we abstain. That explains why, in *Younger*'s entire history, the Court has invoked this category just twice.

At day's end, siding with West Virginia, at least when it comes to the 90% of children who enter foster care through the abuse-and-neglect process, would mean expanding the bounds of either the civil-enforcement or the judicial-process categories— exactly what *Sprint* said we may not do. The district court was wrong to abstain.

B.

West Virginia falls back on five out-of-circuit cases that have abstained from foster-care challenges, urging us to

avoid a split. But those concerns are misplaced. *Oglala*, 904 F.3d at 606, fit neatly into the quasi-criminal category: It was brought by parents whose children were taken into state custody and challenged in federal court the very decision to take them away. Quite reasonably, the Eighth Circuit saw "no meaningful distinction between the custody proceedings in *Moore*" and the case before it. *Id.* at 610. And the other cases, *31 Foster Child.*, 329 F.3d at 1274–82, *J.B.*, 186 F.3d at 1291–92, *Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1268–69 (10th Cir. 2002), and *Ashley W. v. Holcomb*, 34 F.4th 588, 591–94 (7th Cir. 2022), relied on the *Middlesex* factors alone, without determining whether the state periodic hearings were the type of proceedings *Younger* has traditionally applied to.[7]

After *Sprint*, we believe it is enough that the quarterly foster-care hearings lie outside the three "exceptional categories" the Court identified—*Younger* abstention is "the exception, not the rule." 571 U.S. at 79, 82 (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984)). But we would decline to abstain just the same even if we looked beyond that categorical analysis. Federal orders

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[7] *31 Foster Child.*, *J.B.*, and *Joseph A.* were all decided before *Sprint*, understandably delving straight into the *Middlesex* factors. *Ashley*, decided this very term, summarily concluded *Moore* applies to all "state-initiated child-welfare litigation." 34 F.4th at 591– 92 (citing *Brunken v. Lance*, 807 F.2d 1325 (7th Cir. 1986); *Milchtein v. Chisholm*, 880 F.3d 895 (7th Cir. 2018)). We are not persuaded, for the reasons already discussed, and the Seventh Circuit evinces no authority for such a sweeping proposition. Quite the contrary, both cases *Ashley* cites follow directly from *Moore*, with parents seeking to overturn a State's adverse custody determination in federal court. See *Brunken*, 807 F.2d at 1330 (stressing "the context of the instant case—a hearing to determine the custody of a child"); *Milchtein*, 880 F.3d at 899 (abstaining from "the sort of arguments the Milchteins seek to present").

going to the Department simply do not interfere with how *the courts* conduct individual periodic hearings (*Middlesex* factor I). And on the flip side, the individual periodic hearings do not afford an adequate opportunity for Plaintiffs to press their systemic claims (factor III). So abstention is not warranted even assuming West Virginia has a particular state interest in the administration of its foster system (factor II)—an assumption that may not be altogether warranted in light of the substantial federal foster-care funds West Virginia accepts.

1.

Younger's main concern has always been whether federal jurisdiction will "unduly interfere" with pending state proceedings. *Younger*, 401 U.S. at 44. Most plaintiffs run afoul of *Younger* by asking federal courts to void the basis for an unfavorable state decision—usually, a statute that allowed the suit against them in the state court. *Huffman* provides a prototypical example. Recall that the case concerned a state judgment closing an adult theater for playing obscene movies in violation of an Ohio nuisance statute. 420 U.S. at 596–98. "Rather than appealing that judgment within the Ohio court system," the theater owner filed suit in the district court alleging the nuisance statute "constitute[d] an overly broad prior restraint on First Amendment rights." *Id.* at 598–99. The district court agreed, permanently enjoining a "portion of the state court's judgment." *Id.* at 599. Plaintiffs took a similar tack in *Trainor*, where a state court allowed the Illinois Department of Public Aid to freeze their assets upon allegations of fraudulent concealment. 431 U.S. at 435–36. They "never filed an answer either to the [writ of] attachment or to the underlying complaint," instead asking a district court to declare unconstitutional the

statute supplying the basis for the writ. *Id.* at 437. The district court "ordered the clerk of the court and the Sheriff" to return the property. *Id.* at 439; *see also Moore*, 442 U.S. at 422– 23 (faulting the district court for granting "a temporary restraining order addressed to the Montgomery County Juvenile Court" as well as "a preliminary injunction enjoining the Department and other defendants from filing or prosecuting any state suit").

It is easy to see how federal adjudication in such cases directly interferes with the pending state proceeding. In the best case, the State confronts "a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future." *Trainor*, 431 U.S. at 445. In the worst, federal courts abruptly and "permanently" end "legitimate activities of the States." *Huffman*, 420 U.S. at 599, 601 (citation omitted).

West Virginia's foster-care proceedings differ in both form and function. Plaintiffs do not suggest they were harmed in any way by the state-court hearings. They acknowledge the state courts are doing everything in their power to create a safe foster-care environment and instead find fault in the Department's failure to give the courts enough to work with: enough in-state institutional placements, enough foster homes, enough case workers to file the plans on time. None of this is to ignore the role West Virginia's courts play in the administration of foster care—the State has set up a "coordinated" child welfare system for a reason, *see* W. Va. Code Ann. § 49-1-401(a)(1). But it is to recognize the Department and the courts "*both*" have their own statutory obligations in administering care. *State ex rel. S.C. v. Chafin*, 444 S.E.2d

62, 70 (W. Va. 1994). While the courts must approve the case plan, the Department must "develop" it. W. Va. Code Ann. § 49-4-408(a). While the courts must finally accept medical and social services, the Department must "establish" them. *Id.* §§ 49-2-101; 49-4-408(c). While the courts must confirm placements, the Department must "visit," "inspect," and "certif[y]" each foster home and actually "place[ ]" children for adoption. *Id.* §§ 49-2-106; 49-2-107, 49-4-608(b). And so on.

Unlike the plaintiffs in *Huffman*, or *Trainor*, or *Moore*, then, Plaintiffs here do not seek to pause—much less to end—any state proceedings. They ask the district court to bring the inner workings of the executive branch in compliance with federal law. So the state quarterly hearings will proceed as they always have, albeit with more placement and services options if Plaintiffs succeed. Nor will this lawsuit "stop the state court from proceeding independently against" the Department if it, too, finds the Department's practices deficient. *Rio Grande*, 397 F.3d at 71. It is true, of course, that the district court might find a violation where the state court would not. But "[n]ormal res judicata effects of federal actions" do not "trigger *Younger*." *Id.* (discussing *NOPSI*, 491 U.S. at 373). Otherwise, the *Younger* doctrine would overrun the usual rule that "the pendency of an action in a state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Sprint*, 571 U.S. at 73 (cleaned up) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). But nothing here risks the kind of interference *Younger* seeks to forestall: an interruption, an injunction, an end to the pending state proceedings.

Even so, West Virginia protests, the federal relief Plaintiffs seek—particularly the appointment of the

monitor—will occasion "an ongoing federal audit of" the state periodic hearings, à la *O'Shea v. Littleton*, 414 U.S. 488 (1974). *See* Resp. Br. 49. But *O'Shea* does not resemble this case in any way that matters. There, plaintiffs complained that various judicial and prosecutorial officials colluded to curtail their civil rights, and the only two defendants before the Supreme Court were a magistrate and a county circuit judge. 414 U.S. at 500. So right from the start we observe that any relief in O'Shea would necessarily run against the courts. But even setting that difference aside, what troubled the Court most in O'Shea was "how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed." *Id.* at 501. Plaintiffs complained that officials set bond in criminal cases without regard to the facts of individual cases and as punishment and that state courts imposed higher sentences on African American citizens. *Id.* at 492. And the only way the Court believed it could change those practices was by "controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials"—which would require both an "interruption of state proceedings" and "an ongoing federal audit of" them. *Id.* at 500. None of that is true here. The district court can offer meaningful relief solely by monitoring executive action.

This case instead resembles *Gerstein*, which challenged Florida's practice of detaining defendants before trial on a prosecutor's information alone, without judicial determination of probable cause. 420 U.S. at 105–06. As the Court explained, any injunction in that case would not be "addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves." *Moore* 442 U.S. at 431 (discussing *Gerstein*, 420 U.S. at 108 n.9). And so it is here.

But above all, halting the litigation on this record would be premature. Should the district court determine that certain specific relief would overstep *Younger*'s bounds, it can always reject it to secure our comity interests. *See O'Shea*, 414 U.S. at 510 (Douglas, J., dissenting) (proposing courts "cross the bridge of remedies only when the precise contours of the problem have been established after a trial"); *Ashley*, 34 F.4th at 592 (instructing lower courts to "figure out which, if any, of [plaintiffs' foster-care] requests should be submitted to the [state] court under *Younger* and which remain for federal adjudication"); *Joseph A.*, 275 F.3d at 1274 (declining to categorically abstain and remanding "so that the district court may determine whether any of the [consent decree's] provisions may be enforced in light of *Younger*"). West Virginia's approach, by contrast, would deny all foster children all resort to federal courts. Unlike criminal defendants, whose claims are litigated and done with, and who can then ask for postconviction review in federal courts, *see Huffman*, 420 U.S. at 606–07, foster children are always within the jurisdiction of state courts—until they are not, because they have left foster care and their cases have become moot. We cannot endorse such a limitless theory of abstention. *See Sprint*, 571 U.S. at 72 (warning that federal courts may not abstain merely "because a pending state-court proceeding involves the same subject matter").

2.

Another practical question courts often ask is whether plaintiffs' federal claims "could have been raised in the pending state proceedings," for denying state courts an opportunity to adjudicate federal questions is simply another way of questioning the courts' competency to

resolve them. *Moore*, 442 U.S. at 425, 430. West Virginia takes that question literally, requiring abstention anytime "state procedures" allow plaintiffs to bring the claim and allow state courts to enter appropriate relief. Resp. Br. 42. And because "West Virginia's circuit courts have general jurisdiction" as well as "authority to issue injunctive relief," the State concludes Plaintiffs had an "adequate opportunity" to raise their federal claims before state courts. *Id.* (quoting *Jonathan R.*, 2021 WL 3195020, at *13).

We think that reads *Moore* right out of its context. As explained, the federal plaintiffs there wished a singular outcome: to avert an unfavorable custody ruling in the Texas courts. And yet, instead of answering Texas's charge in the state court, they filed their own suit in federal court, asking to halt the state proceedings as violative of the Constitution. 442 U.S. at 422. So when the Supreme Court observed the plaintiffs faced "no procedural barriers" in raising their constitutional arguments in the pending state proceedings, it was speaking of arguments that naturally presented themselves in the course of that litigation. *Id.* at 430. The state court easily could have decided the statute's validity first and, if the statute passed muster, gone on to apply it in the plaintiffs' case—all in the same proceeding. *Id.* at 431. What is more, no injunction was "necessary to obtain the release of the children, for they had already been placed in the custody of their parents," meaning the Texas court had adequate time to mull over the constitutional issues. *Id.*

But here, the individual periodic hearings zero in on the immediate circumstances in front of the court: is the foster home safe? Have the medical expenses been paid? Is the child being taught the skills that will enable her to

successfully enter adulthood? All of these the state courts must resolve "promptly," acting within the existing parameters of the foster-care system. *Carlita B.*, 408 S.E.2d at 374. After all, when no foster placements are available, the courts *must* approve a residential facility; they cannot pause to ponder the constitutionality of their absence. By definition, then, Plaintiffs would have to raise their constitutional and statutory claims outside the "normal course of the pending judicial proceeding," much like the pretrial detainees in *Gerstein*, where the Court declined to abstain. See *Moore*, 442 U.S. at 431 (distinguishing *Gerstein*, 420 U.S. at 108 n.9); *accord Huffman*, 420 U.S. at 602–03 ("the relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding" (cleaned up) (citation omitted)).[8]

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[8] The same can be said about *Pennzoil*, the case the district court invoked for the proposition that "a federal court should assume that state procedures will afford an adequate remedy" "when a litigant has not attempted to present his federal claims in related state-court proceedings." *Jonathan R.*, 2021 WL 3195020, at *13 (quoting *Pennzoil*, 481 U.S. at 15). *Pennzoil* was simply responding to the facts before it. The plaintiff there "argue[d]" that "no Texas court could have heard [its] constitutional claims within the limited time available" for it to post the bond pending appeal. 481 U.S. at 15. But the state court plainly "could suspend the bond requirement," allowing the plaintiff to challenge the bond's constitutionality. *Id.* at 16 n.15 (citing Tex. R. Civ. P. 364). In light of that statutory authority, the Court reasoned, the plaintiff would have to have demonstrated it attempted to "secure the relief sought" in the Texas courts and was denied. *Id.* at 14. Because the plaintiff had not, he could not prove state-court inadequacy. *Id.* at 16 (concluding the plaintiff's submission "that the Texas courts were incapable of hearing its constitutional claims [was] plainly insufficient"). But nothing in *Pennzoil* precludes plaintiffs from demonstrating a state forum's inadequacy in other ways, as Plaintiffs have done here.

West Virginia argues for a more expansive interpretation of "pending" state-court proceedings. Though each individual hearing focuses on the minutia of the moment, the State reasons, the hearings are continuing and repeating. That iterative nature makes it so the state courts can enact large systemic changes in between the individual hearings and then react to them in later ones. That may be true, but even a broad take on "pending" can only carry West Virginia so far. Even *Moore* cautioned that abstention may not be appropriate where confining plaintiffs to state courts would in practice "den[y them] an opportunity to be heard that was theirs in theory." 442 U.S. at 431.

Forcing Plaintiffs to litigate their claims in the state foster-care proceedings would amount to just such an empty promise, for at least four reasons. But before we go through those reasons, we must be clear on one thing: Plaintiffs assert wide-reaching, intertwined, and "systemic" failures that cannot be remedied through piecemeal orders. *See* J.A. 79–81, 165. Reforming foster care case-by-case would be like patching up holes in a sinking ship by tearing off the floorboards. So when we assess the adequacy of the state proceedings, we must measure them against those plausible allegations. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (the complaint need only "raise a right to relief above the speculative level"); *Sofer v. State of N.C. Hertford Police Dep't*, 935 F.2d 1287, at *2 (4th Cir. 1991) (the "basis for *Younger* abstention" must be "clear from the face of the complaint") (unpublished table decision).

Having set that ground rule, the first-order problem presents itself: an individual foster child is unlikely to have standing to ask for systemic changes not tied directly to her own maltreatment. *See, e.g., Brandon H.S.*, 629 S.E.2d

at 788 (wrestling with the Department's argument that "extensive staffing directives [were] unrelated to" the case immediately before the court).

