NO. 25-_____

In the Supreme Court of the United States

ELIZABETH AND JASON WHITE,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether North Carolina misinterpreted the Adoption Assistance and Child Welfare Act of 1980 by reversing an Order granting Petitioners adoption assistance.

2. What duty, if any, do state agencies and/or private nonprofit child-placing agencies have to disclose information about Federal adoption assistance to prospective adoptive parents of special needs' children?

PARTIES TO THE PROCEEDINGS

Petitioners

- Elizabeth White
- Jason White

Respondents

- North Carolina Department of Health and Human Services
- Forsyth County Department of Social Services
- Children's Home Society of North Carolina, Inc.

LIST OF PROCEEDINGS

North Carolina Supreme Court

No. 140A24

Elizabeth White et ux, *Petitioners*. v.
North Carolina Department of Health and Human Services, et al., *Respondents*

Opinion: May 23, 2025

North Carolina Court of Appeals

No. COA23-529

Elizabeth White et ux, *Petitioners*. v.
North Carolina Department of Health and Human Services, et al., *Respondents*

Opinion: May 7, 2024

Forsyth County Superior Court

No. 21-CVS-6259

Elizabeth White et ux, *Petitioners*. v.
North Carolina Department of Health and Human Services, et al., *Respondents*

Final Order: September 16, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REGULATORY AND STATUTORY TEXT

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

REGULATIONS

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Elizabeth and Jason White respectfully petition for a writ of certiorari to review the judgment of the North Carolina Supreme Court in this case.

OPINIONS BELOW

The Superior Court of Forsyth County, North Carolina rendered judgment in an unreported opinion in favor of Petitioners on September 16, 2022; Forsyth County Superior Court Case No. 21-CVS-6259. App.32a. The North Carolina Court of Appeals reversed this decision on May 7, 2024 in their published opinion, 293 N.C. App. 797 *; 902 S.E.2d 274 **; 2024 N.C. App. LEXIS 379 ***; 2024 LX 81909; 2024 WL 2002414 (2024), in which there was a dissenting opinion (same caption as the instant Petition). App.3a and 32a. The North Carolina Supreme Court issued their *per curiam* published opinion on May 23, 2025, affirming the Court of Appeals, which can be found at 2025 N.C. LEXIS 368 *; 387 N.C. 539; 915 S.E.2d 35; 2025 LX 21956; 2025 WL 1478936 (2025) (same caption as the instant Petition). App.1a.

JURISDICTION

The opinion of the Supreme Court of North Carolina was entered on May 23, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The relevant provisions of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670-673 (2000 & 2003 Supp.) are reproduced in the appendix to this Petition. App.62a-124a.

STATEMENT OF THE CASE

This Petition centers on the question of whether or not the North Carolina Court of Appeals' majority and the North Carolina Supreme Court erred in their opinions regarding North Carolina's application of Federal law – namely, the Adoption Assistance and Child Welfare Act of 1980 ("the Act"). The specific issue at hand is the question of the duties and disclosure requirements of state and/or private nonprofit child-placing agencies contracted by the state, as the authorized agent(s) on behalf of the Federal government to administer such a program within the state's borders, by and through the state's authorized agency(s), regarding notifying adoptive parents of financial assistance

made available them to assist in the adoption of special needs children.

A. Factual Background.

The Petitioners' JASON and ELIZABETH WHITE ("Petitioners"), through the Children's Home Society of North Carolina, Inc. ("CHS"), accepted a newborn, CW, shortly after his birth in June 2014. App.8a, 34a. CW remained in foster care with Petitioners and was formally "placed" in their home for adoption in September 2014. *Id.* CW was legally adopted by Petitioners in December 2014. *Id.* The Administrative Record in this matter contains CW's medical, behavioral and occupational health evaluations and medical records, which were submitted by Petitioners at the outset of their original appeal, and which outline CW's special needs from birth through 2021. App.23a-24a. The facts most relevant for this Court's consideration are as follows:

Among other things, CW suffered from substance abuse exposure in utero, including methamphetamines, benzodiazepines, opiates and marijuana. App.24a, 38a. Shortly after his birth, CW's biological mother relinquished her parental rights to CW to CHS on May 31, 2014, and the unknown biological father's rights were terminated within six (6) months of the relinquishment. App.3a and 23a.

At birth, CW's health issues consisted of the following:

1. Premature birth via Cesarean section at 34 weeks.
2. CW spent the first two (2) weeks of his life in the Neonatal Intensive Care Unit due to his severe health conditions. *Id*.

