No. 19-574

In The Supreme Court of the United States

SHEILA J. POOLE, COMMISSIONER OF THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, IN HER OFFICIAL CAPACITY, PETITIONER

v.

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A State that chooses to accept federal funding authorized by the Adoption Assistance and Child Welfare Act ("Child Welfare Act" or "Act") "shall make foster care maintenance payments on behalf of each child" to "cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance * * * and reasonable travel" to home and to school. 42 U.S.C. §§ 672(a)(1), 675(4)(A). The question presented is:

Whether the court of appeals correctly held, in an interlocutory decision, that foster parents entitled to foster care maintenance payments under Sections 672(a)(1) and 675(4)(A) of the Child Welfare Act can enforce that right through a private suit under 42 U.S.C. § 1983.

CORPORATE DISCLOSURE STATEMENT

Respondent New York State Citizens' Coalition for Children ("Children's Coalition"), now called the Adoptive and Foster Family Coalition of New York, is not publicly held and does not have any corporate parent that is publicly held. No publicly held entity owns ten percent or more of the Children's Coalition.

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INTRODUCTION

New York chooses to receive federal funds under the Child Welfare Act to help defray the cost of supporting children in foster care. As a condition of providing those funds, the statute directs that the State "shall make foster care maintenance payments on behalf of each child" to "cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance * * * and reasonable travel" to home and to school. 42 U.S.C. §§ 672(a)(1), 675(4)(A). Yet New York refuses to do so.

In an interlocutory decision, the Second Circuit took a modest step toward correcting that injustice. Following the unmistakable commands of the statutory text and decades of this Court's jurisprudence, the court of appeals held that the Child Welfare Act creates an unambiguous individual right to foster care maintenance payments enforceable under 42 U.S.C. § 1983. And it remanded to the district court for litigation of the Children's Coalition's claims.

Nothing warrants this Court's intervention now. Little has changed in the two years since the Court denied a petition for a writ of certiorari from a state official raising the same question presented. *D.O. v. Glisson*, 847 F.3d 374 (6th Cir. 2017), cert. denied, 138 S. Ct. 316 (2017). Scant disagreement exists in the lower courts. Although a divided Eighth Circuit reached a different conclusion from the Second Circuit,

the few other circuits that have considered the question presented have agreed with the decision below. Just as that thin division was insufficient in *Glisson*, it is insufficient here.

Petitioner's other alleged conflict has even less support: no overarching disagreement exists in the circuits about how to assess whether a statute creates a right enforceable through 42 U.S.C. § 1983. The Court should decline petitioner's invitation to revisit *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and *Blessing v. Freestone*, 520 U.S. 329 (1997), as part of some grand referendum on private rights of action. Not only is such an exercise unwarranted, this would be an unsuitable vehicle for doing so. This case concerns only a narrow statutory provision with uncommonly clear language demonstrating congressional intent.

The petition should be denied.

STATEMENT

A. Statutory Background

Congress enacted the Adoption Assistance and Child Welfare Act of 1980 in the face of the States' severe mismanagement and underfunding of foster care systems. Designed "to strengthen the program of foster care assistance for needy and dependent children, to improve the child welfare, social services, and aid to families with dependent children programs" (Pub. L. 96-272, 94 Stat. 500 (1980)), the Act establishes a cooperative program that makes federal

funding available to participating States to reimburse a portion of foster care expenses.

The Child Welfare Act requires participating States to cover the cost of specific, enumerated basic necessities for each qualifying child in foster care. For a State to be eligible for payments under the Act, it must have a plan approved by the Secretary of Health and Human Services. 42 U.S.C. § 671(a)(1). That plan must "provide[ ] for foster care maintenance payments in accordance with section 672" of the Act. *Ibid.* Section 672 provides in relevant part that the State "shall make foster care maintenance payments on behalf of each child" meeting federal eligibility requirements. 42 U.S.C. § 672(a)(1). And the Act specifies precisely what those payments must "cover": "the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." *Id.* § 675(4)(A).

The Child Welfare Act does not expressly provide for judicial review, state or federal, of an individual beneficiary's claims. To the extent the statute includes any express enforcement mechanisms at all, it requires States to conduct "periodic review of the * * * amounts paid as foster care maintenance payments." 42 U.S.C. § 671(a)(11). And the State merely must provide "an opportunity for a fair hearing before [a] State agency to any individual whose claim for benefits

available pursuant to this part is denied or is not acted upon with reasonable promptness." *Id.* § 671(a)(12). Nothing in the Act requires States to provide judicial review of such state administrative hearings.