And on the flip side of standing, there is mootness. As we saw in this very case, West Virginia stands ready and waiting to request dismissal of any plaintiff who leaves foster care. But how is systemic reform to be achieved under such circumstances? Without a class action to fall back on, individual cases will be mooted out long before a state court issues any orders, let alone before the Department institutes appropriate changes to comply with them. West Virginia suggests litigation could still proceed if *the court* wishes to hold the Department in contempt. But that says nothing about the opportunity "*plaintiffs*" have (or do not) to raise their claims. *Moore*, 442 U.S. at 430 (emphasis added).

And if individual foster children can somehow master these standing and mootness hurdles, it is far from clear they could mount sufficient evidence to secure systemic relief. The periodic hearings proceed under seal, *see* W. Va. R. of Proc. for Child Abuse and Neglect Proc. 6(a), and acting alone, a foster child can hardly appreciate the universe of interrelated deficiencies that may plague the system. Suing as a class, however, Plaintiffs can share their insider knowledge and identify the most productive structural changes to pursue.

Beyond these procedural difficulties lie the more mundane, monetary concerns. Shoring up sufficient evidence to demonstrate the need for systemic relief requires a lot of capital—capital most foster children neither have nor can hope to amass through litigation that seeks only declaratory and injunctive relief. As the Court has many times expressed, where such "individual suits" are not "economically feasible," "aggrieved persons may

be without any effective redress unless they may employ the class-action device" to "allocate[e the] costs among all members of the class." *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9, 339 (1980).

All of this means that Plaintiffs' only real choice is between a federal and a state class (or some other collective) action, not between a federal class action and the individual periodic hearings. But the *Younger* doctrine aspires to minimize interference with pending state proceedings, not to select the most appropriate forum for plaintiffs' claims. Plaintiffs' right "to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) (citations omitted); *accord LaShawn A. by Moore v. Kelly*, 990 F.2d 1319, 1322–23 (D.C. Cir. 1993) (questioning "the need or wisdom of extending *Younger* to all constitutional claims that *might* be adjudicated in state as well as federal courts" (citation omitted)). And indeed, the choice of federal tribunal is not irrational here—the federal government arguably has just as much at stake as West Virginia, having invested significant federal sums into the State's foster-care system. *See* 42 U.S.C. §§ 671, 672 (setting out detailed eligibility criteria states must abide to receive federal funds, like personnel standards and time frames for case-plan submissions); *M.D. v. Perry*, 799 F. Supp. 2d 712, 725 (S.D. Tex. 2011) (reasoning that a State's "voluntary submission to such federal oversight greatly lessens the force of any complaints regarding unwarranted federal intrusion on state sovereignty").[9]

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[9] And because Plaintiffs challenge only executive action, their suit also does not undercut the State's authority to interpret its own laws. *See Moore*, 442 U.S. at 429–30 (citing "the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes" as a leading reason for abstention

3.

Our conclusions about interference and adequacy rest on more than theory and supposition; the cases West Virginia itself relies on bear them out. At the outset, we note West Virginia can only muster seven state decisions from 1991 to the present that have purportedly ordered the Department to change its ways. That sparsity alone signals the difficulty of bringing structural challenges during the periodic individual hearings—and a concomitant lack of interference with state proceedings when federal courts take up the task. But a closer look at each of those cases reveals that none, in fact, comes close to offering the kind of systemic relief Plaintiffs ask for here.

Three of West Virginia's cases do not contemplate revision of any Department policies or practices at all, adjudicating only the case-specific arguments the parties brought before the court. *See State ex rel. Aaron M. v. W. Va. Dep't of Health & Hum. Res.*, 571 S.E.2d 142, 144 (W. Va. 2001) (directing the Department to pay for a particular child's mental-health treatment); *In re Jonathan G.*, 482 S.E.2d 893, 908 (W. Va. 1996) (replacing the Department—in just the one case—with an outside entity because the Department refused to obey the "court's repeated directive to develop and follow a case plan for the purpose of reunifying" the family), *modified on other grounds by State ex rel. C.H. v. Faircloth*, 815 S.E.2d 540 (W. Va. 2018); *State v. Michael M.*, 504 S.E.2d 177, 185 (W. Va. 1998) (finding "an adoptive home," rather than foster care, to constitute "the preferred permanent out-of-home

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(citation omitted)); *Pennzoil*, 481 U.S. at 11 (same); *Trainor*, 431 U.S. at 445 (same).

placement"). If anything, these cases only highlight the state courts' reluctance to order deep structural changes within the Department. *Jonathan G.* gave the court a perfect opening to hold the Department in contempt and order reform, yet it did not follow through; it simply replaced the Department with an outside organization. And *Michael M.*, though it determined the children's "best interests" required adoption, stopped short of actually ordering the Department to do anything to ensure that outcome. *See* 504 S.E.2d at 186 (directing the Department only to "include within its report to this Court a report on the status of all children legally free for adoption").

As for *Carlita B.*, the only systemic problem the court addressed in that case was the "long procedural delays" in the state courts themselves. 408 S.E.2d at 375. Correspondingly, the court limited its relief to instructing "the Administrative Director of this Court . . . to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts." *Id.* at 376. At no point did *Carlita B.* contemplate *Department* changes, not even after observing that the plaintiff-caseworker relationship deteriorated to the point of physical confrontation and that the State failed to meet its "obligation to consider changing assigned workers." *Id.* at 379. Instead, "recogniz[ing] that the steady erosion of child protective services resources has created an enormous unmet need," the court expressed its "hope the Legislature and [the Department] will address this crisis." *Id.* at 379–80.

That leaves *Brandon H.S.* and *S.C.*, the only two cases that took a stab at correcting the executive's shortcomings. *Brandon H.S.* ordered the Department to fill its staffing vacancies. 629 S.E.2d at 786–87. And *S.C.*

directed it to develop uniform procedures for preparing case plans and reporting those plans to the circuit courts. 444 S.E.2d at 74. But even these cases do not support West Virginia in the way it claims, for they both limit relief to the circumstances immediately before the court. *Brandon H.S.* justified its staffing orders on grounds that "the unfilled positions played a part in the delayed assignment of *Brandon's* case to a Child Protective Services worker." 629 S.E.2d at 789 (emphasis added). And *S.C.* directed a committee to "develop a uniform reporting format" "*[a]s a result* of the circumstances of S.C.'s case." 444 S.E.2d at 74 (emphasis added). That the courts saw the need to so limit the remedies only underscores the standing difficulties discussed above. More important still, neither plaintiff asked for Department reform; it was the court that deemed it necessary after observing the problem repeat itself over several cases—which validates our concerns (again discussed above) over how *individual* child plaintiffs are to collect sufficient evidence to justify wide-ranging relief.[10]

In short, though West Virginia correctly observes that state circuit courts have the authority to order injunctive relief against the Department, not one case it cites has acted upon that authority to order the kind of systemic changes Plaintiffs seek here.

Unsurprisingly, against that backdrop, "the overwhelming majority of cases have rejected *Younger* abstention in similar lawsuits challenging foster care

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[10] West Virginia offers one other, sealed case, *In re E.B.*, Aug 28 and Sept. 4, 2019 Show Cause Hearing Order, No. CC-02-2019-JA-53 (W. Va. Cir. Ct., Berkeley Cnty. Sept. 6, 2019), but it fails to persuade us still. Like *Brandon H.S.* and *S.C.*, the court in *E.B.* offered narrow injunctive relieve tied to the factual circumstances of the individual case.

systems, both at the circuit and district court level." *Perry*, 799 F. Supp. 2d at 723 (collecting cases); *see, e.g.*, *Kelly*, 990 F.2d at 1320–21; *L.H. v. Jamieson*, 643 F.2d 1351, 1352 (9th Cir. 1981); *Tinsley*, 156 F. Supp. 3d at 1041; *Dwayne B. v. Granholm*, No. 06-13548, 2007 WL 1140920, at *5–7 (E.D. Mich. Apr. 17, 2007); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 286 (N.D. Ga. 2003); *People United for Child., Inc. v. City of New York*, 108 F. Supp. 2d 275, 291 (S.D.N.Y. 2000); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 514 (D.N.J. 2000); *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 688–89 (S.D.N.Y. 1996).

The animating principles behind all of these cases are rather straightforward: individual periodic hearings cannot provide "an appropriate forum for [a] multi-faceted class-action challenge" because they are "intended merely to reassess periodically the disposition of the child." *Kelly*, 990 F.2d at 1323. And federal reform of systemic deficiencies in the executive branch simply does not asperse the "competency" of state courts to conduct periodic individual foster-care hearings or to independently correct any structural problems state courts themselves identify. *L.H.*, 643 F.2d at 1354. And if any particular request of Plaintiffs' threatens to do so, the district court can always decline to order it. *Joseph A.*, 275 F.3d at 1274. Because all of these principles find sure footing in our facts, as well, we reverse.[11]

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[11] As discussed, we leave it to the district court to decide the claims of children who enter the foster system as part of the delinquency and status-offence proceedings. But even if their claims can be made to fit one of the *Sprint* categories, West Virginia will still need to persuade the district court that federal relief would effect a greater intrusion on those children's periodic hearings and that those children have a better opportunity to present systemic grievances during their individual hearings.

IV.

All that remains is West Virginia's argument under the *Rooker-Feldman* doctrine, which strips federal courts of subject-matter jurisdiction when "state-court losers complain[ ] of injuries caused by state-court judgments" in district courts. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Because the district court believed it must abstain under Younger, it never reached *Rooker-Feldman*, and the "general rule" would dictate we "not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). But even the most generous analysis of the State's contentions cannot be squared with this Court or the Supreme Court's precedent, an analysis we would in any event conduct de novo, *see Hulsey v. Cisa*, 947 F.3d 246, 249 (4th Cir. 2020). So to avoid further procedural delays, and to settle any lingering questions over what kind of claims pose a *Rooker-Feldman* issue, we think it desirable to resolve this issue today.

West Virginia posits Plaintiffs' claims here are " 'inextricably intertwined' with an existing state court decision" and that *Rooker-Feldman* bars federal jurisdiction in such circumstances "as long as the claim could have been brought in the state court action." Resp. Br. 51 (first citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482–84 n.16 (1983); then citing *Guess v. Bd. of Med. Exam'rs of N.C.*, 967 F.2d 998, 1002–03 (4th Cir. 1992)). The rub for West Virginia is that *Exxon*, decided in 2005, "significantly altered this circuit's interpretation of the *Rooker-Feldman* doctrine." *Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 713 (4th Cir. 2006). We no longer ask whether a federal plaintiff "is attempting to litigate claims he either litigated or could have litigated before the state court." *Id.* at 718. And we take "*Feldman*'s

'inextricably intertwined' language" to "merely state[ ] a conclusion," "not create an additional legal test." *Id.* at 719. That is, "if the state-court loser seeks redress in the federal district court for the injury caused by the state-court decision, his federal claim is, by definition, 'inextricably intertwined' with the state-court decision." *Id.* But where the federal complaint presents an "independent claim," even "one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Exxon*, 544 U.S. at 293 (cleaned up) (citation omitted). This axiom, which our Court has reiterated many times over since *Exxon*, entirely forecloses West Virginia's legal theory. *See Thana v. Bd. of License Comm'rs for Charles Cnty.*, 827 F.3d 314, 319–22 (4th Cir. 2016) (observing that "since *Exxon*, we have never, in a published opinion, held that a district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine," an observation that remains true today).

Indeed, we have contemplated that *Exxon* goes even further, "restrict[ing] the doctrine to cases whose procedural postures mirrored those in the *Rooker* and *Feldman* cases themselves," where "the losing party in state court filed suit in federal court after the state proceedings ended . . . seeking review and rejection of that judgment." *Id.* at 320 (quoting *Exxon*, 544 U.S. at 291). Plaintiffs' complaint plainly does not fit that mold. "First and foremost," Plaintiffs do not complain "of an injury caused by a state-court judgment" but by the Department. *Hulsey*, 947 F.3d at 250; *see supra* p. 22 n.5. But "state administrative and executive actions are not covered by the doctrine," *Thana*, 827 F.3d at 320—even where " 'ratified, acquiesced in, or left unpunished by' a state-court

decision," *Hulsey*, 947 F.3d at 250 (quoting *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 88 (2d Cir. 2005)). Nor is this "a case in which 'the process for appealing a state court judgment to the Supreme Court . . . has been sidetracked by an action filed in district court specifically to review that state court judgment.' " *Id.* at 251 (quoting *Thana*, 827 F.3d at 320). Finally, Plaintiffs' suit does not "invite district court review and rejection of a state-court judgment." *Id.* (cleaned up) (quoting *Exxon*, 544 U.S. at 284). As already articulated in the *Younger* context above, even if Plaintiffs succeed in reforming Department practices, they would at most affect future state-court decisions. *But see Manning v. Caldwell for Roanoke*, 930 F.3d 264, 270 n.4 (4th Cir. 2019) (*Rooker-Feldman* had no force where "Plaintiffs d[id] not challenge their specific *interdiction orders*" but "only the Virginia scheme's *application* to them in the *future*"); Jones v. McBride, No. 21-6218, 2022 WL 670873, at *1 (4th Cir. Mar. 7, 2022) ("the *Rooker-Feldman* doctrine applies to state court decisions, not ongoing state court proceedings" (footnote omitted) (citing *Hulsey*, 947 F.3d at 250)).

Tellingly, West Virginia does not engage with any of that binding precedent, aside from a superficial citation to *Hulsey*. But as *Exxon* reminds us, the *Rooker-Feldman* doctrine "merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction" that "does not authorize district courts to exercise appellate jurisdiction over state-court judgments." 544 U.S. at 292 (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002)). And federal courts should not employ it to "supersed[e] the ordinary application of preclusion law." *Id.* at 283. Nor, for that matter, should litigants be permitted to turn it into a backdoor to comity and abstention principles. West Virginia in essence argues

Plaintiffs should have brought their constitutional objections before the state court. But we have already considered and rejected these same contentions under *Younger*. And we staunchly decline to (re)consider them here, dressed in *Rooker-Feldman* clothing.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

RUSHING, Circuit Judge, dissenting in part, and concurring in the judgment:

I agree with the majority's conclusion in Part III–A that, because this case does not "fall[] into one of the three settled categories" specified in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), "[t]he district court was wrong to abstain." *Supra*, at 19, 24. In *Sprint*, the Supreme Court clarified that *Younger* abstention extends to "three exceptional categories" of cases, "but no further." 571 U.S. at 79, 82. Those categories are: (1) "ongoing state criminal prosecutions," (2) "certain civil enforcement proceedings," and (3) "pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 78 (internal quotation marks and ellipsis omitted). If a parallel state proceeding belongs to one of these categories, the court should go on to consider the so-called *Middlesex* factors in evaluating whether to abstain. *See id.* at 81. But if—as here—the state proceeding "does not fall within any of the three exceptional categories" described in *Sprint*, it "therefore does not trigger *Younger* abstention." *Id.* at 79.