3. CW was discharged after approximately two (2) weeks but then was brought back to the emergency room by Petitioners when he experienced breathing issues and tachypnea. *Id*

4. Eye development issues, such as hyperopia, ptosis and accommodative esotrapia. *Id*

5. CW tested positive at birth for cocaine, marijuana, amphetamines, benzodiazepines/ opiates. *Id.*

6. Monofixation syndrome. *Id.*

Upon first being placed in Petitioners' home, CHS, through the state/county child-placing agency, obtained Medicaid on CW's behalf and CW began receiving Medicaid from June 2014 until shortly after his adoption. *Id.* As CW grew older, he development further significant health issues, including, but not limited to:

1. Attention Deficit Hyperactivity Disorder. *Id.*

2. Autism Spectrum Disorder. *Id.*

3. Other Specified Disruptive Impulse Control and Conduct Disorder. *Id.*

4. Developmental Coordination Disorder. *Id.*

5. Neurobehavioral Disorder. *Id.*[1]

In addition to all of his physical symptoms, CW began exhibiting significant oppositional behavior at

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[1] Dr. Yasmin Suzanne N. Senturias, M.D. FAAP, opined that CW exhibits many symptoms of Fetal Alcohol Syndrome. However, Dr. Senturias believes that CW does not meet the full criteria for the same and that CW's symptoms are most consistent with a neurobehavioral disorder. App.38a.

around two (2) years old. App.38a. CW would frequently hit his family members and others, sometimes impulsively and other times intentionally. *Id.* Petitioners have exhausted all of their savings in their attempt to get CW the care that he needs and are currently without means to continue to help CW because of the severity of his health issues. App.35a. Petitioners may be forced to surrender CW back to CHS/FDSS because they do not have the financial means to continue to care for CW given the severity of his special needs. *Id.*

B. General Administrative and Procedural History.

Upon learning of the potential availability for adoption assistance and with the assistance of CHS, Petitioners applied to receive adoption assistance in May 2021. App.9a, 27a. On June 9, 2021, almost immediately after they submitted their application, Forsyth County Department of Social Services ("FDSS") denied their application solely due the State and Federal requirement that an adoption assistance agreement had to be in place prior to the adoption being finalized. App.9a. On July 6, 2021, Petitioners requested a local hearing to appeal FDSS' denial. App.9a, 35a. FDSS upheld its decision and Petitioners appealed through the Office of Administrative Hearings Section of NC DHHS on or about July 23, 2021. App.9a. On September 29, 2021, NC DHHS issued a decision upholding FDSS' decision to deny Petitioners' request for adoption assistance. App.9a. Petitioners timely requested a re-hearing by the Chief Hearing Officer. App.10a. On November 24, 2021, the Chief Hearing Officer issued a Final Decision on behalf of NC DHHS, which ultimately denied Petitioners' request for adoption assistance due primarily to the fact that the

adoption assistance agreement was not in place on or before the finalization of the adoption. App.10a. Petitioners timely filed a Petition for Judicial Review on or about December 21, 2021. App.10a. On or about September 12, 2022, a hearing was had on their Petition for Judicial Review. App.10a. The Honorable Judge William Long ("Judge Long") entered an Order on or about September 16, 2022, which overturned NC DHHS's Final Decision and awarded Petitioners adoption assistance, both retroactive to the date of CW's adoption and prospectively, as well as ordering CHS, FDSS and NC DHHS (collectively "Respondents") to pay Petitioners' attorney's fees. *Id.* Respondents filed their notices of appeal to the North Carolina Court of Appeals on or about October 14, 2022. App.10a. This matter was argued in front of the Court of Appeals on or about January 9, 2024, and an Opinion issued on or about May 7, 2024. App.3a. Petitioners timely appealed the decision of the North Carolina Court of Appeals' majority as a right based upon the Honorable Judge John M. Tyson's ("Judge Tyson") dissent on or about June 9, 2024. Oral argument was held in the North Carolina Supreme Court on or about April 16, 2025, and the North Carolina Supreme Court rendered a short decision affirming the opinion of the North Carolina Court of Appeals' majority on May 23, 2025. App.1a.

REASONS FOR GRANTING THE WRIT

Intervention by this Court is absolutely critical to ensure the protection and preservation of special needs' children within North Carolina and to resolve differences in the application of the Act between various states, including West Virginia, Rhode Island, and Vermont. If allowed to stand, North Carolina's opinion has significant and irreversible consequences for special needs children within North Carolina, as well as the families who step up to adopt them, along with providing a precedent which is counter to existing precedents. This creates a risk that a split between courts could develop and, given the fact that the Act concerns children and adoption assistance, Petitioners believe that this Court should create a clear authority at this time, not only to protect and aid children in North Carolina but to prevent any further splits in opinions between the courts of different states. The consequences within North Carolina alone include, but are not limited to:

1. relieving all state agencies from any liability from an admitted failure to fully disclose a foster child's health conditions and needs to prospective adoptive parents;
2. threatens the existence of permanent adoptive homes for special needs' children across North Carolina and this country;
3. disincentivizes prospective adoptive parents from pursuing adoption from any agency for fear that they may not be able to physically

and/or financially care for their adoptive child; and

4. ultimately creates a world where children either languish in foster care or experience the repeated trauma of multiple failed adoptions due to the child-placing agency's failure to fulfill its affirmative duty to disclose.

These are the exact results which the Adoption Assistance and Child Welfare Act was expressly designed to prevent. *Policy Interpretation Question*, Log No. ACYF-CB-PA-01-01 U.S. Dep't of Health and Human Serv., Children's Bureau, (issued January 23, 2001).