In addition, the U.S. Department of Health and Human Services ("HHS") may withhold funds if it finds a participating State is not in "substantial conformity" with the requirements of the Act. 42 U.S.C. § 1320a-2a. But the statute does not create an avenue for federal agency review of any individual beneficiary's claim.

B. Factual Background

No one can dispute that foster parents take in needy children at enormous personal, financial, and emotional cost. To help defray a fraction of those costs, New York subsidizes foster care through a mix of federal and state funding. N.Y. Soc. Serv. Law § 153-k. Foster parents receive monthly maintenance payments from the local department of social services of the county in which they reside. CA JA A6 (¶ 18). Those payments are reimbursed by the State, which, in turn, receives funds under the Child Welfare Act. *Ibid*. Foster care maintenance payments are limited by maximum monthly rates set by New York's Office of Children and Family Services. *Ibid.*

For decades, monthly maximums set by the State have been grossly inadequate to cover the cost of caring for a child, and many foster parents receive less. New York's Office of Children and Family Services first

established its monthly schedule for subsidizing the costs to care for children in foster care in the 1970s, before Congress enacted the Child Welfare Act. D. Ct. Dkt. No. 48, Plaintiff's Local Rule 56.1 Statement of Material Facts Not In Dispute at 5. In the nearly half-century since—and even after New York became a participating State under the Child Welfare Act—New York has *never* developed any kind of payment-rate methodology. It has refused to deviate from its payment schedule for monthly maintenance rates, making only ad hoc adjustments that fail to account for the real-world costs of essential goods and services. *Id*. at 6.

New York's failure to put any consideration into how it calculates its foster care maintenance payments has been devastating to foster children and their families. By 2007, New York's foster care maintenance payment rates fell between 32% and 43% below the actual cost of providing basic necessities. CA JA A20 (¶ 29). New York now pays less to foster parents to care for a child than a kennel charges to board and feed a dog. CA JA A19 (¶ 29).

That neglect has seriously impaired foster parents' ability to help the children in their care and therefore undermined the children's potential to become functional adults. In New York City, only 35% of students in foster care were on track to graduate high school in 2015. New York City Administration for Children's Services, *Report of the Interagency Foster*

Care Task Force 26 (March 2018).[1] Youth in foster care experienced much higher rates of physical and mental health problems: 50% display symptoms of trauma, 58% display emotional or behavioral difficulties, and 41% experience behavioral problems in school. *Id.* at 31. And 12% of foster children under five years of age suffer from acute or chronic medical conditions. *Id*. at 58. In 2016, 589 children in New York City foster care had acute inpatient psychiatric hospitalizations, with an average length of stay of 17 days. *Id.* at 33 (citing New York City Administration for Children's Services Mental Health Coordination Unit Database Detail Report For Period covering January 1-December 31, 2016). More than a third of those children were hospitalized more than once. *Ibid.* And despite taking on an increased risk of being sued by becoming foster parents, less than 10% of foster parents surveyed by the Children's Coalition received liability insurance from their foster agency, and only 5% purchased additional liability coverage on their own. Adoptive and Foster Family Coalition, Foster Parent Liability Insurance Survey Report (November 29, 2011).[2]

C. Procedural History

Respondent the New York State Citizens' Coalition for Children is a nonprofit organization that supports parents facing the complex challenges of providing foster care, advises them on best practices, and represents

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[1] https://www1.nyc.gov/assets/acs/pdf/testimony/2018/TaskForceReport.pdf.

[2] https://affcny.org/wp-content/uploads/FosterParentInsReport.pdf.

their interests through legislative and administrative advocacy. On behalf of its foster parent members, the Children's Coalition filed this suit under 42 U.S.C. § 1983 against petitioner, the Commissioner of the New York State Office of Children & Family Services. The Children's Coalition sought to enforce its members' federal right to foster care maintenance payments under the Child Welfare Act. In its prayer for relief, the Children's Coalition requested that the State prepare and implement a foster care maintenance payment system that complies with the Child Welfare Act. CA JA A26.

1. The district court's dismissal

The district court dismissed the Children's Coalition's complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(l). It held that the Children's Coalition could not enforce Sections 672(a)(1) and 675(4) of the Child Welfare Act in a private suit brought under 42 U.S.C. § 1983. Pet. App. 108a. The court determined that the Child Welfare Act created no enforceable right to foster care maintenance payments. In particular, the court noted that some of the Act's relevant language fell within a "definitional section" of the statute. Pet. App. 115a. And it stated that Section 672's requirement that "[e]ach state * * * shall make foster care maintenance payments on behalf of each child" is not sufficiently "individually focused" to support a right enforceable under Section 1983. Pet. App. 116a-117a (citation omitted).