Having determined that the state proceedings here do not belong to any of *Sprint*'s three categories, we "need go no further," as the majority aptly puts it. *Supra*, at 19. Yet the majority does go further—fifteen pages further. *See supra*, at 25–39. Across this span, the majority theorizes how it would resolve this case "even if" *Sprint* were not the law. *Supra*, at 25. I do not join this extended dictum.

Nor do I think it "prudent" to resolve mootness at this juncture. *Supra*, at 11. "The parties," as the majority points out, "relegate[d] this issue to the backburner." *Supra*, at 11. Indeed, at oral argument, Plaintiffs stated that, if this Court reversed on *Younger* grounds, they

were "not sure" the mootness issue mattered because they can supplement their complaint on remand. Oral Arg. at 14:31–15:03. The majority finds the parties' proposed resolution inefficient. I would follow the parties' lead. Indeed, because Plaintiffs can supplement the complaint on remand to avoid mootness, any discussion of exceptions to the mootness doctrine is unnecessary.

Nevertheless, considering the issue, the majority is right that the "capable of repetition yet evading review" exception is inapplicable because Plaintiffs have not shown "'a reasonable expectation'" that they will be "'subject to the same action again.'" *Supra*, at 12 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). It errs, however, in determining that the "relation back" exception applies because Plaintiffs' claims are "inherently transitory." *Supra*, at 12–13 (internal quotation marks omitted).

The Supreme Court has clarified that the "'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare Corp. v. Symcyzk*, 569 U.S. 66, 76 (2013). Indeed, the doctrine is available only when the claims raised are "'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *Id.* (quoting *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991)). Given that these proceedings have been pending for nearly three years and multiple Plaintiffs remain, I cannot say that no plaintiff will possess a personal stake in the litigation long enough for the district court to rule on class certification. And the complaint's allegations regarding the length of time Plaintiffs have resided in the foster

system undermine any suggestion that the challenged conduct is fleeting. Consequently, this case falls outside the bounds of the "relation back" exception to mootness. I respectfully dissent from the majority's opinion concluding otherwise.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

[Filed July 28, 2021]

No. 3:19-cv-00710

JONATHAN R., et al.,

Plaintiffs,

v.

JIM JUSTICE, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Before THOMAS E. JOHNSTON, *Chief District Judge*.

Pending before the Court is Defendants Jim Justice, Bill Crouch, Jeremiah Samples, Linda Watts, and the West Virginia Department of Health and Human Resources' (collectively "Defendants") Motion to Dismiss, (ECF No. 17); Defendants' Motion to Dismiss the Claims of Named Plaintiffs Chris K., Calvin K., and Carolina K., (ECF No. 55); Defendants' Motion to Dismiss the Claims of Named Plaintiff Garrett M., (ECF No. 88); Defendants' Motion to Clarify Plaintiffs' Proposed Class Definition and to Dismiss Named Plaintiff Gretchen C., (ECF No. 107); and Defendants' Motion to Dismiss the Claims of Named

Plaintiff Serena S., (ECF No. 167.) Also pending is Plaintiffs Jonathan R., Anastasia M., Serena S., Theo S., Garrett M., Gretchen C., Dennis R., Chris K., Calvin K., Carolina K., Karter W., and Ace L.'s (collectively "Plaintiffs") Motion for Class Certification and Appointment of Class Counsel, (ECF No. 130); Plaintiffs' Motion for Extension of Time to Reply, (ECF No. 153); Defendants' Motion to Stay Discovery, (ECF No. 156); Defendants' Unopposed Motion to Exceed Page Limit, (ECF No. 159); Defendants' Motion for Leave to File Under Seal, (ECF No. 161); Defendants' Motion to Exclude Plaintiffs' Expert Testimony, (ECF No. 163); Plaintiffs' Unopposed Motion for Extension of Page Limit, (ECF No. 166); Plaintiffs' Motion to Exclude Defendants' Expert Testimony, (ECF No. 180); and Defendants' Motion for Leave to File Sur–Reply, (ECF No. 182). For the reasons discussed more fully below, the Court GRANTS Defendants' Motions to Dismiss, (ECF Nos. 17, 55, 88, 107, 167).

I. BACKGROUND

Plaintiffs filed this proposed class action on behalf of all children who are currently in or will be placed in the custody of West Virginia's foster care system. (ECF No. 1 at 6, ¶ 10.) The proposed class consists of one General Class and three subclasses. The proposed Kinship Subclass consists of children who are or will be placed in kinship placements.[1] (*Id.* at 10–11, ¶ 30(a)(i).) The

[1] West Virginia law defines "kinship placement" as "the placement of the child with a relative of the child, as defined herein, or a placement of a child with a fictive kin, as defined herein." W. Va. Code § 49–1–206. Further, "relative of the child" is defined as "an adult of at least 21 years of age who is related to the child, by blood or marriage, within at least three degrees" and "fictive kin" is defined as "an adult of at least 21 years of age, who is not a relative of the child, as defined herein, but who has an established, substantial relationship

proposed ADA Subclass consists of children who have or will have physical, intellectual, cognitive, or mental health disabilities, and the proposed Aging Out Subclass consists of children aged 14 years and older who are eligible for transition planning but have not been provided the necessary case management and services. (*Id.* at 11, ¶ (30(a)(ii–iii).)

The twelve named Plaintiffs are children in the custody of West Virginia's Department of Health and Human Resources ("DHHR"). (*Id.* at 2, ¶ 1.) Plaintiffs allege that West Virginia's foster care system has operated in a state of crisis for years and that the DHHR and the Bureau for Children and Families ("BCF") have failed to protect the children in their care. (*Id.* ¶ 1.) Defendants, all sued in their official capacities, are Governor Jim Justice, Cabinet Secretary of the West Virginia DHHR Bill Crouch, Deputy Secretary of the DHHR Jeremiah Samples, Commissioner of the BCF Linda Watts, and the West Virginia DHHR. Plaintiffs allege Defendants are aware of the following systematic deficiencies within West Virginia's foster care system: a lack of foster care placements; an overwhelmed system that leads to inadequate, temporary, and overcrowded foster home placements; an overreliance on institutional care for children; a failure to ensure placement stability; a failure to track foster children; a failure to employ and retain a sufficient number of case workers; a failure to provide and develop services; a failure to engage in permanency planning; and a failure to properly plan for the children's future. (*Id.* at 4–6, ¶ 9.) Plaintiffs allege Defendants have failed to address these issues, which has caused further harm to the children in their care. (*Id.* at 4, ¶ 9.)

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with the child, including but not limited to, teachers, coaches, ministers, and parents, or family members of the child's friends." *Id.*

Plaintiffs seek both declaratory and injunctive relief against Defendants for these alleged systematic deficiencies. Plaintiffs seek injunctive relief which would require Defendants to implement the following reforms:

a. With regard to all children in the General Class:

i. Require DHHR to contract with an appropriate outside entity to complete a needs assessment of the state's provision of foster care placement and services no later than six months after judgement, to determine the full range and number of appropriate foster care placements and services for all children needing foster care placement, including the development of a plan, with timetables, within which such placements and services shall be secured, and ensure that DHHR shall comply with those timetables;

ii. Require that DHHR ensure that all children who enter foster care placement receive within 30 days of entering care a complete and thorough evaluation of the child's needs, performed by a qualified individual, including whether the child has any physical and/or mental disabilities sufficient to be categorized as a child with disabilities under the ADA and that the child be re-evaluated as the child's needs and the information available to DHHR change;

iii. Require that DHHR ensure that all children who enter foster care placement receive within 60 days of entering care an adequate and individualized written case plan for treatment, services, and supports to address the child's identified needs; describe a plan for reunification with the child's parents, for adoption, or for

another permanent, family-like setting; describing any interim placements appropriate for the child while the child moves towards a permanent home-like setting; and describing the steps needed to keep the child safe during the child's time in DHHR's custody.

iv. Require that DHHR ensure that all children whose case plan identifies a need for services and/or treatment timely receive those services and/or treatment;

v. Require that DHHR shall ensure that all children who are placed in foster care are placed in a safe home or facility and are adequately monitored in accordance with federal standards;

vi. Require that DHHR shall hire, employ, and retain an adequate number of qualified and appropriately trained caseworkers, and ensure that caseloads do not exceed 15 children per-worker for children in placement, with caseloads adjusted for caseworkers who carry mixed caseloads including children not in foster care custody; and

vii. Require DHHR to develop an adequate statewide plan, to be approved by the Monitor referred to below, for recruiting and retaining foster and adoptive homes, including recruitment goals and timetables for achieving those goals, with which DHHR shall comply.

b. For all children in the Kinship Subclass:

i. Require DHHR to develop an adequate statewide kinship placement plan, to be approved by the Monitor referred to below, for assessing, overseeing, and monitoring kinship homes,

including training requirements and regular caseworker contact, and timetables for achieving those goals, with which DHHR shall comply;

ii. Require that DHHR shall ensure caseworkers conduct background and safety assessments of kinship placements as required by reasonable professional standards;

iii. Require that DHHR shall ensure that kinship placements receive foster parent training as required by reasonable professional standards;

iv. Require that DHHR shall ensure that all children in kinship placements shall receive foster care services to meet the child's needs, including, in as many instances as is required by reasonable professional standards, supportive services; and

v. Require that DHHR shall ensure all children who are placed in kinship placement receive permanency planning as required by reasonable professional standards.

c. For all children in the ADA Subclass:

i. Require that DHHR shall ensure that all children with physical, mental, intellectual, or cognitive disabilities shall receive foster care services in the most integrated setting appropriate to the child's needs, including, in as many instances as is required by reasonable professional standards, family foster homes with supportive services;

ii. Require that DHHR ensure that an adequate array of community based therapeutic services are available to children with disabilities; and

iii. Require that DHHR ensure that it develop an adequate array of community-based therapeutic foster homes and therapeutic placements to meet the needs of children with disabilities.

d. For all children in the Aging Out Subclass:

i. Require that DHHR, when a child turns 14 years old while in its custody and is not imminently likely to be reunified with family, adopted, or otherwise placed in a permanent family-like setting, shall engage in transition planning to meet the health care, educational, employment, housing, and other social needs of the children in transitioning to adulthood;

ii. Require that DHHR shall ensure youth be placed in the least restrictive, most-family like setting possible with appropriate, necessary and individualized services; and

iii. Prohibit DHHR from refusing to place a young person in a foster care placement because the child is 14 or older.

(*Id.* at 100–105, ¶ 405.) Plaintiffs also ask this Court to appoint a neutral monitor to oversee implementation of and compliance with these reforms. (*Id.* ¶ 406.)

A. Individual Allegations

Named Plaintiffs Chris K., Calvin K., and Carolina K. are siblings under the age of six. (ECF No. 56 at 2.) When the Complaint was filed, the siblings were living with foster parents who were in the process of adopting them. (*Id.*) On December 10, 2019, during the pendency of this case, Chris, Calvin, and Carolina were adopted. (*Id.*) Plaintiffs do not dispute that this fact. (ECF No. 61 at 3.) As a result of their adoption, these children are no longer

in the custody of the DHHR and are instead in the legal custody of their adoptive parents. (ECF No. 56 at 2.)

Additionally, named Plaintiff Serena S., a twelve-year-old girl with Down Syndrome and a congenital heart defect, was placed with a family that notified the DHHR during the pendency of this case that they wanted to adopt her. (ECF No. 172 at 3.) On September 3, 2020, Serena S. was adopted and is also no longer in the custody of the DHHR. (ECF No. 168 at 1.) This adoption also occurred during the pendency of this case, and Plaintiffs, again, do not dispute this fact. (ECF No. 173 at 2.)

Next, Defendants allege that named Plaintiffs Garrett M. and Gretchen C. are also no longer in the custody of the DHHR. Both Garrett and Gretchen were involved in juvenile delinquency proceedings, and the circumstances surrounding their involvement with the DHHR is slightly different than the other Plaintiffs. West Virginia law authorizes the DHHR to "accept children for care from their parent or parents, guardian, custodian or relatives and to accept the custody of children committed to its care by courts." W. Va. Code § 49–2–101(a). Children typically enter DHHR custody through either abuse and neglect petitions or in connection with juvenile delinquency proceedings or juvenile status offense proceedings. *See* W. Va. Code § 49–4–601; W. Va. Code § 49–4–701(e). West Virginia law allows its circuit courts to place these juvenile offenders in DHHR custody as an alternative to placement in a Bureau of Juvenile Services ("BJS") secure detention facility. W. Va. Code § 49–2–901. Further, some children may come into DHHR custody through an abuse and neglect proceeding and may also be the subject of a juvenile delinquency or juvenile status offense proceeding. (ECF No. 109–1 at 4.)

The parties dispute whether named Plaintiff Garrett M. was in the custody of the DHHR at the time the Complaint was filed. The parties agree that Garrett originally came into the legal and physical custody of the DHHR in 2013 in connection with an abuse and neglect case. (ECF No. 97 at 3; ECF No. 98 at 4.) In March of 2018, Plaintiffs argue that the BJS filed a delinquency petition against Garrett and that he was then undergoing both dependency and delinquency proceedings at the same time. (ECF No. 98 at 4.) Plaintiffs further argue that Garrett remained in the custody of the DHHR even after his parent's parental rights were restored in 2018, and that Garrett was in the custody of the DHHR when the Complaint was filed. (*Id.* at 5.)

On the other hand, Defendants argue that the DHHR was no longer Garrett's guardian after his parental rights were restored, which occurred well over one year before the Complaint was filed. (ECF No. 97 at 5.) Defendants argue Garrett was solely in the custody of the BJS at the time the Complaint was filed and that he resided at a juvenile detention facility as a result of a juvenile delinquency adjudication. (ECF No. 97 at 2.) Defendants argue that Garrett was in the custody of the BJS from June of 2019, until his release in December of 2019. (Id. at 3.) However, the parties agree that Garrett left the custody of the DHHR during the pendency of this case because he turned 18 years of age. (ECF No. 97 at 3; ECF No. 98 at 1.)