Contrary to what most child-placing agencies will convey, the heartrending circumstances of CW's story is just one of many recurring examples across the country which demonstrate why this Court's intervention is imperative. Both state and private nonprofit agencies have an extensive history of providing prospective adoptive parents with minimal information regarding the children whom they seek to adopt, which results in such disastrous consequences such as eventual adoption disruption and/or worsening of medical conditions due to a lack of information and incorrect diagnosis. D. Marianne Brower Blair, *Lifting the Geological Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C.L. REV. 681 *685 (1992). Although several states have implemented protections against such consequences, either through case precedent or via statute, North Carolina, through the North Carolina Supreme Court's decision, seemingly refuses to acknowledge the systemic issues within its foster and adoptive system.

I. The Express Intent of the Legislature Requires the Reversal of the North Carolina Supreme Court's Decision.

The Legislature clearly intended the Adoption and Assistance Child Welfare Act of 1980 to apply to special needs children like CW. The Adoption Assistance and Child Welfare Act of 1980, an amendment to the Title IV-E of the Social Security Act, sets forth the eligibility criteria that every child must meet in order to be eligible to receive adoption assistance under Title IV-E. *Policy Interpretation Question No. ACYF-CB-PA-01-01.* After several requests for clarification as to certain provisions in the Act, the Children's Bureau, within the United States Department of Health and Human Services, (hereinafter referred to as "US DHHS") issued detailed guidelines to all applicable state agencies which clarified the Act. *Id.* The aforementioned guidelines stated:

> The [Act's] legislative history indicates that Congress was concerned primarily with moving children in State foster care systems into permanent adoptive homes.

Id. The Act was developed to provide permanency for children with special needs in foster care by assisting States in providing ongoing financial and medical assistance on their behalf to the families who adopt them. *Id.*

With regard to eligibility for adoption assistance, the Act states:

> Under any adoption assistance agreement entered into by the State with parents who adopt a child with special needs, the State, in any case where the child meets the re-

> quirements of paragraph (2), may make adoption assistance payments to such parents, directly through the State agency or through another public or nonprofit private agency, in amounts so determined."

42 U.S.C. § 673(a)(1)(B)(ii).

Paragraph (2) of the Act divides children into two age groups in order to determine eligibility to receive adoption assistance payments: "applicable children" and "inapplicable children." 42 U.S.C. § 673(2)(A). In the case of a child who is an inapplicable child for the fiscal year . . . the child has been determined by the State to be a child with special needs. 42 U.S.C. § 673(2)(A)(i)(ll). The Act defines a child with special needs to be a child in which:

1. the State determined that the child cannot return to his/her parents;
2. the State determined that the child has medical conditions or physical, mental, or emotional handicaps, which create circumstances in which the child cannot be placed with adoptive parents without providing adoption assistance; and
3. a reasonable, but unsuccessful effort has been made to place the child with appropriate adoptive parents without providing adoption assistance, except where placement would be against the best interests of the child.

42 U.S.C. § 673(c)(1)(A) and (B).

The Code of Federal Regulations added that, in order to be eligible for adoption assistance, there must be an adoption assistance agreement signed by all par-

ties prior to the entry of the final decree of adoption and it must specify its duration and the nature and amount of any payment, services and/or assistance to be provided. 45 C.F.R. § 1356.40(b).

In North Carolina, the relevant corresponding laws which mirror the Act are N.C.G.S. § 108A-49, N.C.G.S. § 108A-49.1, N.C.G.S. § 108A-50, N.C.G.S. § 108A-50.1, and N.C.G.S § 108A-50.2. North Carolina's Regulations based upon these statutes are found in 10A NCAC 70M .0101, 10A NCAC 70M .0102, 10A NCAC 70M .0201, 10A NCAC 70M .0301, 10A NCAC 70M .0302, 10A NCAC 70M .0304, 10A NCAC 70M .0401, and 10A NCAC 70M .0402.

These laws provide, in relevant part:

> The purpose of this program is to encourage . . . the adoption of certain hard-to-place children in order to make it possible for children living in, or likely to be placed in foster homes or institutions to benefit from the stability and security of permanent homes . . .

N.C.G.S. § 108A-50.

While the Act and other applicable Federal laws provide a general outline of who is entitled to benefits, they do allow each state to develop their own plan for the administration of benefits pursuant to the Act. 42 U.S.C. § 670. However, the Code of Federal Regulations mandated that each state expecting federal assistance must actively seek ways to promote the adoption assistance program. 45 C.F.R. 1354.40(a), (b), and (c). North Carolina's plan for the administration of benefits to children in foster care requires the assistance and partnership of private nonprofit child-placing agencies. N.C.G.S. § 108A-50.2; *N.C. DSS Child Welfare Policy*

Manual, Appendix 3.6, Adoption Assistance Funding, p 31 ¶ A, July 2023.

As specifically described in their Child Welfare Manual, which mirrors the Act and the applicable North Carolina law, North Carolina requires both the state/county agency and private nonprofit child-placing agencies to work closely together to ensure that all eligible children within the foster care system receive benefits, including preparing/applying for Medicaid on behalf of each eligible child, as well as applying for adoption assistance. *N.C. DSS Child Welfare Policy Manual, Appendix 3.6, Adoption Assistance Funding,* p 31 ¶ A.