2. The Children's Coalition's standing

a. On appeal, petitioner argued for the first time that the Children's Coalition lacked Article III standing. Petitioner did not dispute the standing of the Children's Coalition's members. But she suggested in a footnote that under the Second Circuit's unique Section 1983 standing requirements, the Children's Coalition did "not appear to allege sufficient facts to establish injury to itself," as opposed to individual foster parents. Petitioner's CA2 Br. 22 n.6. Following oral argument, the Second Circuit remanded "for the district court to address the disputed issue of Article III standing in the first instance, and to conduct any further fact-finding that may be required." Pet. App. 99a.

b. On remand, the district court referred the matter to a magistrate judge, who found that the Children's Coalition had standing based on "the 100 hours [it] spent responding to phone calls from foster parents unable to provide for their children under the current minimum basic rate." Pet. App. 89a. The district court adopted the magistrate judge's report and recommendation in full. Pet. App. 76a.

c. The Second Circuit agreed with the district court that the Children's Coalition had standing to bring this suit. The court of appeals noted that, "[i]n a string of opinions, this Court has held that organizations suing under Section 1983 must, without relying on their members' injuries, assert that their own injuries are sufficient to satisfy Article III's standing requirements." Pet. App. 4a-5a. And it held that the Children's Coalition satisfied the court's requirement

because New York's underfunding of maintenance payments had "cost [the Children's Coalition] hundreds of hours in the form of phone calls from aggrieved foster families." Pet. App. 5a.

The Second Circuit also rejected a new standing argument petitioner raised for the first time in her supplemental appellate brief following the remand. The court held that its third-party standing rule, which prohibits "litigants from asserting the rights or legal interests of others," did not bar the claims here. Pet. App. 5a. This case fell within an exception to that rule because "the Coalition enjoys a close relationship with the foster parents it counsels," and because "the manifest desire of their foster parent members for anonymity constitutes a significant disincentive for those parents to sue in their own names." Pet. App. 5a-7a.

3. The Second Circuit's decision finding an enforceable right and remanding for further litigation

a. After addressing standing, the Second Circuit held that the Child Welfare Act's "specific monetary entitlement aimed at assisting foster parents" is enforceable through Section 1983. Pet. App. 9a. Applying this Court's analysis from *Blessing* and *Gonzaga*, the Second Circuit explained that a statute presumptively creates an enforceable right only when three requirements are met. First, the statute must "'unambiguously confer[]' a 'mandatory benefit,' or 'entitlement,' to a discernible group of rights holders" in "rights-creating language." Pet. App. 13a, 21a.

Second, it must do so without being "so vague and amorphous that its enforcement would strain judicial competence." Pet. App. 18a, 22a. And third, the statute must impose "a binding obligation on participating states." Pet. App. 15a. Even then, the Second Circuit cautioned that "resort to Section 1983 is barred when the statute provides 'remedial mechanisms * * * sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a [Section] 1983 cause of action.'" Pet. App. 24a.

After careful analysis, the Second Circuit concluded that the Child Welfare Act's foster care maintenance provisions readily satisfy that exacting test. In clear terms, the statute "imposes a binding obligation on participating states" (Pet. App. 15a), "grants * * * a specific entitlement to an identified class of beneficiaries" (Pet. App. 19a), and is "fit for judicial enforcement" (Pet. App. 22a). Accordingly, the court "conclude[d] that the Act meets the requirements to create a presumption that foster parents have a right to foster care maintenance payments that cover the enumerated expenses that is enforceable through Section 1983." Pet. App. 24a.

Petitioner failed to rebut that presumption. Because "the Act does not provide any other federal avenues for foster parents to vindicate that right," the Second Circuit held that "the right is enforceable through Section 1983." Pet. App. 28a.

b. Judge Livingston dissented. Pet. App. 29a. She stated that the Child Welfare Act's provision that a participating State "shall make foster care

maintenance payments on behalf of each child" is not actually mandatory. Pet. App. 36a-37a. It merely "specifies those state expenditures that are eligible for partial federal reimbursement." *Ibid.* (internal quotation marks omitted).

c. The Second Circuit denied rehearing en banc, with several judges joining Judge Livingston's renewed dissent. Pet. App. 132a. Judge Cabranes wrote separately to comment on the Second Circuit's en banc customs. Pet. App. 145a.

d. The court of appeals vacated the district court's decision and remanded for further litigation of the Children's Coalition's claims. Pet. App. 28a. The district court has scheduled a status conference for January 22, 2020, to set a schedule for how the Children's Coalition's claims will proceed. Oct. 30, 2019 D. Ct. Scheduling Order.

