DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

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

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

"[T]he National Government, anxious though it may be to vindicate and protect federal rights . . . , always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). The majority's decision today violates this principle, upending the relationship between the federal government and state foster care systems while ushering dozens of federal judges in this Circuit into the delicate and sensitive world of local child-welfare policymaking. I see nothing in the CWA indicating that Congress intended such a result—let alone that it *unambiguously* did so. I therefore respectfully dissent.

I

A

In 1980, Congress enacted the CWA, also known as Title IV-E of the Social Security Act, to assist states in providing foster care in appropriate circumstances and for appropriate periods by offering "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Soc. & Rehab. Servs. v. U.S. Dep't of Health & Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986). Passed pursuant to Congress's Spending Clause power, *see Suter v.*

Artist M., 503 U.S. 347, 355–56 (1992), the CWA establishes a partial reimbursement mechanism for *some* of the expenses that states incur as to *some* of the children in their foster care and adoption-services programs. But these specified expenses, incurred within the CWA's statutory constraints, are eligible for partial reimbursement only if a state has chosen to participate in the federal program, enacted a plan of operation for its foster care system, and received approval for that plan from the Secretary of Health and Human Services ("HHS"). 42 U.S.C. § 671(a).

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

[1] In other words, the statute provides for partial federal reimbursement of state support payments for only a percentage of the foster children in a state's foster care system. This

1190, 1194 (8th Cir. 2013) (discussing 42 U.S.C. § 672(a)(1)). Section 675 of the Act, entitled "Definitions," defines "foster care maintenance payments" as:

> payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

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

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

- "specify the timetable for conformity reviews of State programs";

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percentage of eligible children has declined over time, according to Defendant-Appellee New York, because "Congress has not raised financial eligibility standards since 1996." Br. Def-Appellee at 25.

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

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

The second review mechanism is more particular to the foster care maintenance payments at issue here. The CWA requires states both to periodically review these payments "to assure their continuing appropriateness" and to provide an opportunity for caregivers whose claims for payments have been

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

denied to receive "a fair hearing before the [relevant] State agency." *Id.* §§ 671(a)(11), (a)(12). In New York, the state agency's decision is thereafter subject to further review through the state's robust procedures for review of administrative action.

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

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

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

B

Only with this background in mind does the full import of the majority's decision become clear. The majority first decides, in effect, that New York may well have been operating in rank violation of the CWA for over 35 years. (Inexplicably, no one seems to have noticed until now.) According to the majority, the partial federal reimbursement scheme enshrined in the CWA imposes a minimum foster care *spending obligation* on recipient states, which must cover the cost of a litany of specific items dictated by the federal government. This supposed spending obligation arises (again, according to the majority) because the Act employs "mandatory language" in § 672(a), which provides that participating states "shall make foster care maintenance payments," and then defines "in absolute terms" in § 675(4)(A) the expenses that constitute these mandatory "payments."[3] Maj. Op. at 18. New York argues, to the contrary, that § 672(a)

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

> payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

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

Respectfully, I disagree. I join the Eighth Circuit in concluding that §§ 672(a) and 675(4)(A) "speak to the states as regulated participants in the CWA and enumerate limitations on when the states' expenditures will be matched with federal dollars." *Midwest Foster Care*, 712 F.3d at 1197. So construed, § 675(4)(A) does not entitle foster parents and eligible institutions to a certain monetary sum; instead, it specifies those state expenditures that are "eligible for partial federal reimbursement."[4] *Id.*; *see also* Emilie Stoltzfus, Cong. Research Serv., R42792, *Child*

[4] As highlighted below, my interpretation of the CWA, unlike the majority's, is consistent with that of HHS (which has not appeared in this litigation). To take one example, in 2008, Congress amended § 675(4)(A) to broaden the definition of "foster care maintenance payments" to include "payments to cover the cost of (and the cost of providing) . . . reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." But HHS did not interpret this amendment as *requiring* states (as the majority would have it) to pay for such travel: "As with any cost enumerated in the definition of foster care maintenance payments in [§ 675(4)]," it said, "the [state] agency

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

The majority reaches its contrary result only by reading both §§ 672(a) and 675(4)(A) selectively, rather than in light of the CWA as a whole. *Cf. Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014) (reiterating that it is "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))). I agree with the majority that states receiving partial reimbursement pursuant to the CWA must make foster care maintenance payments—without which there would be nothing to reimburse. But our agreement ends there. In my view, it is not reasonable to interpret § 675(4)(A) to impose some minimum spending obligation for each enumerated item on all fifty state foster care systems—much less to locate

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may decide which of the costs to include in the child's foster care maintenance payment." U.S. Dep't of Health & Human Servs., Program Instruction No. ACYF-CB-PI-10-11 at 20, http://perma.cc/9LX9-C76D (emphasis added).

this vast new spending obligation in the "Definitions" section of the CWA.[5] As the Supreme Court reminded us in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes," *id.* at 468 (citation omitted); *see also Midwest Foster Care*, 712 F.3d at 1197 ("Finding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent."). So too here.