North Carolina carries out various social services, such as foster care and adoption via its state-supervised, county administered system. N.C.G.S. § 108A-25. However, the administration of foster care and adoption services is not limited to the state/county agency. North Carolina is unique in that it contracts with certain private nonprofit child-placing agencies, such as CHS, to provide foster care and adoption services to the general public. On its website, CHS boasts that its charitable purpose is to care for children in foster care, to assist parents seeking to adopt a child and to strengthen families.

Although the duty to determine eligibility and administer financial assistance still rests with the state/county child-placing agency and the NC DHHS, private nonprofit child-placing agencies have a duty to provide referrals so as to initiate the eligibility process. *Id.* Subsequently and within thirty (30) days, the child welfare agency must determine whether the child in question is eligible for assistance benefits and must notify the private agency of its decision. *Id.* at p

30 ¶ XXI. If the child is determined to be eligible, then the child welfare agency creates a new Adoption Assistance Eligibility Checklist using the information provided by the private agency. *Id.* Subsequently, the child welfare agency contacts the prospective adoptive parents of their decision. *Id.* at p 31 ¶ A. At that time, the child welfare agency must inform them of the availability of adoption assistance benefits and discuss whether they will adopt the child without the financial assistance. *Id.* at p 31 ¶ A.

In their critique of the Superior Court's decision, the North Carolina Supreme Court and Court of Appeals' majority based their decision on what Petitioners assert is a gross misinterpretation of the Act's express wording. As previously stated, the Act requires that a state agency determine whether the child's special needs create a financial barrier to his/her adoption. Specifically, this "financial barrier" requirement refers to 1) whether the child has medical diagnosis(es) or conditions which it is reasonable to conclude that the child cannot be placed with the prospective adoptive parents without providing adoption assistance; and 2) after reasonable efforts, the state agency was unable to place him/her with adoptive parents without providing adoption assistance. 42 U.S.C. § 673(c)(1)(B).

To support their ultimate determination that CW was ineligible for adoption assistance, the Court of Appeals' majority stated:

> [I]t is unreasonable to conclude that CW could not be placed with adoptive parents without adoption assistance when he was, in fact, placed with Petitioners without adoption assistance.

App.17a. Further, the Court of Appeals' majority found:

> [T]he evidence does not support that [CW] was "unadoptable" or hard to place due to special needs or that any efforts had to be made with other specialized adoption agencies . . .

App.16a.

However, this rationale fails to acknowledge the implicit requirement that the adoptive parents be given medical information about the child so as to make an informed decision about whether to continue with the adoption. As eloquently explained by the Honorable Judge Tyson in his dissent:

> [T]his element only exists within the context of and after full disclosure by CHS and [F]DSS of all known and relevant information about the child's health and conditions and prognosis to the prospective parents . . .

App.26a.

Additionally, this rationale completely ignores the very explicit exception to the "financial barrier" requirement. The Act expressly forbids efforts to find other adoptive placements if such a placement would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents . . . 42 U.S.C. § 673(c)(1)(B). As the Superior Court correctly recognized in its Order, CW had been placed with Petitioners for approximately six (6) months, and they were essentially the only family he had ever known. App.39a. Therefore Res-

pondents would not have been required to put forth any effort into searching for additional placements because such placements would not have been in CW's best interests.

The Court of Appeals' majority and North Carolina Supreme Court completely disregarded the express wording of the Act to find that, because CW was adopted from a private nonprofit, he was automatically disqualified from receiving adoption assistance. In their erroneous decision, North Carolina's appellate courts accurately recognized the duty expressly defined in the Policy Announcement issued by the U.S. Department of Health and Human Services on January 23, 2001. In the Policy Announcement, it expressly states:

> Adoption agencies, whether public or private, have an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of adoption assistance.

Policy Interpretation Question No. ACYF-CB-PA-01-01.

However, in the very next paragraph, the North Carolina Court of Appeals' majority completely disregards the explicit wording of the Policy Announcement they just cited and stated that Respondents were "relieved" of any duty to inform because such a duty

> dissipates in cases such as this, in which the child was adopted through a private adoption agency . . . without the involvement or knowledge of the State or local Title IV-E agency.

App.19a. Such a finding is not only contrary to the express wording of the Act and North Carolina's own Child Welfare Manual, but also, for reasons set forth

below, completely contrary to established case precedent.

II. North Carolina's Decision Disregards Established Precedent Found in Multiple Other Jurisdictions.

A. Precedent Indicates That, Outside of Rare Circumstances, Private Nonprofit Child-Placing Agencies and State/County Agencies Have an Affirmative Duty to Disclose Information to Prospective Adoptive Parents of Special Needs' Children.

Although CW's case was a case of first impression in North Carolina, several other jurisdictions have considered the same issues, and all have recognized the existence of an affirmative duty to disclose information regarding adoption assistance to prospective adopters of special needs' children even when a child was adopted from a private nonprofit child-placing agency. Respondents, as well as the North Carolina's appellate courts, supported their argument using the case of *Laird v. Dep't of Pub. Welfare*, 23 A.3d 1015 (PA 2011). *White* at *809. In *Laird*, the Pennsylvania Supreme Court found the four (4) special needs' children adopted from a private nonprofit, ineligible for state adoption assistance because the applicable state agency had no knowledge of the children's existence.