REASONS FOR DENYING THE PETITION

A. The Petition Raises No Conflict That Warrants This Court's Review

1. Just two Terms ago, the Court denied a petition for a writ of certiorari raising the same question presented and asserting the same thin division in the federal courts of appeals. *D.O. v. Glisson*, 847 F.3d 374 (6th Cir. 2017), cert. denied, 138 S. Ct. 316 (2017). In that now-denied petition, a Kentucky state official asked the Court to review a Sixth Circuit decision that reached the same conclusion as the Second Circuit in this case. And like the petition here, the Kentucky petition's only support for its alleged conflict was the

divided Eighth Circuit's decision in *Midwest Foster Care & Adoption Association v. Kincade*, 712 F.3d 1190 (8th Cir. 2013). That was insufficient then to warrant this Court's review; so too now.

Little has changed since the Court denied review in *Glisson*. Only a few federal courts of appeals have addressed the question presented; of those, all but one agree with the decision below. In *Glisson*, the Sixth Circuit faithfully applied each of *Blessing*'s requirements as clarified by *Gonzaga*. 847 F.3d at 377-78. It concluded that the Child Welfare Act unambiguously confers an enforceable right to foster care maintenance payments under Section 1983. *Id.* at 378. First, it held that the foster care maintenance provisions demonstrate an intent to benefit the individual plaintiffs by using rights-creating language—the Act "requires individual payments and focuses on the needs of specific children." *Ibid.* Second, the court determined that the provisions are not "so vague and amorphous that [their] enforcement would strain judicial competence"—they instead set forth an "itemized list of expenses that the state must cover." *Id.* at 377-78. Third, the provisions unambiguously impose a binding obligation on the States—requiring that a participating State "shall make" foster care maintenance payments to each child. *Id.* at 378. And the Sixth Circuit concluded that the Child Welfare Act's "weak enforcement mechanisms fall short of foreclosing access to § 1983 remedies." *Id.* at 380.

The Ninth Circuit reached the same conclusion in *California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 977 (2010). Like the Sixth Circuit in

Glisson, the Ninth Circuit carefully applied *Blessing* and *Gonzaga* and held that the foster care maintenance provisions of the Child Welfare Act confer an enforceable individual right. And the overwhelming majority of federal district courts to address the issue have reached the same conclusion.[3] The Second Circuit's decision here merely reflects the consensus view of lower federal courts.

Only the Eighth Circuit's divided *Kincade* decision remains an outlier, and it would be premature to address the question presented based on any shallow conflict created by that decision. *Kincade* addressed only one of *Blessing*'s three requirements—concluding that Section 672(a)(1)'s mandate that each participating State's plan "shall make foster care maintenance payments on behalf of each child" (42 U.S.C. § 672(a)(1)) has an aggregate rather than an individualized focus. *Kincade*, 712 F.3d at 1198-99. And having stopped there, the court never suggested that the expenses detailed in Section 675(4)(A) were beyond judicial competence, or that Section 672(a)(1) imposes no binding obligation on the States. This Court thus would lack

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[3] *See Lamaster v. Indiana Dep't of Child Servs.*, No. 4:18-cv-00029-RLY-DML, 2019 WL 1282043, at *1 (S.D. Ind. Mar. 20, 2019); *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 172 (D. Mass. 2011); *Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 387 (D.R.I. 2011); *C.H. v. Payne*, 683 F. Supp. 2d 865, 877 (S.D. Ind. 2010); *Missouri Child Care Ass'n v. Martin*, 241 F. Supp. 2d 1032, 1042 (W.D. Mo. 2003); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 302-03 (N.D. Ga. 2003). *But see D.G. ex rel. Stricklin v. Henry*, 594 F. Supp. 2d 1273, 1280 (N.D. Okla. 2009) (holding no right of action); *Olivia Y. ex rel. Johnson v. Barbour*, 351 F. Supp. 2d 543, 558-59 (S.D. Miss. 2004) (same).

the benefit of any contrary appellate court holding based on the analysis of those other factors. Even were this Court inclined to review this question at some point, it should allow further percolation.

2. Searching in vain for some way to distinguish her petition from the one denied in *Glisson*, petitioner argues that the lower federal courts are divided "more generally about" how to address private rights of action under Section 1983. Pet. 19. She contends that several courts of appeals, including the Second, Sixth, and Ninth Circuits, "find the requisite rights-creating language so long as a federal statute contains any language referring to individual beneficiaries." Pet. 20. That conflicts, she says, with how "other courts of appeals have recognized 'the notable change in [this] Court's approach to recognizing implied causes of action.'" Pet. 21.