Named Plaintiff Gretchen C. was never removed from her family as a result of abuse and neglect proceedings but was placed in an institution solely as a result of an adjudicated delinquency proceeding for a violent offense. (ECF No. 109–1 at 2.) The Complaint states that Gretchen entered foster care as a result of abuse and neglect

proceedings, but Plaintiffs admit that the Complaint is incorrect. (ECF No. 116 at 2.) Further, Gretchen was released to the custody of a family member in December of 2019 and is no longer in the custody of the DHHR or the BJS. (ECF No. 109–1 at 14.) Plaintiffs acknowledge that Gretchen was released from DHHR custody and is no longer in its care. (ECF No. 116 at 9.)

On November 26, 2019, Defendants filed their first Motion to Dismiss. (ECF No. 17.) Plaintiffs timely responded, (ECF No. 29), and Defendants timely replied, (ECF No. 35). Further, on January 29, 2020, the Court granted Plaintiffs' Motion for Leave to file Sur–Reply in Response to Defendants' Reply. (ECF Nos. 51, 52.) Next, on February 7, 2020, Defendants filed their second Motion to Dismiss. (ECF No. 55.) Plaintiffs timely responded, (ECF No. 61), and Defendants timely replied, (ECF No. 65). On June 4, 2020, Defendants filed their third Motion to Dismiss. (ECF No. 88.) Plaintiffs timely responded, (ECF No. 98), and Defendants timely replied, (ECF No. 103). On July 31, 2020, Defendants filed their fourth Motion to Dismiss. (ECF No. 107.) Plaintiffs timely responded, (ECF No. 116), and Defendants timely replied, (ECF No. 129). Finally, on November 19, 2020, Defendants filed their fifth Motion to Dismiss. (ECF No. 167.) Plaintiffs timely responded, (ECF No. 172), and Defendants timely replied, (ECF No. 219). As such, these motions are fully briefed and ripe for adjudication.

II. DISCUSSION

Plaintiffs' Class Action Complaint alleges the following five causes of action: (1) violations of substantive due process under the United States Constitution; (2) violations of the First, Ninth, and Fourteenth Amendments to the United States Constitution; (3) violations of the Adoption Assistance and Child

Welfare Act of 1980; (4) violations of the Americans with Disabilities Act; and (5) violations of the Rehabilitation Act. (ECF No. 1.) Defendants argue this Court lacks subject matter jurisdiction over Plaintiffs' claims and requested relief because they seek federal review and ongoing oversight over West Virginia state court decisions.[2] (ECF No. 18 at 12.) Specifically, Defendants argue the principles of federalism and comity require this Court to abstain from oversight of West Virginia's child welfare system because its state courts have exclusive and continuous jurisdiction over such determinations. (*Id.* at 11.) Additionally, Defendants challenge all five counts of the Complaint for failure to state a claim and argue that the federal laws upon which Plaintiffs base their claims do not support the relief they seek. (*Id.*) Defendants also allege that named Plaintiffs Chris K., Calvin K., Carolina K., Garrett M., Gretchen C., and Serena S. are no longer in DHHR custody, are no longer in the putative class, and that their claims are now moot.

First, the Court must address the threshold question of whether the six challenged Plaintiffs' claims present a justiciable claim or controversy. Then, it will consider Defendants' arguments related to abstention. Both questions must be decided before this Court can address the merits of Plaintiffs' claims.

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[2] Despite Defendants' arguments to the contrary, the Court's decision to abstain under the Younger abstention doctrine is not based on a finding that it lacks subject matter jurisdiction over this case. *See Nivens v. Gilchrist*, 444 F.3d 237, 247 n.7 (4th Cir. 2006). Younger abstention "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986).

A. Mootness

First, the Court will address Defendants' motions to dismiss named Plaintiffs Chris K., Calvin K., Carolina K., Garrett M., Gretchen C., and Serena S. (ECF Nos. 55, 88, 107, 167.) Article III of the United States Constitution limits a federal courts' jurisdiction to cases and controversies. U.S. Const. art. III, § 2, cl.1. "The doctrine of mootness originates in Article III's 'case' or 'controversy' language." *Incumaa v. Ozmint*, 507 F.3d 281, 286 (4th Cir. 2007) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)) (internal quotation marks omitted). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the out-come." *Incumaa*, 507 F.3d at 286 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Further, "even if a plaintiff has standing when he or she files a complaint, subsequent events can moot the claim." *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013). Thus, "[t]o remain a justiciable controversy, a suit must remain alive throughout the course of litigation, to the moment of final appellate disposition." *Catawba Riverkeeper Found. v. N. Carolina Dep't of Transportation*, 843 F.3d 583, 588 (4th Cir. 2016) (quoting *Bahnmiller v. Derwinski*, 923 F.2d 1085, 1088 (4th Cir. 1991) (internal quotation marks omitted). "A case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

Plaintiffs Chris K., Calvin K., Carolina K., and Serena S. were adopted during the pendency of this litigation. (ECF No. 56 at 2; ECF No. 61 at 3.) In addition, Plaintiff

Garrett M. reached the age of eighteen during the pendency of this case and is also no longer in the custody of the DHHR. (ECF No. 97 at 3; ECF No. 98 at 1.) Finally, Gretchen C. completed her juvenile delinquency rehabilitation and is also no longer in the custody of the DHHR. (ECF No. 109–1 at 14; ECF No. 116 at 9.) There is no dispute that these six Plaintiffs are no longer in the custody of the DHHR or in the foster care system.

Plaintiffs' Complaint seeks injunctive and declaratory relief against Defendants to prevent future harm to the children in their custody due to an alleged deficient child welfare system. Because these Plaintiffs have all left Defendants' legal or physical custody, they can neither be further harmed by Defendants alleged illegal practices nor do they have a current claim for injunctive relief against Defendants arising from the operation of its child welfare system. With regard to these six Plaintiffs, they now "lack a legally cognizable interest in the out-come" of this case and no live controversy exists between the parties. *Incumaa*, 507 F.3d at 286. Courts considering similar system wide challenges to a state's foster care system have held the same. *See, e.g.*, *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003) (dismissing adopted plaintiffs' claims as moot because "they are no longer in the defendants' legal or physical custody and therefore cannot be further harmed by the defendants' alleged illegal practices"); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 (10th Cir. 1999) (dismissing plaintiffs "because they have reached the age of majority or otherwise fallen outside of state custody and their claims are now moot"); *Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 510–11 (D. Neb. 2007) (dismissing plaintiffs' claims as moot because they aged out of the foster care system). Accordingly, Plaintiffs Chris K., Calvin K., Carolina K., Garrett M., Gretchen C., and

Serena S. have no legally cognizable interest in the outcome of this litigation and their claims are moot.

a. Wrongs Capable of Repetition Yet Evading Review

Plaintiffs argue that the claims brought by all six of these Plaintiffs fall within the "exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review."[3] *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal quotation marks omitted). This doctrine has been applied where "the apparent absence of a live dispute is merely a temporary abeyance of a harm that is capable of repetition, yet evading review." *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006) (internal quotations omitted). "A dispute qualifies for that exception only if (1) the

[3] Plaintiffs' briefing demonstrates a lack of understanding between the very different standards for the "capable of repetition yet evading review" and "voluntary cessation" mootness exceptions. Plaintiffs rely on a quote from *Am. Civil Liberties Union of Massachusetts v. Sebelius*, 821 F. Supp. 2d 474, 481 (D. Mass. 2012), a decision vacated by the First Circuit Court of Appeals, to argue that Defendants bear a heavy burden here. (ECF No. 61 at 5.) Plaintiffs further argue that it is "predictable" that children will be discharged from the foster care system over the course of this litigation because Defendants control this process and it is in Defendants' "best interest to pick off named plaintiffs with the goal of dismissing the entire case as moot." (*Id.* at 7.) In this regard, Plaintiffs' argument invokes the voluntary cessation exception. In these types of cases, a defendant voluntarily ceases the alleged improper behavior but is free to return to it at any time. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). Here, Plaintiffs' insinuation that Defendants are removing children from their care simply to get this case dismissed is absurd and contrary to the undisputed facts. The Plaintiffs' adoption date, birth date, and completion date for rehabilitation were well known before this case was filed and are beyond the manipulation of Defendants. Accordingly, Plaintiffs' voluntary cessation exception arguments are easily rejected.

challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Sanchez–Gomez*, 138 S. Ct. at 1540 (internal quotations omitted). The second prong of this test requires "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (internal quotations omitted). Supreme Court precedent holds that "the same controversy [is] sufficiently likely to recur when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality,' or 'will be subject to the threat of prosecution' under the challenged law.'" *Id.* (internal citations omitted). Finally, this exception applies "only in exceptional situations." *Kingdomware*, 136 S.Ct. at 1976.

The parties dispute both prongs of this test. First, Plaintiffs argue "that foster care is intended to be a short–term, temporary stay for children." (ECF No. 61 at 7.) However, as Defendants argue, this argument is in direct conflict with Plaintiffs' continuing arguments that children in West Virginia's foster care system "languish" for years. (ECF No. 1 at 79, ¶ 328; ECF No. 29 at 1.) Further, the allegations contained within the Complaint itself contradict Plaintiffs' argument. For example, Plaintiffs allege that named Plaintiff Johnathan R. has spent the last seven years in institutional care and describes alleged failures in his case that go back to 2013. (ECF No. 1 at 16 ¶¶ 42, 45.) Next, Plaintiffs allege that Gretchen C. has been in the custody of the DHHR since April of 2015, which means she was in custody for over four years before she was placed in the custody of her grandmother. (Id. at 32, ¶ 121.) Plaintiffs also allege that

named Plaintiff Dennis C. has been in DHHR custody for over five years, (ECF No. 1 at 35, ¶ 137), that named Plaintiffs Karter W. and Ace L. have both been in DHHR custody since 2016, (Id. at 41, 45 ¶ 164, 183), and that Garrett M. has been in custody since 2012, (Id. at 27, ¶ 102.) In fact, the majority of the named Plaintiffs have been in DHHR custody for significant periods of time which undermines Plaintiffs' argument that the children's time in DHHR custody is too short to allow this action to be fully litigated.

Next, Plaintiffs argue that Chris K., Calvin K., Carolina K., Serena S., and Gretchen C. all face "some likelihood of reentering the West Virginia foster care system in the future." (*See, e.g.*, ECF No. 61 at 6.) Again, this argument is contradicted by the facts of this case. Chris K., Calvin K., and Carolina K were legally adopted on December 10, 2019, Serena S. was legally adopted on September 3, 2020, and Gretchen C. was placed in the custody of her grandmother in December of 2019. None of these Plaintiffs returned to the custody of the DHHR or the BJS, which does not support a conclusion that there is a "reasonable expectation" that these six Plaintiffs "will be subjected to the same action again." Plaintiffs have presented no other evidence to allow this Court to conclude that there is "a reasonable expectation or a demonstrated probability" that these children will return to West Virginia's foster care system and be subject to harm.

Finally, Garrett M. has reached the age of majority and is not now and can never again be in the custody of the DHHR or involved in West Virginia's foster care system. Garrett M. has neither a current nor future claim for relief against Defendants arising from its deficient child welfare system. Thus, there is no "reasonable expectation" that he

will again be subjected to the actions that lead to this Complaint. Accordingly, Plaintiffs have failed to carry their burden and have not presented evidence to allow this Court to conclude that these six Plaintiffs' claims fit within the definition of claims that are capable of repetition, yet evading review.

b. Class Action Context

Next, Plaintiffs argue that these six Plaintiffs' claims are "inherently transitory" and that this Court should still retain jurisdiction over these claims and allow these Plaintiffs to assert claims on behalf of the putative class members. (*See, e.g.*, ECF No. 172 at 8.) Generally, in the class action context, a named plaintiff's claims must be dismissed if the claim becomes moot prior to the certification of the class. *See, e.g.*, *Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) ("Normally a class action would be moot if no named class representative with an unexpired claim remained at the time of class certification."). However, the United States Supreme Court has carved out an exception to this mootness doctrine in particular types of class actions and has held that the mootness of a named plaintiff's claim after the class action has been properly certified does not render the action moot. *See Sosna v. Iowa*, 419 U.S. 393 (1975). The Supreme Court has made clear that it has "never adopted a flat rule" that certification of the class alone is sufficient to allow a court to determine the merits of a case once the claims of the named parties are moot. *Kremens v. Bartley*, 431 U.S. 119, 130 (1977). This exception is not applicable here because this Court has not yet considered Plaintiffs' pending motion for class certification and no class currently exists.

Plaintiffs' argument here relies on a separate but related line of cases established in actions like here, where

the claims of named plaintiffs are mooted prior to the certification. In *Sosna*, the Supreme Court

> suggested that, where a named plaintiff's individual claim becomes moot before the district court has an opportunity to rule on the certification motion, and the issue would otherwise evade review, the certification might "relate back" to the filing of the complaint. The Court has since held that the relation-back doctrine may apply in Rule 23 cases where it is "certain that other persons similarly situated" will continue to be subject to the challenged conduct and the claims raised are "'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'"

Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75–76 (2013). "The 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare Corp.*, 569 U.S. at 76.

As discussed above in relation to Plaintiffs' "capable of repetition yet evading review" argument, Plaintiffs have failed to show that these children have been moved so quickly in and out of DHHR custody that their claims are effectively unreviewable. In fact, the facts alleged in the Complaint are likewise contrary to Plaintiffs' arguments here. Further, unlike in the majority of cases that apply this narrow exception, the dismissal of these six named Plaintiffs is not a dispositive determination and this action is not being dismissed because of this determination. In fact, six other named Plaintiffs remain and Plaintiffs have

not argued that dismissal of Chris K., Calvin K., Carolina K., Garrett M., Gretchen C., and Serena S. would moot any of their claims. Thus, this exception is inapplicable here. Accordingly, Plaintiffs Chris K., Calvin K., Carolina K., Garrett M., Gretchen C., and Serena S. have no legally cognizable interest in the outcome of this litigation, and they are **DISMISSED** as parties to this action.

B. Younger *Abstention*

Next, Defendants argue that abstention is appropriate under *Younger v. Harris*, 401 U.S. 37 (1971). The Supreme Court has stated that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Quite simply, "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358 (1989). There are, however, circumstances under which a federal court must withhold relief to prevent interference with state court proceedings. *Id.* at 359. The Supreme Court has cautioned that these exceptions are "carefully defined" and "remain the exception, not the rule." *Id.* (internal quotations omitted) (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)).

In *Younger* and its progeny, the Supreme Court has reiterated "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). The reason for restraining federal courts from exercising jurisdiction in these types of actions is the notion of "comity," which includes

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44. "The [Younger abstention] doctrine recognizes that state courts are fully competent to decide issues of federal law and has as a corollary the idea that all state and federal claims should be presented to the state courts." *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 251 (4th Cir. 1993).