However, North Carolina's argument is grossly misplaced for multiple reasons: First: although the Act is discussed in *Laird*, all parties stipulated from the beginning that the only assistance at issue was Pennsylvania state adoption assistance, not assistance under the Act. *Id.* at *20. Second: in *Laird*, Petitioners

do agree with the Court's ultimate holding because there truly was no connection between the children and the state agency, and therefore the state agency would not have had knowledge of the children's existence. *Id.* at *27.

CW's case can be differentiated from *Laird* in that NC DHHS clearly had knowledge of CW's existence due to the undisputed fact that CW received Medicaid from birth until shortly after his adoption. App.34a. Medicaid is administered by NC DHHS and the applicable county/state agency, therefore the only way CW could have received Medicaid is through NC DHHS. App.24a. Given that CW received Medicaid, NC DHHS, the applicable county agency and CHS would have known of CW's special needs and/or at a minimum, known of his existence, and therefore it was their affirmative duty to disclose the potential availability of adoption assistance to Petitioners.

The Forsyth County Superior Court and the Honorable Judge John. M. Tyson correctly recognized that Respondents owed had an affirmative duty to disclose information pertaining to adoption assistance to Petitioners. As the applicable state/county agency with the statutorily prescribed task of administering adoption assistance, NC DHHS and FDSS knew of CW's existence/special needs given that they had to apply for Medicaid on his behalf shortly after his birth. CHS, as the government contracted private nonprofit child-placing agency with exclusive legal custody of CW, had an affirmative duty to send a referral to FDSS/NC DHHS so that an eligibility determination could have been made regarding CW's potential availability for adoption assistance. There has never been a dispute as to whether CHS or FDSS ever made

any sort of referral for an eligibility determination. App.34a. Further, there is no dispute that none of Respondents ever had any sort of discussion with Petitioners regarding the potential availability of adoption assistance. *Id.* North Carolina's decision ultimately provides immunity for Respondents based on a mere post hoc rationalization in an attempt to excuse their clear failure to fulfill their affirmative duty to inform Petitioners regarding the potential availability of adoption assistance. *Ferdinand* at *405. As laid out in detail herein, neither the Act, nor established case precedent supports a decision which ultimately rewards the failures of state/private nonprofit actors and achieves an unjust result.

III. North Carolina's Decision, in and of Itself, Is an Incorrect Application of the Act and Warrants Reversal.

North Carolina limits its standard of review in cases involving issues left to the sole discretion of the trial court to a determination solely as to whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, *778; 324 S.E.2d 829; 1985 N.C. LEXIS 1497 (1985). The Superior Court is vested with the sole authority to review and determine the soundness of a final decision by an administrative agency regarding the denial of adoption assistance benefits. N.C.G.S § 150B-43; N.C.G.S. § 1108A-79. Consequently, appellate review of the same is limited to a determination of whether there was a clear abuse of discretion by the Superior Court. *In Re Estate of Skinner*, 370 N.C. 126; 804 S.E.2d 449; 2017 N.C. LEXIS 692, ***21 (2017). An abuse of discretion exists only when there has been a determination that the trial court's actions are manifestly unsupported by [any] reason and so

arbitrary that the ruling could not have been the result of a reasoned decision. *Skinner* at ***27.

In excess of its limited authority, North Carolina's appellate courts improperly reweighed the facts of this case and imposed its own opinions on CW's eligibility under the Act and the applicable state law in excess of its limited authority. In its Order, the Forsyth County Superior Court addressed each eligibility requirement under the Act and the applicable North Carolina state law and applied the facts of this case to the same, which clearly evidence CW's eligibility for adoption assistance under the Act. Petitioners set forth the following detailed outline of Judge Long's Order, which supports CW's eligibility for adoption assistance under the Act:

The first requirement for adoption assistance under the Act provides:

> It has been determined that the child cannot or should not be returned to the home of his/her parents.

42 U.S.C. § 672-673. The Administrative Record indicates, and Judge Long properly found as fact, that CW's biological mother relinquished physical and legal custody of CW to CHS upon his birth and his biological father's rights were terminated within six (6) months of CW being relinquished. App.34a. Further, the Record reveals that CW's birth mother was unemployed and already received state public assistance benefits from the WIC program. These facts support Judge Long's conclusion that CW met the first requirement as set forth in 42 U.S.C. § 672-673 and N.C.G.S. 108A-49. Therefore, Judge Long properly concluded that CW met the first requirement for adoption

assistance under the Act, both at the time of his adoption as well as in 2021 when Petitioners applied.

The next part requires CW to have one or more documented factors or conditions in order to be eligible for assistance. These factors are, in relevant part:

> e. The child has a medically diagnosed disability which substantially limits one or more major life activity, requires professional treatment, assistance in self-care, or the purchase of special equipment; and/or
>
> f. The child is diagnosed by a qualified professional to have a psychiatric condition which impairs the child's mental, intellectual, or social functioning, and for which the child receives professional services; and/or
>
> g. The child is diagnosed by a qualified professional to have a behavioral or emotional disorder characterized by inappropriate behavior which deviates substantially from the behavior appropriate to the child's age or significantly interferes with child's intellectual, social and personal adjustment; and/or
>
> i. The child is at risk for a diagnosis described above in items e through h, due to prenatal exposure to toxins . . .