The majority argues that § 675(4)(A) must specify the precise costs that states are required to pay because, in its view, § 672(a)(1), entitled "Eligibility," provides that participating states "shall make foster care maintenance payments" and specifies "which *foster children* are eligible to have maintenance payments made on their behalf." Maj. Op. at 17–18. But this is wholly consistent with the view that § 672(a)(1) sets out conditions for federal reimbursement—not a spending mandate. It is unsurprising that a statute providing for partial federal reimbursement of a portion of the costs associated with taking care of *some* foster

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

children (and subject to the state complying with conditions for appropriate placement) would have a section devoted to delineating the category of children whose costs are eligible for reimbursement, and under what conditions. Indeed, the CWA is replete with provisions establishing such eligibility criteria. It is notably lacking, however, *any* provisions that clearly and cleanly mandate a spending minimum that participating states must pay for the items enumerated in § 675(4)(A).

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

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

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

limit, that the CWA commands states to make "payments to cover the cost of" the items listed in § 675(4)(A).

The majority studiously avoids going quite that far. But it does so only by ducking *any* real specification of what the CWA now requires. Thus, the CWA, it says, "give[s] states some discretion as to how to calculate costs and to distribute payments" and courts "may well defer to reasonable exercises of that discretion." Maj. Op. at 25. Yet § 674(A)(4) does not itself contain such qualifications, making it difficult to discern where the majority got them. *Cf. Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not—we cannot—add provisions to a federal statute.").

Ultimately, the majority's rejiggering of the CWA results in a curious bargain for New York to have struck—a bargain in which New York supposedly relinquished to federal courts its longstanding control over discretionary judgments about payment rates for foster care providers in exchange for *partial* reimbursement of *some* expenses incurred in the care of a declining percentage of foster care children.[6] The majority characterizes this trade-off as part of a "reasonable bargain" that Congress struck with the states, Maj. Op. at 19, but the

[6] See *supra* note 1.

states themselves do not appear to agree with that characterization. Fourteen of them have submitted an amicus brief in support of New York's position (and thus against the majority's view). *See* Br. of Amici Curiae States. If these states struck such a bargain, they did so unwittingly. *See Pennhurst,* 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the "contract.").

It is perhaps for all the above reasons that the agency tasked with implementing the Act, HHS, has not interpreted §§ 672(a)(1) and 675(4)(A) as imposing a minimum spending mandate on the states for the enumerated items in § 675(4)(A). The definition of "foster care maintenance payments" in HHS regulations promulgated under the CWA tracks § 675(4)(A)'s definition, but the regulation continues: "[l]ocal travel associated with providing the items listed above is *also an allowable expense*."[7] 45 C.F.R. § 1355.20 (emphasis added). This

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

language again suggests that § 675(4)(A) simply lists items for which federal reimbursement remains available, not items for which the state is obligated to fully compensate providers. The majority brushes aside HHS's pronouncements, both formal and informal, *see* Maj. Op. at 19 n.2., and I see no need to wade into the various contours of deference to agency interpretations here. Suffice it to say, however, that at the very least, HHS's interpretations of the CWA, embodied both in regulations promulgated through the notice and comment process and in informal guidance, "carr[y] some persuasive force" and therefore "lend[] further support" to New York's position. *Ret. Bd. of the Policemen's Annuity & Benefit Fund v. Bank of N.Y. Mellon*, 775 F.3d 154, 170 (2d Cir. 2014).

II

But there's a bigger problem with the majority's decision. For even if I'm wrong about the proper interpretation of §§ 672(a)(1) and 675(4)(A)—even if § 672(a)(1) does require states to make payments covering each of the categories of costs enumerated in § 675(4)(A) on behalf of eligible foster children—this requirement would, at most, implicate the federal government's reimbursement

11, at 20 (July 9, 2010), http://perma.cc/9LX9-c76D ("As with any cost enumerated in the definition of foster care maintenance payments in [§ 675(4)], the title IV-E agency may decide which of the enumerated costs to include in a child's foster care maintenance payment.").

obligations under the Act. The majority concludes, to the contrary, that a subset of New York caregivers have a right, *enforceable under 42 U.S.C. § 1983*, to foster care payments that "cover the cost of (and the cost of providing)" the expenses outlined in § 675(4)(A). This startling conclusion (which has the effect of entitling *some* of the caregivers in a state's foster care system to sue in federal court) is squarely precluded by Supreme Court precedent. I again respectfully disagree with the majority's analysis.