Although *Younger* involved state criminal proceedings, the Supreme Court has expanded its application to "noncriminal judicial proceedings when important state interests are involved." *Middlesex*, 457 U.S. at 432. "Where vital state interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims." *Id.* (internal quotations omitted) (quoting *Moore v. Sims*, 442 U.S. 415, 426 (1979)). In *Middlesex*, the Supreme Court articulated the following three–part test: "first, do [these proceedings] constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Id.* at 432; *see also Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1396 (4th Cir. 1994).

Younger abstention applies only to "three exceptional categories" of cases: (1) "parallel, pending state criminal proceeding[s]"; (2) "state civil proceedings that are akin to criminal prosecutions"; and (3) "civil proceedings

involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013). These three categories of cases define the scope of *Younger*. *Id.* at 82.

The ongoing state court proceeding must be "the type of proceeding to which *Younger* applies." *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367 (1989). Plaintiffs argue that this case does not fit within any of these exceptional circumstances. (ECF No. 29 at 13.) However, this argument is easily dismissed. This case is perhaps best classified as a hybrid of both the second and third categories of cases. Not only does this action involve state-initiated abuse and neglect proceedings like in *Moore v. Sims*, 442 U.S. 415 (1979), but Plaintiffs are also asking this Court to issue an injunction "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state" abuse and neglect proceedings, like in *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974).

After a petition is filed, the state of West Virginia initiates the abuse and neglect proceeding and is a party throughout the case. W. Va. Code § 49–4–501 ("The prosecuting attorney shall render to the Department of Health and Human Resources . . . the legal services as the department may require."). The Supreme Court has held that the principles of *Younger* and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) apply to civil proceedings where the state is a party. *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977). Further, in *Moore v. Sims*, the Texas Department of Human Resources removed children from their parents, who were suspected of child abuse, and the state then initiated child abuse proceedings. 442 U.S. at 418. The parents filed suit in federal court challenging the

constitutionality of Texas' laws relating to the authority of the Department of Human Resources to protect children. *Id.* The Supreme Court held that *Younger* applied and stated that Texas "was a party to the state proceedings, and the temporary removal of a child in a child-abuse context is, like the public nuisance statute involved in Huffman, 'in aid of and closely related to criminal statutes.'" *Id.* at 423. The Court further held that "[t]he existence of these conditions, or the presence of such other vital concerns as enforcement of contempt proceedings or the vindication of 'important state policies such as safeguarding the fiscal integrity of [public assistance] programs' determines the applicability of *Younger-Huffman* principles as a bar to the institution of a later federal action." *Id.*

In addition, in *O'Shea*, the proposed class of plaintiffs filed a lawsuit alleging that a state municipal court system intentionally discriminated against black citizens in various patterns and practices in its criminal justice system. 414 U.S. at 490. The Supreme Court ultimately dismissed the case due to ripeness but suggested that the principles of *Younger* should be applied to prevent federal court review. *Id.* at 498–499. The plaintiffs sought to challenge criminal prosecutions "brought under seemingly valid state laws" and, in essence, sought an order that "would contemplate interruption of state proceedings to adjudicate assertions of noncompliance" by the defendants." *Id.* at 500. The Court held that such a system seemed to be "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris*, *supra*, and related cases sought to prevent." *Id.* Thus, the proposed relief contemplated in *O'Shea* appears quite similar to Plaintiffs' request here. Further, other courts have similarly held that *Younger* applies to system–

wide challenges to a state's foster care system. *See, e.g.*, *31 Foster Children v. Bush*, 329 F.3d 1255, 1260 (11th Cir. 2003); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999). Accordingly, *Younger* has been found to apply to "exceptional categories" of cases which present factual issues very similar to the case at hand.

a. First *Middlesex* Factor

This Court must first determine whether there is an ongoing state court proceeding and whether Plaintiffs' required relief would interfere with those proceedings. Some courts have required an additional finding be made before the three–part test established in Middlesex can be applied.[4] Specifically, these courts require a determination that the federal relief sought would interfere directly with state court litigation. Here, Plaintiffs have not acknowledged that the remaining Plaintiffs, as children in the custody of West Virginia, are currently, or were, subject to abuse and neglect proceedings or other ongoing proceedings before West Virginia's Circuit Courts. However, the factual allegations

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[4] In *31 Foster Children*, the Eleventh Circuit joined its "sister circuits in explicitly stating that an essential part of the first Middlesex factor in Younger abstention analysis is whether the federal proceeding will interfere with an ongoing state court proceeding." 329 F.3d at 1276. While the Fourth Circuit has not expressly held that the first *Middlesex* factor requires such interference with the state court proceeding, it seems to have implicitly assumed as much. *See, e.g.*, *Beam v. Tatum*, 299 F. App'x 243, 246 (4th Cir. 2008) ("We consider first whether there is an ongoing state proceeding."); *Norfolk S. Ry. Co. v. McGraw*, 71 F. App'x 967, 970 (4th Cir. 2003) (same). Further, the majority of circuits which have considered this issue have required the same. *See 31 Foster Children*, 329 F.3d at 1276; *Green v. City of Tucson*, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc); *J.B.*, 186 F.3d at 1291; *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996).

contained in the Complaint allow this Court to infer as much.[5] Further, these ongoing state court abuse and neglect proceedings involving each of the plaintiffs are ongoing proceedings for the purposes of the *Middlesex* analysis. *See J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999) (holding that continuing jurisdiction

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[5] The Court has dismissed the six named Plaintiffs who are no longer in the custody of the DHHR. (*See* Section III.A.) Further, Plaintiffs do not argue that any of the remaining named children are not involved with West Virginia's state courts such that decisions about their welfare would not be subject to review by these courts. For some named Plaintiffs, the Complaint alleges they were subject to abuse and neglect proceedings or that their parents had their parental rights terminated. For the others, sufficient information is not provided, and Plaintiffs have failed to present any evidence or arguments to the contrary.

In addition, the Court has also dismissed Gretchen C., who appears to be the only named plaintiff who was in the custody of the DHHR as a result of a juvenile delinquency proceeding and not an abuse and neglect proceeding. Plaintiffs admit that the Complaint misstates that Gretchen C. entered foster care as a result of an abuse and neglect proceeding. (ECF No. 116 at 2.) In fact, Gretchen C. was never removed from her family as a result of an abuse and neglect proceeding but was in DHHR custody solely as a result of a juvenile delinquency petition. (ECF No. 121 at 7.) Further, the parties dispute whether juvenile justice youth who came into DHHR custody through juvenile delinquency or juvenile stats offenses should be considered within the proposed class definition. (ECF No. 121.) The Court does not consider the merits of this issue. However, Plaintiffs do not argue that any of the remaining named children are in the custody of the DHHR solely because of a juvenile delinquency or juvenile status offense proceeding. For some named Plaintiffs, the Complaint alleges they were subject to juvenile delinquency proceedings but also alleges that they suffered some type of abuse. Sufficient information is not provided to determine if these remaining children are in DHHR custody solely the result of a juvenile delinquency proceeding, and Plaintiffs have failed to present any evidence or arguments to the contrary. Accordingly, the Court focuses its analysis here on West Virginia's abuse and neglect proceedings system.

of juvenile court and six-month periodic review hearings constituted an ongoing state judicial proceeding); *see also 31 Foster Children v. Bush*, 329 F.3d 1255, 1275 (11th Cir. 2003). Once an abuse and neglect petition is filed, that child remains subject to the continuing jurisdiction of the state circuit courts until they reach eighteen years of age or find a permanent placement. W. Va. Code § 49–4–608. Further, the state is required by law to hold mandatory, periodic review of these cases. *Id.* Thus, these proceedings constitute ongoing judicial proceedings for the purposes of *Younger*.

Next, this Court must determine whether the relief sought here would result in interference with ongoing state proceedings. This inquiry depends on the way in which West Virginia's Circuit Courts oversee these cases. According to the factual allegations contained in the Complaint, all the remaining named Plaintiffs were the subject of either abuse and neglect proceedings or their parents had their parental rights terminated, which would have put them under jurisdiction of West Virginia's Circuit Courts. (ECF No. 1 at 15–48, ¶¶ 42–198.) Thus, each of the named Plaintiffs and every child adjudicated under the West Virginia Child Welfare Act are subject to the continuing jurisdiction of West Virginia's Circuit Courts. *See* W. Va. Code § 49– 1–101.

West Virginia's Circuit Courts play an important role in child abuse and neglect proceedings from the outset of the child's case. After a petition is filed, the state court will issue an initial order either granting temporary custody of the child to the DHHR or not. *Id.* § 49–4–602. Depending on whether temporary custody is granted, the court is required to hold a preliminary hearing within a certain time period. *Id.* At the preliminary hearing, the court will review the petition and take evidence regarding the status

of the child; determine whether the DHHR has made reasonable efforts to preserve the family; and determine whether imminent danger requires the removal of the child from the custody of the parents or whether emergency custody should continue. *Id.* § 49–4–105. Next, the court is required to hold an adjudicatory hearing within a certain time, depending on what was ordered at the preliminary hearing. *Id.* § 49–4–601. At the adjudicatory hearing, the court is required to determine whether the child has been abused and neglected. *Id.* § 49–4–602.

Next, a disposition hearing must occur within forty–five days of the entry of the adjudicatory order. W. Va. R. Child and Abuse and Neglect Proceedings 32(a). If the child is found to be abused and neglected, the DHHR is required to provide the court with a copy of the child's case plan which includes the following: a permanency plan which documents efforts to ensure that the child is returned home in the appropriate time or efforts to place the child for adoption or with a legal guardian and, if applicable, states why reunification is not possible and details the alternative permanent placement; a family case plan; a description of the type of home or institution where the child will be placed, including a discussion of the appropriateness of that placement and how the agency will ensure that the child receives proper care and services and accommodations as required under the Americans with Disabilities Act; "[a] plan to facilitate the return of the child to his or her own home or the concurrent permanent placement of the child"; and a plan to address the needs of the child while in kinship or foster care, which must include a discussion of the appropriateness of the services that have already been provided for that child. W. Va. Code § 49–4–604(a)(1–2). The state court is required to make findings of fact and conclusions of law, which

includes, among others, dismissing the petition; returning the child to his or her own home; referring the child and parent to a community agency for assistance; committing the child to the care of the DHHR, a private child welfare agency, or an appointed guardian; or terminating parental rights and permanently committing the child to the custody of the non-abusing parent, the DHHR, or a child welfare agency. *Id.* § 49–4–604(c)(1–6).

Finally, the state court will hold a permanency hearing where the court will determine the permanency plan and what efforts are being made to provide the child with a permanent home. *Id.* § 49–4–608. "The court has exclusive jurisdiction to determine the permanent placement of a child." W. Va. R. P. Child Abuse and Neglect Proceedings 36(e). The court also makes the determination as to whether the DHHR is required to make reasonable efforts to preserve the family. *Id.* § 49–4–608(a). Further, the court is required to have a permanency hearing every 12 months until permanency is achieved. *Id.* § 49–4–608(b). The DHHR is required to file "a progress report with the court detailing the efforts that have been made to place the child in a permanent home and copies of the child's case plan, including the permanency plan . . . ." *Id.* Under the statute, the purpose of these hearings is to "review the child's case, to determine whether and under what conditions the child's commitment to the department shall continue, to determine what efforts are necessary to provide the child with a permanent home, and to determine if the department has made reasonable efforts to finalize the permanency plan." *Id.*

In addition, within thirty days of the original filing of the petition, the state court is required to convene a

meeting of a multidisciplinary treatment team[6] ("MDT") and the MDT is required to submit written reports to the court and will meet with the court at least every three months until permanency is achieved and the child's case is dismissed. W. Va. Code §§ 49–4–405, 602. Once the court finds that a permanent placement has been achieved, the court may dismiss the case. W. Va. R. P. Child Abuse and Neglect Proceedings 42(b).

West Virginia Circuit Courts are required to make additional determinations. They are responsible for determining what services are needed to help children make the transition from foster care to adulthood and independent living. *Id.* § 49–4–608(c). Further, "[a] court may not order a child to be placed in an out of state facility unless the child is diagnosed with a health issue that no in-state facility or program serves, unless a placement out of state is in closer proximity to the child's family for the necessary care, or the services are able to be provided more timely." *Id.* § 49–4–608(d). In addition, the DHHR is required to file a disclosure stating its determinations as to whether any relatives or family members are appropriate placement options for the child. *Id.* § 49–4–601a(4). This document must be filed with the court within forty–five days of the filing of the petition. *Id.*

It is clear that West Virginia's state courts are heavily involved in abuse and neglect proceedings and are required to oversee and approve the majority of the determinations related to the child's care and placement.

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[6] The MDT is established by the prosecuting attorney of the county where the case is initiated and consists of the prosecuting attorney, a caseworker from the DHHR, a local law enforcement officer, a child advocacy center representative, a health care provider, a mental health professional, an educator, and a representative from a licensed domestic violence program. W. Va. Code § 49–4–402(a)(1–8).

A ruling favorable to Plaintiffs would interfere with and disrupt these ongoing state court proceedings. Plaintiffs' request that this Court enjoin the executive Defendants from actions that West Virginia's Circuit Courts are currently responsible for overseeing and approving. Specifically, Plaintiffs request oversight of needs assessments of foster children; case plans; placement decisions; and plans for reunification. Further, Plaintiffs request that this Court ensure children receive services and treatments; ensure that foster care placements are safe or adequately monitored; oversee kinship placements; properly assess kinship placements; ensure children and families in kinship placements receive services; ensure that kinship placements receive permanency planning; and ensure that disabled children receive services. (ECF No. 1 at 100–104, ¶¶ 405(a)(i)–(d)(iii)). Plaintiffs further request that both this Court and a neutral monitor oversee the implementation of these reforms. (*Id.* at 104, ¶ 406.) Thus, this Court would be tasked with ensuring that West Virginia's state courts comply with its mandate. Such an order would essentially be taking decisions that are now in the hands of state courts and placing them under the supervision of a federal district court. Issuing Plaintiffs the declaratory and injunctive relief they seek would undoubtedly interfere with state court proceedings. There is a possibility that this Court and the state court could issue conflicting orders concerning which placement decision or which services were best for a child. Such determinations are left to the state courts under West Virginia law, but this Court's order would reassign these responsibilities, likely leading to confusing and conflicting results.