App.46-47a.

It is undisputed that CW meets at least one (1) if not all of these factors, but nonetheless, Judge Long found the following facts and conclusions which correlate directly to this second requirement:

1. At birth, CW was born prematurely at twenty-four (24) weeks and spent the first two (2) weeks of his life in the Neonatal Intensive Care Unit. App.38a.

2. Among other things, CW suffered from substance abuse exposure in utero, including exposure to methamphetamines, benzodiazepines, opiates and marijuana. *Id.*

3. When CW was approximately six (6) years old, he was formally diagnosed by Dr. Mary Paige Powell, Ph.D. with Attention Deficit Hyperactivity Disorder; Other Specified Disruptive Impulse Control and Conduct Disorder; and Developmental Coordination Disorder. *Id.*

4. In February 2021, CW was assessed for Fetal Alcohol Syndrome ("FAS") by Dr. Yasmin Suzanne N. Senturias, M.S., F.A.A.P. and it was determined that he did not meet the full criteria for FAS, but that it was clear he suffered from a neurobehavioral disorder. *Id.*

5. CW was also subsequently diagnosed with autism spectrum disorder. *Id.*

6. In addition to his physical health needs, at around two (2) years old, CW began exhibiting increasingly severe oppositional behavior. CW would hit his family members and others, sometimes impulsively but other times intentionally. *Id.*

7. He exhibited this behavior both in school and at home. However, his behavior at home was usually more severe. *Id.*

8. Despite CW being six (6) years old, CW's educational skills levels resemble those of a 4–5-year-old child. *Id.*

These facts are undisputed. Therefore, as Judge Long properly concluded, this requirement was met.

The next section requires that reasonable,

> but unsuccessful efforts to place the child for adoption with appropriate adoptive parent(s) without providing adoption assistance be made, except when it would not be in the best interest of the child to make this effort.

42 U.S.C. § 673(c)(1)(B). As expressly stated by Judge Long and the applicable federal and state laws, this requirement is overcome by showing the existence of significant emotional ties such that it is not in the child's best interests to place, or attempt to place, the child with another family who may not require adoption assistance. *Id.* Given this exception, Judge Long properly found and concluded that

> Just prior to his adoption, CW had been placed with Petitioners for approximately six (6) months, and they were essentially the only family he had ever known.

App.39a. As such, it would not have been in CW's best interests for CHS to make any efforts to place him with other potential adoptive parents who may not have required adoption assistance. *Id.* The Court of Appeals majority and Respondents erroneously attempt to argue that this element is not met because he <u>was</u> placed with Petitioners without adoption assistance. However, their argument is irrelevant because Petitioners never knew that foster/adoption assistance was

a possibility, so were unable to object and/or alert Respondents that they were unable to adopt without adoption assistance. Consequently, Judge Long properly concluded that this requirement was met both at the time of CW's adoption as well as in 2021.

The final requirement is that an adoption assistance agreement be signed and in effect at the time of the adoption. 45 C.F.R. § 1356.40. However, for all of the reasons described herein, this requirement is overcome by a showing that the applicable state/private nonprofit agency failed to fulfill their affirmative duty to disclose information pertaining to the potential availability of adoption assistance to the adoptive parents. The Forsyth County Superior Court and the Honorable Judge John M. Tyson properly recognized this exception and properly held that this requirement was overcome by the fact that Respondents failed in their affirmative duty to disclose information related to the potential availability of adoption assistance to Petitioners.

Notably at the trial in the Forsyth County Superior Court, Respondents conceded that if CW were to be surrendered back to CHS or FDSS, that he would be eligible to receive foster/adoption assistance. App.35a. Ironically, it was not until their appeal to the North Carolina Court of Appeals that Respondents argued that CW was ineligible for reasons other than a failure to have a signed adoption assistance agreement prior to adoption.

B. Multiple Other Courts Which Have Addressed These Issues Have Imposed a Duty to Disclose to Prevent an Inequitable Result, Resulting in a Potential Split on the Act's Interpretation Which This Court Alone Has Authority to Clarify.

The United States District Court for Rhode Island was the first to interpret the Act and set the stage for further jurisdictions to review similar issues. In *Ferdinand*, the Ferdinands adopted their daughter from Children's Friend and Service, a private nonprofit child placing agency that functions similarly to CHS. *Ferdinand v. Dep't for Children & Their Families*, 768 F. Supp. 401, 402 (1991). At the time of the adoption, the child was an infant, Mrs. Ferdinand was married, and both she and her husband were gainfully employed. *Id.* However, several years later, Mrs. Ferdinand divorced her husband and the child's special needs fully manifested such that she submitted a belated request for adoption assistance. *Id.* Regardless of the fact that the child was adopted from a private nonprofit, the U.S. District Court of Rhode Island ultimately held in favor of Mrs. Ferdinand and stated:

> This Court has no doubt that Congress intended to place the burden on the States to promote the adoption assistance program.