But nowhere do the Second, Sixth, or Ninth Circuits use such a lax standard to recognize federal rights enforceable under Section 1983. Petitioner quotes *no* language from those courts that might support the standard she attributes to them. Nor could she: the Second Circuit followed this Court's strict requirement that "a statute must 'manifest' Congress's '*unambiguous* intent to confer individual rights' in order to support a Section 1983 action." Pet. App. 17a (emphasis added). The Ninth Circuit, too, has recognized that "Congress's intent to benefit the plaintiff must be '*unambiguous*.'" *Wagner*, 624 F.3d at 978-79 (emphasis added). And the Sixth Circuit has required "the kind of individually focused terminology that *unambiguously* confers an individual entitlement

under the law." *Glisson*, 847 F.3d at 377 (emphasis added). None has even hinted that the mere mention of an individual beneficiary suffices.

Unable to support her alleged "general[]" conflict (Pet. 19) with decisions addressing the Child Welfare Act, petitioner pivots to other rulings involving completely unrelated Spending Clause legislation. Pet. 20-21 (citing cases addressing 42 U.S.C. §§ 1396a(a)(13)(A), (a)(23), (bb)(1)). From those decisions she stitches together a purported division, because some courts addressing some statutes have recognized an enforceable right while different courts addressing different statutes have not. But it should be no surprise that varying statutory provisions produce varying results. What matters is how courts addressing the question presented here have applied this Court's precedent. On that issue, petitioner fails to show any meaningful disagreement.

B. Petitioner Overstates The Significance Of The Second Circuit's Decision

Even were this Court inclined to consider at some point the issue of rights enforceable under Section 1983 "more generally" (Pet. 19), this would be an unsuitable vehicle to do so. This case involves one narrow provision of the Child Welfare Act with exceptionally clear language. Contrary to petitioner's sweeping contentions, this case's disposition will not affect the broader landscape of Section 1983 private rights of action. Nor does it "upend th[e] historic relationship

between the States and the federal government." *Contra* Pet. 23.

The Child Welfare Act established a cooperative program in which New York chooses to participate. If any State finds the plain terms of the statute intolerable, nothing requires it to accept federal funds. And the conditions of the Act at issue here are modest. Requiring participating States to cover the cost of food, clothing, and shelter for children in foster care would not "supplant the States' policy-laden judgments about foster care." Pet. 24. Indeed, the record demonstrates hardly any exercise of policy judgment, as New York never developed a rate methodology and has made only sporadic rate adjustments since the 1970s. *See* D. Ct. Dkt. No. 48, Plaintiff's Local Rule 56.1 Statement of Material Facts Not In Dispute at 5-6.

Nor do the other cases involving the foster care maintenance provisions evince any evidence of federal "intrusion on state prerogatives." *Contra* Pet. 25. Even though many district court decisions—most of which were never appealed by the States, *see supra* n.3—have recognized that these provisions may be enforced under Section 1983, petitioner points only to the *Wagner* case as evidence of supposed intrusion. But the *Wagner* district court did no such thing. To the contrary, it held that the Act "did not vest with the courts the role of collecting data regarding foster care costs and setting appropriate foster care rates in the first instance." *California State Foster Parent Ass'n v. Wagner*, No. C 07-05086 WHA, 2010 WL 5209388, at *2 (N.D. Cal. Dec. 16, 2010) (emphasis omitted). The court

made clear that its "order does not conclude that the state must adopt any particular method for analyzing the statutory costs or for setting rates." *Id.* at *3 (emphasis omitted). Instead, the court merely held that California could not set its rates "without consideration of the Act's mandatory cost factors." *Id.* at *2 (emphasis omitted). New York cannot continue to do so either.

Petitioner omits significant context when complaining (Pet. 25) about the pace at which California had to implement its rates. The district court entered judgment against California in late 2008. *California State Foster Parent Ass'n v. Wagner*, No. C 07-05086 WHA, 2008 WL 4679857, at *9 (N.D. Cal. Oct. 21, 2008). Only after two years of delay by California did the district court subsequently impose the modest requirement that the State accelerate the pace of its study of rate alternatives. *Wagner*, 2010 WL 5209388, at *4. Then after more months had passed, the court merely ordered California to implement the payment rates that the State already had selected on its own. *California State Foster Parent Ass'n v. Lightbourne*, No. C 07-05086 WHA, 2011 WL 2118564, at *3 (N.D. Cal. May 27, 2011).