Plaintiffs emphasize in their briefing that they are seeking relief from West Virginia's executive agencies and the DHHR and any order entered by this Court would be

enforced against these Defendants. (ECF No. 29 at 14.) However, West Virginia law is clear that its state courts, not the DHHR, have the ultimate decision-making authority over whether to approve the child's case plan and to ensure that that plan is followed. W. Va. Code § 49–4–608. Plaintiffs ask this Court to permanently enjoin Defendants from a long list of practices that they argue violates their rights. They further request that a neutral monitor be appointed to implement and oversee an order issued by this Court. Removing discretion from West Virginia's state courts and implementing federal court review over these decisions is highly problematic. It makes no difference that this case is directed at the state's executive agencies because the practical effects in enforcing an order reforming West Virginia's foster care system would undoubtedly impact the state's circuit courts. Even though Plaintiffs have not framed their request as a direct review of state court judgments, that would be the result. As the Supreme Court articulated in *O'Shea*,

> [t]he objection is to unwarranted anticipatory interference in the state . . . process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts; the object is to sustain "(t)he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law."

O'Shea, 414 U.S. at 500 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). The relief Plaintiffs seek would interfere extensively with ongoing state court proceedings

for each of the named Plaintiffs.[7] Accordingly, the first *Middlesex* factor is satisfied.

b. Second *Middlesex* Factor

Next, the Court must determine if the ongoing state court proceedings implicate important state interests. Plaintiffs do not dispute that the state has an important interest in the care, disposition, and welfare of the children in its custody. While Plaintiffs do not address this factor in their arguments, they repeatedly emphasized the importance of West Virginia's role in protecting the children in its custody. (ECF No. 1 at 2, ¶ 1.) There can be little dispute that the protection of abused and neglected children is a vital and important state interest. Accordingly, the second *Middlesex* factor is satisfied.

c. Third *Middlesex* Factor

Finally, for abstention to be appropriate, Plaintiff must have an adequate opportunity to raise and litigate their constitutional claims in the state court proceedings. *Middlesex*, 457 U.S. at 432. "The question is whether that challenge can be raised in the pending state proceedings

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[7] The majority of Plaintiffs arguments in opposition demonstrate a misunderstanding of the Younger abstention doctrine and its purpose as well as a misunderstanding of how abuse and neglect proceedings are conducted in the State of West Virginia. Plaintiffs argue that "West Virginia circuit courts, like other state courts, review agency placement decisions" and "the state circuit courts do not identify placements or place children in specific foster care setting." (ECF No. 52 at 3.) However, this argument is contradicted expressly by Rule 36 of West Virginia's Rules of Procedure for Child Abuse and Neglect Proceedings. W. Va. R. P. Child Abuse and Neglect Proceedings 36(e) ("The court has exclusive jurisdiction to determine the permanent placement of a child."). Further, Plaintiffs' arguments ignore the fact that West Virginia's Circuit Courts are involved from the moment an abuse and neglect petition is filed and retain continuous jurisdiction over the case as it proceeds.

subject to conventional limits on justiciability." *Moore v. Sims*, 442 U.S. at 425. The plaintiff has the burden to show "that state procedural law barred presentation of their claims." *Id.* at 432. Further, "when a litigant has not attempted to present his federal claims in related state–court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987).

In the present case, Plaintiffs did not give West Virginia's state courts an opportunity to consider their constitutional claims, and they cannot demonstrate that West Virginia's courts were unavailable. Child abuse and neglect proceedings are handled by West Virginia's Circuit Courts, which are trial courts of general jurisdiction. *See* Syl. Pt. 2, *State ex rel. Rose L. v. Pancake*, 544 S.E.2d 403, 404 (W. Va. 2001) ("A circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W. Va. Code § 49–6– 1, et seq."); *see also State ex rel. Silver v. Wilkes*, 584 S.E.2d 548, 552 (W. Va. 2003) ("Circuit courts are courts of general jurisdiction and have power to determine all controversies that can possibly be made the subject of civil actions."). Plaintiffs argue that the West Virginia Supreme Court of Appeals did not contemplate state circuit courts considering claims arising under federal law or the United States Constitution. (ECF No. 52 at 8.) This argument is completely baseless. The United States Supreme Court has been clear that "[m]inimal respect for the state processes . . . precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex*, 457 U.S. at 431. As courts of general jurisdiction, West Virginia's Circuit Courts are capable of hearing federal claims.

The law is clear that Plaintiffs bear the burden here, and Plaintiffs have presented no "unambiguous authority to the contrary" to prove that West Virginia's Circuit Courts lack the jurisdiction or ability to adjudicate their federal statutory and constitutional claims during abuse and neglect proceedings. In fact, this factor is what separates this case from other child welfare class actions where *Younger* abstention was denied. *See, e.g.*, *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 158 (D. Mass. 2011); *M.D. v. Perry*, 799 F. Supp. 2d 712, 723 (S.D. Tex. 2011); *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319, 1323 (D.C. Cir. 1993); *but see 31 Foster Children*, 329 F.3d at 1281; *J.B.*, 186 F.3d at 1292–93; *Carson P*, 240 F.R.D. at 532. Accordingly, the Court finds that Plaintiffs have failed to prove that West Virginia's Circuit Courts prevent the presentation of these claims during the periodic review proceedings conducted as a part of these children's ongoing abuse and neglect proceedings. The third and final prong of the *Younger* analysis is satisfied.

d. Exceptions to Younger

The Supreme Court has established three exceptions to *Younger* abstention: (1) "'there is a showing of bad faith or harassment by state officials responsible for the prosecution'; (2) 'the state law to be applied in the criminal proceeding is flagrantly and patently violative of express constitutional prohibitions'; or (3) 'other extraordinary circumstances' exist that present a threat of immediate and irreparable injury." *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006) (quoting *Kugler v. Helfant*, 421 U.S. 117, 124 (1975)). The Supreme Court has recognized that a federal court may disregard *Younger*'s requirements only under these circumstances. Plaintiffs have made no showing that would allow this Court to conclude that any of these exceptions should be applied here. Accordingly,

there is no basis to support the conclusion that *Younger* abstention is inappropriate, and all three *Middlesex* factors are satisfied. This Court is barred from consideration of this case under *Younger* and its progeny.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' five Motions to Dismiss. (ECF Nos. 17, 55, 88, 107, 167.) The following six named Plaintiffs are removed from this action: Serena S., Garrett M., Gretchen C., Chris K., Calvin K., and Carolina K. Further, it is **ORDERED** that this civil action is **DISMISSED** and retired from the docket of this Court. The Court **DIRECTS** the Clerk to remove this matter from the Court's docket.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: July 28, 2021

s/ Thomas E. Johnston
Thomas E. Johnston, Chief Judge

APPENDIX C

W. Va. Code § 49-4-102
Procedure for appealing decisions

Cases under this chapter, if tried in any inferior court, may be reviewed by writ of error or appeal to the circuit court, and if tried or reviewed in a circuit court, by writ of error or appeal to the Supreme Court of Appeals.

W. Va. Code § 49-4-108

Payment of services

(a) At any time during any proceedings brought pursuant to this chapter, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay the Medicaid rates for professional services rendered by a health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. A health care professional shall be paid by the Department of Health and Human Resources upon completion of services and submission of a final report or other information and documentation as required by the policies implemented by the Department of Health and Human Resources: *Provided*, That if the service is covered by Medicaid and the service is not provided within 30 days, the court may order the service to be provided by a provider at a rate higher than the Medicaid rate. The department may object and request to be heard, after which the court shall issue findings of fact and conclusions of law supporting its decision.

(b) At any time during any proceeding brought pursuant to this chapter, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay for socially necessary services rendered by an entity who has agreed to comply with § 9-2-6(21) of this code. The Department of Health and Human Resources shall set the reimbursement rates for the socially necessary services: *Provided*, That if services are not provided within 30 days, the court may order a service to be provided by a provider at a rate higher than the department established rate. The

department may object and request to be heard, after which the court shall issue findings of fact and conclusions of law supporting its decision.

W. Va. Code § 49-4-110

Foster care; quarterly status review; transitioning adults; annual permanency hearings

(a) For each child who remains in foster care as a result of a juvenile proceeding or as a result of a child abuse and neglect proceeding, the circuit court with the assistance of the multidisciplinary treatment team shall conduct quarterly status reviews in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safety maintained in the home or placed for adoption or legal guardianship. Quarterly status reviews shall commence three months after the entry of the placement order. The permanency hearing provided in subsection (c) of this section may be considered a quarterly status review.

(b) For each transitioning adult as that term is defined in section two hundred two, article one of this chapter who remains in foster care, the circuit court shall conduct status review hearings as described in subsection (a) of this section once every three months until permanency is achieved.

(c) For each child or transitioning adult who continues to remain in foster care, the circuit court shall conduct a permanency hearing no later that twelve months after the date the child or transitioning adult is considered to have entered foster care, and at least once every twelve months thereafter until permanency is achieved. For purposes of permanency planning for transitioning adults, the circuit

court shall make factual findings and conclusions of law as to whether the department made reasonable efforts to finalize a permanency plan to prepare a transitioning adult for emancipation or independence or another approved permanency option such as, but not limited to, adoption or legal guardianship pursuant to the West Virginia Guardianship and Conservatorship Act.

(d) Nothing in this section may be construed to abrogate the responsibilities of the circuit court from conducting required hearings as provided in other provisions of this code, procedural court rules, or setting required hearings at the same time.

W. Va. Code § 49-4-113

Duration of custody or guardianship of children committed to department

(a) A child committed to the department for guardianship, after termination of parental rights, shall remain in the care of the department until he or she attains the age of eighteen years, or is married, or is adopted, or guardianship is relinquished through the court.

(b) A child committed to the department for custody shall remain in the care of the department until he or she attains the age of eighteen years, or until he or she is discharged because he or she is no longer in need of care.

W. Va. Code § 49-4-116

Voluntary placement; petition; requirements; attorney appointed; court hearing; orders

(a) Within ninety days of the date of the signatures to a voluntary placement agreement, after receipt of physical custody, the department shall file with the court a petition for review of the placement. The petition shall include:

(1) A statement regarding the child's situation; and,

(2) The circumstance that gives rise to the voluntary placement.

(b) If the department intends to extend the voluntary placement agreement, the department shall file with the court a copy of the child's case plan.

(c) The court shall appoint an attorney for the child, who shall receive a copy of the case plan as provided in subsection (b) of this section.

(d) The court shall schedule a hearing and give notice of the time and place and right to be present at the hearing to:

(1) The child's attorney;

(2) The child, if twelve years of age or older;

(3) The child's parents or guardians;

(4) The child's foster parents;

(5) Any preadoptive parent or relative providing care for the child; and

(6) Any other persons as the court may in its discretion direct.

The child's presence at the hearing may be waived by the child's attorney at the request of the child or if the child would suffer emotional harm.

(e) At the conclusion of the proceedings, but no later than ninety days after the date of the signatures to the voluntary placement agreement, the court shall enter an order:

(1) Determining whether or not continuation of the voluntary placement is in the best interests of the child;

(2) Specifying under what conditions the child's placement will continue;

(3) Specifying whether or not the department is required to and has made reasonable efforts to preserve and to reunify the family; and

(4) Providing a plan for the permanent placement of the child.

W. Va. Code § 49-4-203

Filing petition after accepting possession of relinquished child

A child of whom the Department of Health and Human Resources assumes care, control and custody under this article is a relinquished child and to be treated in all respects as a child taken into custody pursuant to section three hundred three, article four of this chapter. Upon taking custody of a child under this article, the department, with the cooperation of the county prosecuting attorney, shall cause a petition to be presented pursuant to section six hundred two, article four of this chapter. The department and county prosecuting attorney may not identify in the petition the parent(s) who utilized this article to relinquish his or her child. Thereafter, the department shall proceed in compliance with part six, of this article.

W. Va. Code § 49-4-303

Emergency removal by department before filing of petition; conditions; referee; application for emergency custody; order

Prior to the filing of a petition, a child protective service worker may take the child or children into his or her custody (also known as removing the child) without a court order when:

(1) In the presence of a child protective service worker a child or children are in an emergency situation which constitutes an imminent danger to the physical well-being of the child or children, as that phrase is defined in section two hundred one, article one of this chapter; and

(2) The worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered.

After taking custody of the child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or referee of the county where custody was taken and immediately apply for an order. If no judge or referee is available, the worker shall appear before a circuit judge or referee of an adjoining county, and immediately apply for an order. This order shall ratify the emergency custody of the child pending the filing of a petition.

The circuit court of every county in the state shall appoint at least one of the magistrates of the county to act as a referee. He or she serves at the will and pleasure of the appointing court, and shall perform the functions prescribed for the position by this subsection.

The parents, guardians or custodians of the child or children may be present at the time and place of application for an order ratifying custody. If at the time the child or children are taken into custody by the worker he or she knows which judge or referee is to receive the application, the worker shall so inform the parents, guardians or custodians.

The application for emergency custody may be on forms prescribed by the Supreme Court of Appeals or prepared by the prosecuting attorney or the applicant, and shall set forth facts from which it may be determined that the probable cause described above in this subsection exists. Upon the sworn testimony or other evidence as the judge or referee deems sufficient, the judge or referee may order the emergency taking by the worker to be ratified. If appropriate under the circumstances, the order may include authorization for an examination as provided in subsection (b), section six hundred three of this article.

If a referee issues an order, the referee shall by telephonic communication have that order orally confirmed by a circuit judge of the circuit or an adjoining circuit who shall, on the next judicial day, enter an order of confirmation. If the emergency taking is ratified by the judge or referee, emergency custody of the child or children is vested in the department until the expiration of the next two judicial days, at which time any child taken into emergency custody shall be returned to the custody of his or her parent or guardian or custodian unless a petition has been filed and custody of the child has been transferred under section six hundred two of this article.

W. Va. Code § 49-4-404

Court review of service plan; hearing; required findings; order; team member's objections

(a) In any case in which a multidisciplinary treatment team develops an individualized service plan for a child or family pursuant to this article, the court shall review the proposed service plan to determine if implementation of the plan is in the child's best interests. If the multidisciplinary team cannot agree on a plan or if the court determines not to adopt the team's recommendations, it shall, upon motion or *sua sponte,* schedule and hold within ten days of the determination, and prior to the entry of an order placing the child in the custody of the department or in an out-of-home setting, a hearing to consider evidence from the team as to its rationale for the proposed service plan. If, after a hearing held pursuant to this section, the court does not adopt the teams's recommended service plan, it shall make specific written findings as to why the team's recommended service plan was not adopted.

(b) In any case in which the court decides to order the child placed in an out-of-state facility or program it shall set forth in the order directing the placement the reasons why the child was not placed in an in-state facility or program.