Id. at 404. The Court further held i[t]he clear implication is that the state has an affirmative duty to fully explain all available assistance programs so that potential adoptive parents can make an informed decision. *Id.* Finally, the Court emphasized that

> [p]arents, therefore, should not be allowed to waive adoption assistance for their children

> without full information and knowledge of all possible benefits present and future.

Id. at 405.

In October 1998, the Supreme Court of Vermont found similarly in favor of the child and his adoptive parents due to the state agency's failure to fulfill its duty. *Hogan v. Dep't of Soc. And Rehab. Serv.*, 168 Vt. 615 *; 727 A.2d 1242 **1245 (Vt. 1998). The child in question was placed with the Hogans by a private non-profit adoption agency less than a month after his birth in May 1991. *Id.* at **1243. The child's adoption was finalized in January 1992. More than two (2) years later, the child was diagnosed with having a "pervasive developmental disability" similar to Autism. *Id.* Unlike in *White*, the Vermont Department of Social and Rehabilitative Services ("SRS") had notified the private adoption agency about the availability of federally funded adoption assistance. *Id.* at **1244. However, no one from the private nonprofit made the Hogans aware of the same. *Id.* When the Hogans applied for benefits in December 1994, their application was denied. *Id.* The Hogans appealed that decision, but it was eventually dismissed on the stipulation of the parties in February 1997 to permit the state agency to reconsider its decision in light of the written guidance that had just been issued from the US DHHS. *Id.* Specifically, the federal agency corrected the state agency and advised that the failure of a private nonprofit adoption agency to notify adoptive parents of the existence of the adoption assistance program constituted sufficient grounds for requiring the state agency to conduct a "fair hearing" under 42 U.S.C. § 671(a)(12) and that a special needs' child whose adoptive parents were not informed about the potential availability of

adoption assistance is still eligible to receive benefits as long as the child meets the eligibility requirements. *Id.* The Supreme Court of Vermont reasoned that, because the Act and the aforementioned federal guidance allowed for a post-adoption application of benefits, it logically follows that the Act would also allow a post-adoption diagnosis to substitute for the normal preadoption diagnosis of such a condition. *Id.* The Court stated:

> As a simple matter of logic, mitigating the unfair deprivation of an opportunity to seek benefits is useless unless there is also a mitigation of the similar deprivation of an opportunity to build the requisite medical record.

Id. Therefore, the Court ultimately held that the child was eligible for benefits as of the date the Hogans sought adoption assistance benefits. *Id.*

In *Barczynski*, the child in question began in the custody of the Philadelphia Department of Human Services ("DHS"), but legal custody was subsequently transferred to the child's foster parents, the Barczynskis. *Barczynski v. Dep't of Pub. Welfare*, 727 A.2d 1222 *1223-1224 (Pa. Commw. Ct. 1999). The Pennsylvania Commonwealth Court viewed their state law, which required children to be adopted from a state /county agency or other agency in order to be eligible for adoption assistance, to be contrary to the federal Act. *Id.* at 1226. Consequently, the Commonwealth Court reversed DHS' decision and held in favor of the Barczynskis. *Id.*

However, a couple of years after that in 2001, the Pennsylvania Supreme Court sided with the dissenting

judge in *Barczynski* and held that the Pennsylvania law limiting adoption assistance to children adopted from a state/county agency or other agency, was not preempted by the Act. *C.B. ex rel. RRM v. Com.*, 786 A.2d 176, *183; 567 Pa. 141 (Pa 2001).

In *C.B.*, the child was initially placed in the custody of the state agency. *Id.* at *180. However, CB's legal custody was later granted to his foster parents, who subsequently filed to adopt him. *Id.* The state agency argued that CB's adoption was a "private adoption" and therefore CB was ineligible for adoption assistance under the Act. *Id.* The Court agreed with the state agency that the requirement of agency custody was consistent with the federal Act because the Act suggested, both by its terms and legislative history, that adoption assistance should only be provided to children in agency custody. *Id.* at *184. Although this rationale is expressly disclaimed by the Act, the Court in *C.B.* still held in favor of the adoptive parents because it recognized the injustice that would result should any other decision be rendered.

Id. at *185. In their decision granting adoption assistance to the adoptive parents, the Pennsylvania Supreme Court stated:

> Certainly, we cannot allow the mere designation to cloud our understanding of what actually happened here . . . [CB] was a child of special needs' who, it is undisputed, otherwise qualified for an adoption assistance subsidy.

Id. at *186.

In 2006, West Virginia echoed the sentiments rendered in the other jurisdictions and emphasized the fact that a child need not be the legal or physical

custody of a state/county child-placing agency in order for he/she to be eligible for adoption assistance under the Act and the corresponding state adoption assistance laws. *In Re Adoption of Jamison Nicholas C.*, 219 W. Va. 729 *, 639 S.E.2d 821 **828 (2006). Prior to his adoption and at only two (2) years old, the child was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and depressive disorders. *Id.* at **824. There was no dispute that the applicable state child-placing agency had no discussion whatsoever regarding adoption assistance with his adoptive parents. *Id.* at **825. Although the child in *Jamison* was in the custody of a state child-placing agency for approximately ten (10) days pursuant to an emergency custody order, the child's exclusive care, custody and control was granted to his adoptive parents prior to his adoption. *Id.* at **828. Consequently, the state child-placing agency argued that the child was not in "foster care" at the time of his adoption and therefore could not receive assistance under the Act. *Id.* at **827. However, because the child was still receiving Medicaid at the time of his adoption, the Supreme Court of Appeals of West Virginia found that the child's special needs were clearly known to [the applicable state child-placing agency].