Amici complain that federal courts would "make *individualized determinations* of the payments that are due *per foster child*." States' Amicus Br. 6 (emphasis in original). But that argument misunderstands the Children's Coalition's claims—New York has *no* methodology to calculate adequate reimbursements for foster parents. Nothing about this suit requests

individualized determinations. New York simply must ensure that it has a plan that "shall make foster care maintenance payments *on behalf of each child*" (42 U.S.C. § 672(a)(1) (emphasis added)), and that those payments "cover the cost of (and the cost of providing)" the expenses listed in Section 675(4)(A).

Nor does the modest relief the Children's Coalition requests require federal courts to engage in ratemaking. Instead, like the plaintiff in *Wagner*, the Children's Coalition merely requests that New York fulfill its legal obligation under the Child Welfare Act to consider the cost of basic necessities listed in the statute when calculating maintenance payment rates. Such a task falls well within judicial competence. District courts engage in that kind of factfinding every day, and they are equally equipped to resolve the claims of foster parents here. At the very least, as discussed below (*infra* Part D), this Court should await final judgment to allow the district court a chance to do so.

C. The Second Circuit Correctly Allowed This Litigation To Proceed

The Second Circuit correctly held that the Child Welfare Act "creates a specific entitlement for foster parents to receive foster care maintenance payments, and that this entitlement is enforceable through a Section 1983 action." Pet. App. 3a. That conclusion follows from the unambiguous statutory text and a faithful application of this Court's three-part test from *Blessing* as clarified by *Gonzaga*.

1. The Child Welfare Act establishes an unmistakable individual right to foster care maintenance payments

To satisfy *Blessing*'s first requirement, "Congress must have intended the provision in question [to] benefit the plaintiff." *Blessing*, 520 U.S. at 340. As the Court clarified in *Gonzaga*, it is not enough to show that the "plaintiff falls within the general zone of interest that the statute is intended to protect." 536 U.S. at 283. The statute must use "rights-creating language" demonstrating a statutory focus on the needs of the individual rather than "an 'aggregate' focus" more generally on state services. *Id.* at 287-88 (quoting *Blessing*, 520 U.S. at 343).

The foster care maintenance provisions at issue here easily clear the first *Blessing* requirement. Those provisions use individually focused rights-creating language. Section 672(a)(1) provides that participating States "shall make foster care maintenance payments on behalf of *each child*." 42 U.S.C. § 672(a)(1) (emphasis added). As the Second Circuit explained, the "use of the term 'each child' indicates an individual focus." Pet. App. 20a. "By referencing 'each child'—rather than, for example, stating the state must establish a maintenance payment program to meet the needs of foster children—Congress expressed its concern with 'the needs of * * * particular person[s],' not 'aggregate services.'" *Ibid*.

Section 672(a)(1)'s individual focus is confirmed by Section 675(4)(A). That provision defines "foster care

maintenance payments" to include the basic life essentials for "each child"—food, clothing, shelter. 42 U.S.C. § 675(4)(A); Pet. App. 20a. And it repeatedly refers to those life essentials as they relate to the individual child, not the State's foster care system more generally—such as "*a child's* personal incidentals, liability insurance with respect to *a child*, reasonable travel to *the child's* home for visitation, and reasonable travel for *the child* to remain in the school in which *the child* is enrolled at the time of placement." 42 U.S.C. § 675(4)(A) (emphases added).

In addition, the foster care maintenance provisions—in specifying *who* is entitled to the payments on behalf of "each child"—reinforces the individual focus of the Act. As the Second Circuit explained, the Act designates individual foster parents as one of the intended recipients of the payments. Pet. App. 20a. Section 672(a) states that payments are made on behalf of "each child" in foster care and Subsection (b) designates foster parents as one of three proper recipients of those payments—specifically saying that the payments are "made to such individual" foster parents. 42 U.S.C. § 672(b)(1).

Each of these provisions focuses on the individual, and, taken together, they demonstrate Congress's unmistakable intent: to ensure provision of each foster child's essential needs, the Act vests the right to defined payments in the individual foster care parents who do the providing. Pet. App. 20a-21a.