(c) Any member of the multidisciplinary treatment team who disagrees with recommendations of the team may inform the court of his or her own recommendations and objections to the team's recommendations. The recommendations and objections of the dissenting team member may be made in a hearing on the record, made in writing and served upon each team member and filed with the court and indicated in the case plan, or both made in

writing and indicated in the case plan. Upon receiving objections, the court will conduct a hearing pursuant to paragraph (a) of this section.

W. Va. Code § 49-4-405

Multidisciplinary treatment planning process involving child abuse and neglect; team membership; duties; reports; admissions

(a) Within thirty days of the initiation of a judicial proceeding pursuant to part six, of this article, the Department of Health and Human Services shall convene a multidisciplinary treatment team to assess, plan and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families. The multidisciplinary team shall obtain and utilize any assessments for the children or the adult respondents that it deems necessary to assist in the development of that plan.

(b) In a case initiated pursuant to part six of this article, the treatment team consists of:

(1) The child or family's case manager in the Department of Health and Human Resources;

(2) The adult respondent or respondents;

(3) The child's parent or parents, guardians, any copetitioners, custodial relatives of the child, foster or preadoptive parents;

(4) Any attorney representing an adult respondent or other member of the treatment team;

(5) The child's counsel or the guardian ad litem;

(6) The prosecuting attorney or his or her designee;

(7) A member of a child advocacy center when the child has been processed through the child advocacy center program or programs or it is otherwise appropriate that a member of the child advocacy center participate;

(8) Any court-appointed special advocate assigned to a case;

(9) Any other person entitled to notice and the right to be heard;

(10) An appropriate school official; and

(11) Any other person or agency representative who may assist in providing recommendations for the particular needs of the child and family, including domestic violence service providers.

The child may participate in multidisciplinary treatment team meetings if the child's participation is deemed appropriate by the multidisciplinary treatment team. Unless otherwise ordered by the court, a party whose parental rights have been terminated and his or her attorney may not be given notice of a multidisciplinary treatment team meeting and does not have the right to participate in any treatment team meeting.

(c) Prior to disposition in each case which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child. If the team determines that an out-of-home placement will best serve the needs of the child, the team shall first consider placement with appropriate relatives then with foster care homes, facilities or programs located within the state. The team may only recommend placement in an out-of-state facility if it concludes, after considering the best interests and overall needs of the child, that there are no available and suitable in-state facilities which can satisfactorily meet the specific needs of the child.

(d) The multidisciplinary treatment team shall submit written reports to the court as required by the rules governing this type of proceeding or by the court, and shall meet as often as deemed necessary but at least every three months until the case is dismissed from the docket of the court. The multidisciplinary treatment team shall be available for status conferences and hearings as required by the court.

(e) If a respondent or copetitioner admits the underlying allegations of child abuse or neglect, or both abuse and neglect, in the multidisciplinary treatment planning process, his or her statements may not be used in any subsequent criminal proceeding against him or her, except for perjury or false swearing.

W. Va. Code § 49-4-601

Petition to court when child believed neglected or abused; venue; notice; right to counsel; continuing legal education; findings; proceedings; procedure

(a) ***Petitioner and venue.*** -- If the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or if the petition is being brought by the department, in the county in which the custodial respondent or other named party abuser resides, or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no circumstance may a party file a petition in more than one county based on the same set of facts.

(b) ***Contents of Petition.*** -- The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how the conduct comes within the statutory definition of neglect or abuse with references to the statute, any supportive services provided by the department to remedy the alleged circumstances, and the relief sought. Each petition shall name as a party each parent, guardian, custodian, other person standing *in loco parentis* of or to the child allegedly neglected or abused and state with specificity whether each parent, guardian, custodian, or person standing *in loco parentis* is alleged to have abused or neglected the child.

(c) ***Court action upon filing of petition.*** -- Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child. When there is an order for temporary custody pursuant to this

article, the preliminary hearing shall be held within 10 days of the order continuing or transferring custody, unless a continuance for a reasonable time is granted to a date certain, for good cause shown.

(d) ***Department action upon filing of the petition.*** -- At the time of the institution of any proceeding under this article, the department shall provide supportive services in an effort to remedy circumstances detrimental to a child.

(e) ***Notice of hearing.*** --

(1) The petition and notice of the hearing shall be served upon both parents and any other guardian, custodian, or person standing *in loco parentis,* giving to those persons at least five days' actual notice of a preliminary hearing and at least 10 days' notice of any other hearing.

(2) Notice shall be given to the department, any foster or pre-adoptive parent, and any relative providing care for the child.

(3) In cases where personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to the person by certified mail, addressee only, return receipt requested, to the last known address of the person. If the person signs the certificate, service is complete and the certificate shall be filed as proof of the service with the clerk of the circuit court.

(4) If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with § 59-3-1 *et seq*. of this code.

(5) A notice of hearing shall specify the time and place of hearings, the right to counsel of the child, parents, and other guardians, custodians, and other persons standing *in loco parentis* with the child and the fact that the proceedings can result in the permanent termination of the parental rights.

(6) Failure to object to defects in the petition and notice may not be construed as a waiver.

(f) ***Right to counsel.*** --

(1) In any proceeding under this article, the child shall have counsel to represent his or her interests at all stages of the proceedings.

(2) The court's initial order shall appoint counsel for the child and for any parent, guardian, custodian, or other person standing *in loco parentis* with the child if such person is without retained counsel.

(3) The court shall, at the initial hearing in the matter, determine whether persons other than the child for whom counsel has been appointed:

(A) Have retained counsel; and

(B) Are financially able to retain counsel.

(4) A parent, guardian, custodian, or other person standing *in loco parentis* with the child who is alleged to have neglected or abused the child and who has not retained counsel and is financially unable to retain counsel beyond the initial hearing, shall be afforded appointed counsel at every stage of the proceedings.

(5) Under no circumstances may the same attorney represent both the child and another party. The same attorney may not represent more than one parent or custodian: *Provided,* That one attorney may represent

both parents or custodians where both parents or custodians consent to this representation after the attorney fully discloses to the client the possible conflict and where the attorney advises the court that she or he is able to represent each client without impairing her or his professional judgment. If more than one child from a family is involved in the proceeding, one attorney may represent all the children.

(6) A parent who is a co-petitioner is entitled to his or her own attorney.

(7) The court may allow to each attorney appointed pursuant to this section a fee in the same amount which appointed counsel can receive in felony cases.

(8) The court shall, *sua sponte* or upon motion, appoint counsel to any unrepresented party if, at any stage of the proceedings, the court determines doing so is necessary to satisfy the requirements of fundamental fairness.

(g) ***Continuing education for counsel*** -- Any attorney representing a party under this article shall receive a minimum of eight hours of continuing legal education training per reporting period on child abuse and neglect procedure and practice. In addition to this requirement, any attorney appointed to represent a child must first complete training on representation of children that is approved by the administrative office of the Supreme Court of Appeals. The Supreme Court of Appeals shall develop procedures for approval and certification of training required under this section. Where no attorney has completed the training required by this subsection, the court shall appoint a competent attorney with demonstrated knowledge of child welfare law to represent

the parent or child. Any attorney appointed pursuant to this section shall perform all duties required of an attorney licensed to practice law in the State of West Virginia.

(h) ***Right to be heard.*** -- In any proceeding pursuant to this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. Foster parents, pre-adoptive parents, and relative caregivers shall also have a meaningful opportunity to be heard.

(i) ***Findings of the court.*** -- Where relevant, the court shall consider the efforts of the department to remedy the alleged circumstances. At the conclusion of the adjudicatory hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether the child is abused or neglected and whether the respondent is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence.

(j) ***Priority of proceedings.*** -- Any petition filed and any proceeding held under this article shall, to the extent practicable, be given priority over any other civil action before the court, except proceedings under § 48-27-309 of this code and actions in which trial is in progress. Any petition filed under this article shall be docketed immediately upon filing. Any hearing to be held at the end of an improvement period and any other hearing to be held during any proceedings under this article shall be held as nearly as practicable on successive days and, with respect

to the hearing to be held at the end of an improvement period, shall be held as close in time as possible after the end of the improvement period and shall be held within 30 days of the termination of the improvement period.

(k) ***Procedural safeguards.*** -- The petition may not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence apply. Following the court's determination, it shall ask the parents or custodians whether or not appeal is desired and the response transcribed. A negative response may not be construed as a waiver. The evidence shall be transcribed and made available to the parties or their counsel as soon as practicable, if the transcript is required for purposes of further proceedings. If an indigent person intends to pursue further proceedings, the court reporter shall furnish a transcript of the hearing without cost to the indigent person if an affidavit is filed stating that he or she cannot pay for the transcript.

W. Va. Code § 49-4-602

Petition to court when child believed neglected or abused; temporary care, custody, and control of child at different stages of proceeding; temporary care; orders; emergency removal; when reasonable efforts to preserve family are unnecessary

(a)(1) ***Temporary care, custody, and control upon filing of the petition.*** -- Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the care, custody, and control of the department or a responsible person who is not the custodial parent or guardian of the child, if it finds that:

(A) There exists imminent danger to the physical well-being of the child; and

(B) There are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody.

(2) Where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in the home unless the alleged abusing person is or has been precluded from visiting or residing in the home by judicial order.

(3) In a case where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent, the petition shall so state. Notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of those children, each child in the home for whom relief is sought shall

be made a party to the proceeding. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of the child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal.

(4) The initial order directing custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of care, custody, and control of the child or children to the department or a responsible relative, which may include any parent, guardian, or other custodian. The court order shall state:

(A) That continuation in the home is contrary to the best interests of the child and why; and

(B) Whether or not the department made reasonable efforts to preserve the family and prevent the placement or that the emergency situation made those efforts unreasonable or impossible. The order may also direct any party or the department to initiate or become involved in services to facilitate reunification of the family.

(b) ***Temporary care, custody and control at preliminary hearing.*** -- Whether or not the court orders immediate transfer of custody as provided in subsection (a) of this section, if the facts alleged in the petition demonstrate to the court that there exists imminent danger to the child, the court may schedule a preliminary hearing giving the respondents at least five days' actual notice. If the court finds at the preliminary hearing that there are no

alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period, the court may order that the child be delivered into the temporary care, custody, and control of the department or a responsible person or agency found by the court to be a fit and proper person for the temporary care of the child for a period not exceeding sixty days. The court order shall state:

(1) That continuation in the home is contrary to the best interests of the child and set forth the reasons therefor;

(2) Whether or not the department made reasonable efforts to preserve the family and to prevent the child's removal from his or her home;

(3) Whether or not the department made reasonable efforts to preserve the family and to prevent the placement or that the emergency situation made those efforts unreasonable or impossible;

(4) Whether or not the department made reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, to parents with disabilities in order to allow them meaningful access to reunification and family preservation services; and

(5) What efforts should be made by the department, if any, to facilitate the child's return home. If the court grants an improvement period as provided in section six hundred ten of this article, the sixty-day limit upon temporary custody is waived.

(c) ***Emergency removal by department during pendency of case.*** -- Regardless of whether the court has previously granted the department care and custody of a

child, if the department takes physical custody of a child during the pendency of a child abuse and neglect case (also known as removing the child) due to a change in circumstances and without a court order issued at the time of the removal, the department must immediately notify the court and a hearing shall take place within ten days to determine if there is imminent danger to the physical well-being of the child, and there is no reasonably available alternative to removal of the child. The court findings and order shall be consistent with subsections (a) and (b) of this section.

(d) ***Situations when reasonable efforts to preserve the family are not required.*** -- For purposes of the court's consideration of temporary custody pursuant to subsection (a), (b), or (c) of this section, the department is not required to make reasonable efforts to preserve the family if the court determines:

(1) The parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

(2) The parent has:

(A) Committed murder of the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(B) Committed voluntary manslaughter of the child's other parent, guardian or custodian, another child of the parent or any other child residing in the

same household or under the temporary or permanent custody of the parent;

(C) Attempted or conspired to commit murder or voluntary manslaughter or been an accessory before or after the fact to either crime;

(D) Committed unlawful or malicious wounding that results in serious bodily injury to the child, the child's other parent, guardian or custodian, to another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(E) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent; or

(F) Has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family; or

(3) The parental rights of the parent to another child have been terminated involuntarily.

W. Va. Code § 49-4-604

Disposition of neglected or abused children; case plans; dispositions; factors to be considered; reunification; orders; alternative dispositions

(a) ***Child and family case plans.*** -- Following a determination pursuant to § 49-4-602 of this code wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term "case plan" means a written document that includes, where applicable, the requirements of the family case plan as provided in § 49-4-408 of this code and that also includes, at a minimum, the following:

(1) A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child, and foster or kinship parents in order to improve the conditions that made the child unsafe in the care of his or her parent(s), including any reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U. S. C. § 12101 *et seq.*, to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(2) A plan to facilitate the return of the child to his or her own home or the concurrent permanent placement of the child; and address the needs of the child while in kinship or foster care, including a discussion of the appropriateness of the services that have been provided to the child.

The term "permanency plan" refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available. The plan must document efforts to ensure that the child is returned home within approximate time lines for reunification as set out in the plan. Reasonable efforts to place a child for adoption or with a legal guardian should be made at the same time, or concurrent with, reasonable efforts to prevent removal or to make it possible for a child to return to the care of his or her parent(s) safely. If reunification is not the permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative, concurrent permanent placement plans for the child to include approximate time lines for when the placement is expected to become a permanent placement. This case plan shall serve as the family case plan for parents of abused or neglected children. Copies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian or their counsel at least five days prior to the dispositional hearing. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard.

(b) ***Requirements for a Guardian ad litem.***

A guardian ad litem appointed pursuant to § 49-4-601(f)(1) of this code, shall, in the performance of his or her duties, adhere to the requirements of the Rules of Procedure for Child Abuse and Neglect Proceedings and the Rules of Professional Conduct and such other rules as the West Virginia Supreme Court of Appeals may promulgate, and any appendices thereto, and must meet all educational requirements for the guardian ad litem. A guardian ad litem may not be paid for his or her services without meeting the certification and educational requirements of the court. The West Virginia Supreme

Court of Appeals is requested to provide guidance to the judges of the circuit courts regarding supervision of said guardians ad litem. The West Virginia Supreme Court of Appeals is requested to review the Rules of Procedure for Child Abuse and Neglect Proceedings and the Rules of Professional Conduct specific to guardians ad litem.