Id. at **828. The Court further stated that the applicable state child-placing agency had an affirmative duty to fully explain all available assistance programs to the potential adoptive parents and that the adoptive parents

> cannot waive adoption assistance without full knowledge and information to assist them in making an informed decision to proceed by private adoption.

Id. at **825. The Court also found that the failure of the applicable state child-placing agency to fully advise the child's adoptive parents of adoption assistance constituted extenuating circumstances, which required the matter to be reopened for a subsequent determination of eligibility. *Id.* at **829.

In November 2006, the Commonwealth Court of Pennsylvania addressed these same issues and joined their fellow states in holding in favor of the child and adoptive parents. *Allegheny Cty Office of Children, Youth & Families v. Dep't of Pub. Welfare*, 912 A.2d 342, 343 (2006). The child in question ("Serina") was born in New Mexico in 1984 and was placed with a state child-placing agency for foster care until she was adopted in 1989 by a Pennsylvania couple. *Id.* When Serina reached ten (10) years old, the adoptive parents surrendered her to a private nonprofit child-placing agency, which provided foster care and adoption services similar to that of CHS. *Id.* at 344. The private nonprofit child-placing agency placed her with foster parents through their agency, and those foster parents eventually adopted her from the private nonprofit child-placing agency. *Id.* The private non-profit child-placing agency initially threatened the adoptive parents that they would lose custody of Serina if they did not sign an agreement stating that she was ineligible for adoption assistance and therefore the adoptive parents signed the same. *Id.* However, the private nonprofit assured the adoptive parents that they would nonetheless assist her with obtaining financial assistance after Serina's adoption. *Id.*

After the adoption, the adoptive parents sent multiple requests for adoption assistance under the Act to their applicable state child-placing agency, but

they were denied. *Id.* at 345. After a subsequent appeal, an administrative law judge found in favor of the adoptive parents and ordered the applicable state child-placing agency to provide adoption assistance, both prospective and retroactive to the date of Serina's adoption. *Id.*

In South Carolina in 2015, an administrative law judge found the South Carolina Department of Social Services erred in denying the adoptive parents' request for adoption assistance even when the adoptive parents lived in a different state and adopted via a private adoption. *Kimmel v. S.C. Dep't of Soc. Servs*, No. 15-ALJ-18-0009-AP, 2015 WL 5793225 at *15 (S.C. Admin. Law. Judge. Div. 2015). Like CW, the child "Mia" tested positive for cocaine at birth in July 2007 and was immediately placed in the South Carolina Department of Social Services' ("SC DSS") care. *Id.* at *1. Mia was eventually placed with relatives who lived in Pennsylvania and upon placement, SC DSS had no further involvement in her care. *Id.* The Kimmels hired a private attorney to assist with the termination of Mia's biological parents' rights in family court and to assist with the private adoption, which occurred in 2009. *Id.* It was undisputed that no discussion of adoption assistance was had between SC DSS nor the applicable child-placement agency in Pennsylvania, and Mia's adoptive parents. *Id.* at *4-*5.

As she grew older, Mia's special needs manifested and she was diagnosed with oppositional defiance disorder, reactive attachment disorder, as well as difficulties with socialization, emotional regulation and pragmatic skills. *Id.* at *3. Mia's adoptive parents submitted a request for adoption assistance in June 2014, which was denied by SC DSS. *Id.* at *6. The

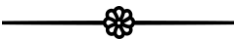
adoptive parents appealed the denial and the Administrative Law Judge ultimately held in favor of Mia and her adoptive parents. *Id.* at *12. Moreover, the Court reviewed the same cases as presented herein and stated:

> [I]n each of these cases the state adoption agency has a duty under Federal law to inform adoptive parents of the availability of adoption assistance.

Id.

Despite the fact that Mia's adoption was private and that the SC DSS had no further involvement in her case after placement, the Court held that adoptive parents could not waive their right to adoption assistance if they were never made aware of its existence as required by law. *Id.*

North Carolina's erroneous decision is completely contrary to the overwhelming precedent described herein and such a decision has the capacity to derail the consistent and correct precedent as established by the above-stated jurisdictions. This case is an ideal vehicle for this Court to correct North Carolina's misinterpretation of the Act as well as to ensure a clear application of the Act to special needs children in North Carolina and across this country. Applied more broadly, North Carolina's decision furthers the erosion of the court system as a mechanism for the redress of harms done by bad actors and completely undermines the fundamental system of fairness and justice which this country was founded upon.



CONCLUSION

Based upon the foregoing arguments and analysis, Elizabeth and James White respectfully request that this Court issue a writ of certiorari to review the judgment of the North Carolina Supreme Court.

Respectfully submitted,

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