None of petitioner's arguments overcomes the unambiguous statutory text. She contends that there can be no individual right if a statute "operates as a reimbursement scheme under which the federal government covers a portion of certain expenditures by the States." Pet. 28. And she argues that, no matter how individually focused the statutory text, it nevertheless should be read to "focus on the states" when it is part of a federal reimbursement scheme. *Ibid*. (emphasis omitted). But if that were so, no right created by Spending Clause legislation could be enforced under Section 1983. Yet this Court has recognized such rights. *E.g.*, *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

And Congress expressly has rejected petitioner's suggested approach, in a provision known as the "*Suter* Fix." 42 U.S.C. § 1320a-2. Congress enacted that provision in response to a decision by this Court holding that a different provision of the Child Welfare Act created no right enforceable under Section 1983. *Suter v. Artist M.*, 503 U.S. 347 (1992). The *Suter* Court held the provision at issue there unenforceable in part because the provision "only goes so far as to ensure that the State have a plan approved by the Secretary." *Suter*, 503 U.S. at 358. While Congress did not overturn the result of *Suter*, it enacted legislation specifically to reject that rationale. H.R. Rep. No. 103-761, at 924 (1994) (Conf. Rep.). The *Suter* Fix states that "[i]n an action brought to enforce a provision of this chapter,

such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-2. As the Second Circuit correctly recognized, "[i]t would have been pointless for Congress to do this if it did not contemplate that some provisions of the Act would support a private enforcement action." Pet. App. 25a n.7.

Finally, petitioner attempts to ignore the statutory text altogether by relying instead on a patchwork of informal HHS guidance. Pet. 28-29. Yet there is no need to resort to any agency guidance; the statutory text is unambiguous and courts "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

2. Calculating the cost of basic necessities such as food and clothing is well within the competence of federal courts

The foster care maintenance provisions also satisfy *Blessing*'s second requirement—that the right created must not be "so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41. Far from being "vague and amorphous," the Child Welfare Act states precisely what must be covered. Section 675(4)(A) defines foster care maintenance payments as

> the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals,

> liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.

42 U.S.C. § 675(4)(A).

Petitioner does not—and cannot—argue that courts lack competence to calculate the costs of food, clothing, or other necessities. She instead argues private enforcement of the Child Welfare Act would require courts to make policy-laden "ratemaking" decisions to determine "the adequacy of foster care maintenance payments." Pet. 30-31. Not so: States maintain ample policy choices in making foster care maintenance payments—as a matter of state policy, they can decide to cover more than the bare necessities Congress has mandated. If they choose to accept federal funds, however, they cannot cover less. And by specifying a set list of goods and services that the State must cover, Congress avoided any deep judicial dive into "the adequacy of foster care maintenance payments." *Contra* Pet. 30-31.

If anything, the foster care maintenance provisions are more concrete and specific than other statutory provisions this Court has deemed enforceable. In *Wilder*, for example, the Court held enforceable under Section 1983 a Medicaid provision requiring States to set "reasonable and adequate" rates for reimbursing health care providers. Even though the Court noted that the law "gives the States substantial discretion in choosing among reasonable methods of calculating

rates," that discretion "does not render the [provision] unenforceable by a court." *Wilder*, 496 U.S. at 519-20. Courts still can determine whether rates fall outside that permissible discretion. *Ibid.*; *see Wright*, 479 U.S. at 432 (holding that a law providing for a "reasonable" allowance for utilities under the Housing Act was not "beyond the competence of the judiciary to enforce"). Here, by contrast, the terms of the federal statute expressly limit petitioner's discretion—she must cover the basic necessities listed in Section 675(4)(A).

3. The Child Welfare Act imposes a binding obligation on participating States

Petitioner hardly contests *Blessing*'s third requirement—that the "statute must unambiguously impose a binding obligation on the States" in "mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341. This differs from her approach below, where she argued that the statutory command that the State "shall make" the payments is merely "permissive and not mandatory." Pet. App. 15a. The Second Circuit rightly rejected that argument, as such a construction "is belied by the Act's text" which "uses clearly mandatory language" and explains its requirements "with particularity and in absolute terms." *Ibid*. Section 672(a)(1) provides that "[e]ach State with a plan approved under this part *shall* make foster care maintenance payments on behalf of each child who" meets federal eligibility requirements. And Section 675(4)(A) specifies what those payments "*shall* include." The use of the word "shall" imposes a binding obligation on participating States. *Blessing*, 520 U.S. at 341.

"Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' * * * normally creates an obligation impervious to judicial discretion.").[4]

4. Nothing in the Act forecloses private enforcement

Any statute providing a concrete individual right creates a presumption of enforceability under Section 1983. *Gonzaga*, 536 U.S. at 284 n.4. To rebut that presumption, a State must prove that Congress foreclosed Section 1983 remedies in express terms "or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Blessing*, 520 U.S. at 341. The Second Circuit correctly found that petitioner failed to meet that burden.