(c) ***Disposition decisions.*** The court shall give precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his or her own home under supervision of the department;

(4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;

(5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the care, custody, and control of the department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court. The court order shall state:

(A) That continuation in the home is contrary to the best interests of the child and why;

(B) Whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve

the family, or some portion thereof, and to prevent or eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home;

(C) Whether the department has made reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U. S. C. § 12101 *et seq.*, to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(D) What efforts were made or that the emergency situation made those efforts unreasonable or impossible; and

(E) The specific circumstances of the situation which made those efforts unreasonable if services were not offered by the department. The court order shall also determine under what circumstances the child's commitment to the department are to continue. Considerations pertinent to the determination include whether the child should:

(i) Be considered for legal guardianship;

(ii) Be considered for permanent placement with a fit and willing relative; or

(iii) Be placed in another planned permanent living arrangement, but only in cases where the child has attained 16 years of age and the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options set forth in subparagraphs (i) or (ii) of this paragraph. The

court may order services to meet the special needs of the child. Whenever the court transfers custody of a youth to the department, an appropriate order of financial support by the parents or guardians shall be entered in accordance with § 49-4-801 through § 49-4-803 of this code;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a nonabusing battered parent. If the court shall so find, then in fixing its dispositional order the court shall consider the following factors:

(A) The child's need for continuity of care and caretakers;

(B) The amount of time required for the child to be integrated into a stable and permanent home environment; and

(C) Other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child 14 years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights. No adoption of a child shall take

place until all proceedings for termination of parental rights under this article and appeals thereof are final. In determining whether or not parental rights should be terminated, the court shall consider the efforts made by the department to provide remedial and reunification services to the parent. The court order shall state:

(i) That continuation in the home is not in the best interest of the child and why;

(ii) Why reunification is not in the best interests of the child;

(iii) Whether or not the department made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made those efforts unreasonable or impossible; and

(iv) Whether or not the department made reasonable efforts to preserve and reunify the family, or some portion thereof, including a description of what efforts were made or that those efforts were unreasonable due to specific circumstances.

(7) For purposes of the court's consideration of the disposition custody of a child pursuant to this subsection, the department is not required to make reasonable efforts to preserve the family if the court determines:

(A) The parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse, and sexual abuse;

(B) The parent has:

(i) Committed murder of the child's other parent, guardian or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(ii) Committed voluntary manslaughter of the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(iii) Attempted or conspired to commit murder or voluntary manslaughter, or been an accessory before or after the fact to either crime;

(iv) Committed a malicious assault that results in serious bodily injury to the child, the child's other parent, guardian, or custodian, to another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(v) Attempted or conspired to commit malicious assault, as outlined in subparagraph (iv), or been an accessory before or after the fact to the same;

(vi) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent; or

(vii) Attempted or conspired to commit sexual assault or sexual abuse, as outlined in subparagraph (vi), or been an accessory before or after the fact to the same.

(C) The parental rights of the parent to another child have been terminated involuntarily;

(D) A parent has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family.

(d) As used in this section, "No reasonable likelihood that conditions of neglect or abuse can be substantially corrected" means that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Those conditions exist in the following circumstances, which are not exclusive:

(1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and the person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health, or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare, or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems, or assist the abusing parent or parents in fulfilling their responsibilities to the child; and

(6) The battered parent's parenting skills have been seriously impaired and the person has willfully refused or is presently unwilling or unable to cooperate in the development of a reasonable treatment plan, or has not adequately responded to or followed through with the recommended and appropriate treatment plan.

(e) The court may, as an alternative disposition, allow the parents or custodians an improvement period not to exceed six months. During this period the court shall require the parent to rectify the conditions upon which the

determination was based. The court may order the child to be placed with the parents, or any person found to be a fit and proper person, for the temporary care of the child during the period. At the end of the period, the court shall hold a hearing to determine whether the conditions have been adequately improved and at the conclusion of the hearing shall make a further dispositional order in accordance with this section.

(f) The court may not terminate the parental rights of a parent on the sole basis that the parent is participating in a medication-assisted treatment program, as regulated in § 16-5Y-1 *et seq.*, for substance use disorder, as long as the parent is successfully fulfilling his or her treatment obligations in the medication-assisted treatment program.

W. Va. Code § 49-4-606

Modification of dispositional orders; hearings; treatment team; unadopted children

(a) Upon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section six hundred four of this article and may modify a dispositional order if the court finds by clear and convincing evidence a material change of circumstances and that the modification is in the child's best interests. A dispositional order may not be modified after the child has been adopted, except as provided in subsections (b) and (c) of this section. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian, the department and any person entitled to notice and the right to be heard. The circuit court of origin has exclusive jurisdiction over placement of the child, and the placement may not be disrupted or delayed by any administrative process of the department.

(b) If the child is removed or relinquished from an adoptive home or other permanent placement after the case has been dismissed, any party with notice thereof and the receiving agency shall promptly report the matter to the circuit court of origin, the department and the child's counsel, and the court shall schedule a permanency hearing within sixty days of the report to the circuit court, with notice given to any appropriate parties and persons entitled to notice and the right to be heard. The department shall convene a multidisciplinary treatment team meeting within thirty days of the receipt of notice of permanent placement disruption.

(c) If a child has not been adopted, the child or department may move the court to place the child with a parent or custodian whose rights have been terminated and/or restore the parent's or guardian's rights. Under these circumstances, the court may order the placement and/or restoration of a parent's or guardian's rights if it finds by clear and convincing evidence a material change of circumstances and that the placement and/or restoration is in the child's best interests.

W. Va. Code § 49-4-608

Permanency hearing; frequency; transitional planning; out-of-state placements; findings; notice; permanent placement review

(a) ***Permanency hearing when reasonable efforts are not required.*** -- If the court finds, pursuant to this article, that the department is not required to make reasonable efforts to preserve the family, then, notwithstanding any other provision, a permanency hearing must be held within 30 days following the entry of the court order so finding, and a permanent placement review hearing must be conducted at least once every 90 days thereafter until a permanent placement is achieved.

(b) ***Permanency hearing every 12 months until permanency is achieved.*** -- If, 12 months after receipt by the department or its authorized agent of physical care, custody, and control of a child either by a court-ordered placement or by a voluntary agreement, the department has not placed a child in an adoptive home, placed the child with a natural parent, placed the child in legal guardianship, or permanently placed the child with a fit and willing relative, the court shall hold a permanency hearing. The department shall file a progress report with the court detailing the efforts that have been made to place the child in a permanent home and copies of the child's case plan, including the permanency plan as defined in § 49-1-201 and § 49-4-604 of this code. Copies of the report shall be sent to the parties and all persons entitled to notice and the right to be heard. The court shall schedule a hearing, giving notice and the right to be present to the child's attorney; the child; the child's parents; the child's guardians; the child's foster parents; any preadoptive parent, or any relative providing care for the child; any person entitled to notice and the right to be

heard; and other persons as the court may, in its discretion, direct. The child's presence may be waived by the child's attorney at the request of the child or if the child is younger than 12 years and would suffer emotional harm. The purpose of the hearing is to review the child's case, to determine whether and under what conditions the child's commitment to the department shall continue, to determine what efforts are necessary to provide the child with a permanent home, and to determine if the department has made reasonable efforts to finalize the permanency plan. The court shall conduct another permanency hearing within 12 months thereafter for each child who remains in the care, custody, and control of the department until the child is placed in an adoptive home, returned to his or her parents, placed in legal guardianship, or permanently placed with a fit and willing relative.

(c) ***Transitional planning for older children.*** -- In the case of a child who has attained 16 years of age, the court shall determine the services needed to assist the child to make the transition from foster care to independent living. The child's case plan should specify services aimed at transitioning the child into adulthood. When a child turns 17, or as soon as a child aged 17 comes into a case, the department must immediately provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child. The plan must include specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, work force support, and employment services, and the plan should be as detailed as the child may elect. In addition to these requirements, when a child with special needs turns 17, or as soon as a child aged 17 with special needs comes into a case, he or she is entitled to the appointment of a department adult services worker

to the multidisciplinary treatment team, and coordination between the multidisciplinary treatment team and other transition planning teams, such as special education individualized education planning (IEP) teams.

(d) ***Out-of-state placements.*** -- A court may not order a child to be placed in an out-of-state facility unless the child is diagnosed with a health issue that no in-state facility or program serves, unless a placement out of state is in closer proximity to the child's family for the necessary care, or the services are able to be provided more timely. If the child is to be placed with a relative or other responsible person out of state, the court shall use judicial leadership to help expedite the process under the Interstate Compact for the Placement of Children provided in § 49-7-101 and § 49-7-102 and the Uniform Child Custody Jurisdiction and Enforcement Act provided in § 48-20-101 *et seq*. of this code.

(e) ***Findings in order.*** -- At the conclusion of the hearing the court shall, in accordance with the best interests of the child, enter an order containing all the appropriate findings. The court order shall state:

(1) Whether or not the department made reasonable efforts to preserve the family and to prevent out-of-home placement or that the specific situation made the effort unreasonable;

(2) Whether or not the department made reasonable efforts to finalize the permanency plan and concurrent plan for the child;

(3) The appropriateness of the child's current placement, including its distance from the child's home and whether or not it is the least restrictive one (most family-like one) available;

(4) The appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(5) Services required to meet the child's needs and achieve permanency; and

(6) In addition, in the case of any child for whom another planned permanent living arrangement is the permanency plan, the court shall: (A) Inquire of the child about the desired permanency outcome for the child; (B) make a judicial determination explaining why, as of the date of the hearing, another planned permanent living arrangement is the best permanency plan for the child; and (C) provide in the court order compelling reasons why it continues to not be in the best interest of the child to (i) return home, (ii) be placed for adoption, (iii) be placed with a legal guardian, or (iv) be placed with a fit and willing relative.

(f) The department shall annually report to the court the current status of the placements of children in the care, custody and control of the state department who have not been adopted.

(g) The department shall file a report with the court in any case where any child in the custody of the state receives more than three placements in one year no later than 30 days after the third placement. This report shall be provided to all parties and persons entitled to notice and the right to be heard. Upon motion by any party, the court shall review these placements and determine what efforts are necessary to provide the child with a permanent home. No report may be provided to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(h) The department shall give actual notice, in writing, to the court, the child, the child's attorney, the parents and the parents' attorney at least 48 hours prior to the move if this is a planned move, or within 48 hours of the next business day after the move if the child is in imminent danger in the child's current placement, except where the notification would endanger the child or the foster family. A multidisciplinary treatment team shall convene as soon as practicable after notice to explore placement options. This requirement is not waived by placement of the child in a home or other residence maintained by a private provider. No notice may be provided pursuant to this provision to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(i) Nothing in this article precludes any party from petitioning the court for review of the child's case at any time. The court shall grant the petition upon a showing that there is a change in circumstance or needs of the child that warrants court review.

(j) Any foster parent, preadoptive parent or relative providing care for the child shall be given notice of and the right to be heard at the permanency hearing provided in this section.

W. Va. Code § 49-4-610

Improvement periods in cases of child neglect or abuse; findings; orders; extensions; hearings; time limits

In any proceeding brought pursuant to this article, the court may grant any respondent an improvement period in accord with this article. During the period, the court may require temporary custody with a responsible person which has been found to be a fit and proper person for the temporary custody of the child or children or the state department or other agency during the improvement period. An order granting an improvement period shall require the department to prepare and submit to the court a family case plan in accordance with section four hundred eight, of this article. The types of improvement periods are as follows:

(1) ***Preadjudicatory improvement period.*** -- A court may grant a respondent an improvement period of a period not to exceed three months prior to making a finding that a child is abused or neglected pursuant to section six hundred one of this article only when:

> **(A)** The respondent files a written motion requesting the improvement period;
>
> **(B)** The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;
>
> **(C)** In the order granting the improvement period, the court:

(i) Orders that a hearing be held to review the matter within sixty days of the granting of the improvement period; or

(ii) Orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondents progress in the improvement period within sixty days of the order granting the improvement period; and

(D) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article;

(2) ***Post-adjudicatory improvement period.*** -- After finding that a child is an abused or neglected child pursuant to section six hundred one of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:

(A) The respondent files a written motion requesting the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) orders that a hearing be held to review the matter within thirty days of the granting of the improvement period; or

(ii) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;

(D) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period; and

(E) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article.

(3) ***Post-dispositional improvement period.*** -- The court may grant an improvement period not to exceed six months as a disposition pursuant to section six hundred four of this article when:

(A) The respondent moves in writing for the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) Orders that a hearing be held to review the matter within sixty days of the granting of the improvement period; or

(ii) Orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;

(D) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances, the respondent is likely to fully participate in the improvement period; and

(E) The order granting the improvement period shall require the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article.

(4) ***Responsibilities of the respondent receiving improvement period.*** --

(A) When any improvement period is granted to a respondent pursuant to this section, the respondent shall be responsible for the initiation and completion of all terms of the improvement period. The court may order the state department

to pay expenses associated with the services provided during the improvement period when the respondent has demonstrated that he or she is unable to bear the expenses.

(B) When any improvement period is granted to a respondent pursuant to this section, the respondent shall execute a release of all medical information regarding that respondent, including, but not limited to, information provided by mental health and substance abuse professionals and facilities. The release shall be accepted by a professional or facility regardless of whether the release conforms to any standard required by that facility.

(5) ***Responsibilities of the department during improvement period.*** -- When any respondent is granted an improvement period pursuant to this article, the department shall monitor the progress of the person in the improvement period. This section may not be construed to prohibit a court from ordering a respondent to participate in services designed to reunify a family or to relieve the department of any duty to make reasonable efforts to reunify a family required by state or federal law.

(6) ***Extension of improvement period.*** -- A court may extend any improvement period granted pursuant to subdivision (2) or (3) of this section for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the department to permanently place the child; and that the extension is otherwise consistent with the best interest of the child.

(7) ***Termination of improvement period.*** -- Upon the motion by any party, the court shall terminate any improvement period granted pursuant to this section when the court finds that respondent has failed to fully participate in the terms of the improvement period or has satisfied the terms of the improvement period to correct any behavior alleged in the petition or amended petition to make his or her child unsafe.

(8) ***Hearings on improvement period.*** --

(A) Any hearing scheduled pursuant to this section may be continued only for good cause upon a written motion properly served on all parties. When a court grants a continuance, the court shall enter an order granting the continuance specifying a future date when the hearing will be held.

(B) Any hearing to be held at the end of an improvement period shall be held as nearly as practicable on successive days and shall be held as close in time as possible after the end of the improvement period and shall be held no later than thirty days of the termination of the improvement period.

(9) ***Time limit for improvement periods.*** -- Notwithstanding any other provision of this section, no combination of any improvement periods or extensions thereto may cause a child to be in foster care more than fifteen months of the most recent twenty-two months, unless the court finds compelling circumstances by clear and convincing evidence that it is in the child's best interests to extend the time limits contained in this paragraph.