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[4] In the petition's "Statutory and Regulatory Background," petitioner suggests that the word "eligibility" in Section 672(a)(1)'s heading means the payments are ones that *may* be reimbursed rather than ones that are required. Pet. 7. The plain language of the Act refutes that argument. Section 672(a)(1) indicates which children are eligible to receive foster care maintenance payments, not which payments are eligible for reimbursement. Pet. App. 15a-16a. And nothing in that statutory text indicates that the listed essential goods and services are just those eligible to be reimbursed. Once again, Section 672 provides that the State "shall make foster care maintenance payments on behalf of each child." 42 U.S.C. § 672(a)(1).

For starters, petitioner identifies no express provision of the Act prohibiting private enforcement of the foster care maintenance provisions. In fact, the opposite is true: the *Suter* Fix expressly contemplated that some portions of the Child Welfare Act would be enforceable under Section 1983. 42 U.S.C. § 1320a-2; *see supra* p. 21-22.

Petitioner's arguments that Congress implicitly foreclosed private enforcement fare no better. She argues that the Act's "review" mechanisms do so, but the only federal review mechanism she identifies is HHS's "substantial conformity" review of state plans. Pet. 31. Precedent precludes that argument: the Court in *Blessing* expressly rejected the argument that "substantial compliance" review can displace a Section 1983 action. *Blessing*, 520 U.S. at 348. And if HHS's "substantial conformity" review were enough to defeat private enforcement of the Child Welfare Act, Congress's enactment of the *Suter* Fix would have been a nullity, as it addressed provisions subject to such review. 42 U.S.C. § 1320a-2 (addressing the provisions "in a section of this chapter requiring a State plan or specifying the required contents of a State plan"). This Court generally rejects interpretations that would render statutory language "meaningless." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018).

Nor does *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), hold that a federal agency's "substantial compliance" review forecloses the enforcement of rights under Section 1983. *Contra* Pet. 31. *Armstrong* involved no Section 1983 claim; it involved

an equitable cause of action under the Supremacy Clause. And the Court's holding turned on the "judicially unadministrable nature" of the statute, not the existence of an agency enforcement mechanism "by itself." *Armstrong*, 575 U.S. at 328 (emphasis omitted). Unlike the specific goods and services that must be reimbursed under the foster care maintenance provisions here, the Medicaid Act provision at issue in *Armstrong* broadly requires States to "provide for payments that are 'consistent with efficiency, economy, and quality of care.'" *Ibid.*

Petitioner wrongly suggests that the availability of "*state* administrative" review of maintenance payments bars private enforcement under Section 1983. *Contra* Pet. 31-32 (emphasis added). Yet again, this Court has held otherwise. In *Wright*, the Court held that "the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983." 479 U.S. at 427-28. That is so because a remedial scheme displaces Section 1983 only where it "culminate[s] in a right to judicial review" in federal court. *Wilder*, 496 U.S. at 521 (citing *Smith v. Robinson*, 468 U.S. 992, 1010-11 (1984); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981)).

Even were state judicial review of a state administrative proceeding enough, Congress would have had to require such judicial review for it to foreclose private enforcement under Section 1983. Nothing in the Child Welfare Act does so. *Contra* Pet. 32. Section 671(a)(12) requires only that States "grant[] an opportunity for a fair hearing before the State agency to any individual

whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness." Neither that provision nor any other in the Act mentions state judicial review of maintenance payments. New York's decision—on its own accord—to open its courts for foster parents in some circumstances does not mean *Congress* intended to foreclose Section 1983 remedies. And this Court has never so held.

D. Any Review Should Await Final Judgment

The interlocutory posture of this case provides another reason for the Court to deny review. This Court generally denies interlocutory review. *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (referring to "[the Court's] normal practice of denying interlocutory review"). The lack of a final judgment below is "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Awaiting final judgment here would be especially prudent given petitioner's speculation (Pet. 30-31) that the calculation of the essential goods and services that make up the foster care maintenance payments

"would strain judicial competence." *Blessing*, 520 U.S. at 340-41. Allowing this case to proceed to final judgment on the Children's Coalition's claims would test that speculation, and it would provide the Court with a fuller and more concrete record to decide whether review is warranted.

Nor would denying the current petition prejudice a petition following final judgment. *United States v. Virginia*, 516 U.S. 910 (1995) (granting certiorari following previous denial in *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993)). Petitioner identifies no concrete reason this Court should grant interlocutory review. At most, she claims some unspecified "disruption to New York's sovereign interest in supervising its foster care system will occur on remand." Pet. 33. But suits to compel state officials to comply with federal statutes are commonplace. *See*, *e.g.*, *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019); *Edelman v. Jordan*, 415 U.S. 651 (1974). Petitioner's speculation cannot overcome the Court's wellfounded reluctance to review a case in an interlocutory posture.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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