A

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

The Court has grown increasingly wary of recognizing new private rights of the sort at issue here, enforceable under § 1983.[8] As the majority well knows, this is particularly true with respect to "legislation enacted pursuant to the spending power," where "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the state." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 U.S. at 28). Clarity as to the existence of a *right* enforceable in a § 1983 action is *especially* important in this context because the right of action itself is a condition on a state's receipt of federal funds, and is thus a significant term in the "contract" to which the state must knowingly and voluntarily agree. *See Suter*, 503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17).

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[8] The Supreme Court's reticence in the § 1983 context is consistent with the entire swath of its implied rights jurisprudence. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (describing "the notable change in the Court's approach to recognizing implied causes of action" over the past two decades); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (repudiating the "*ancien regime*" practice of creating implied causes of action to effectuate a statute's broader purposes); *Gonzaga*, 536 U.S. at 285 (discussing the Court's implied rights and implied cause of action jurisprudence together and noting that "[a] court's role in discerning whether personal rights exist in the § 1983 context should . . . not differ from its role in discerning whether personal rights exist in the implied right of action context"); *see also* Richard H. Fallon et al., Hart & Wechsler's The Federal Courts and the Federal System 1010 (7th ed. 2015) (observing that the Court's "general tenor . . . has reflected skepticism that Congress intends federal statutes to create 'rights' when it fails to provide statutory remedies").

The Supreme Court has held that Spending Clause legislation created an individually enforceable right under § 1983 in only three cases. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987); *Maine v. Thiboutot*, 448 U.S. 1 (1980). The majority cites these cases repeatedly, but glosses over the nearly three decades of case law following *Wilder*, the most recent of the trio, during which time the Supreme Court has never again recognized a private right enforceable under § 1983 in Spending Clause legislation. This trend has not been accidental. As the Court clarified in 2015, "our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 n.* (2015) (citation omitted). The majority criticizes citation to *Armstrong* as "glom[ing] on to one sentence of dicta," but the Court's migration away from recognizing § 1983 rights is both pervasive and undeniable. Indeed, this Court has already conceded as much, *see, e.g.*, *Kapps v. Wing*, 404 F.3d 105, 127 (2d Cir. 2005) (Calabresi, *J.*) (recognizing that "the Court has appeared to be increasingly reluctant to find § 1983–enforceable rights in statutes which . . . set forth their requirements in the context of delineating obligations that accompany participation in federal spending clause programs").

In outlining the Supreme Court's jurisprudence in this area, then, I am not predicting the future but instead faithfully following existing precedent. The Court has *held* that unless Congress "speaks with a clear voice and manifests an unambiguous intent to confer individual rights, federal funding provisions provide *no basis for private enforcement* by § 1983." *Gonzaga*, 458 U.S. at 280 (emphasis added) (internal quotation marks omitted). Given this existing and demanding standard for recognizing a privately enforceable right, the Plaintiff-Appellant took on a challenging task indeed in attempting to demonstrate that the CWA confers on certain New York foster child caregivers the right to bring suit in federal court when they believe they have not been adequately compensated for the items specified in § 675(4)(A).[9] I cannot agree with the majority that the Plaintiff-Appellant has come even close to meeting this challenge.

B

The majority structures its analysis around the three *Blessing* factors.[10] At the start, however, I would note that the Supreme Court's more recent

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

[10] Those three factors are: (1) whether "Congress . . . intended that the provision in question benefit the plaintiff"; (2) whether "the right assertedly protected by the statute is . . . so 'vague and amorphous' that its enforcement would strain judicial competence";

jurisprudence calls into question the vitality of the *Blessing* test. In *Gonzaga*, the Court stated that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983. *Blessing*, for example, set forth three 'factors' to guide judicial inquiry into whether or not a statute confers a right . . . . We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." 536 U.S. at 260; *see also id.* at 291 (Breyer, *J.*, concurring in the judgment) ("[S]tatute books are too many, the laws too diverse, and their purposes too complex, for any single formula to offer more than general guidance."). Again, contrary to the majority's suggestion, I do not canvas *current* Supreme Court precedent to "read the tea leaves to predict" *future* Supreme Court decisions. Maj. Op. at 16–17. In this Circuit we use the *Blessing* factors to "guide" our analysis but, in recognition of the Supreme Court's existing guidance, we

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and (3) whether the statute "unambiguously impose[s] a binding obligation on the States"—*i.e.*, whether "the provision giving rise to the asserted right [is] couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340–41; *see also Gonzaga*, 536 U.S. at 288–89. If a plaintiff meets this test, thus demonstrating "that [the] federal statute creates an individual right," this creates "a rebuttal presumption that the right is enforceable under § 1983," which the defendant may rebut by showing that Congress "creat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341.

already decline to apply these factors mechanistically, "find[ing] a federal right based on [their] rigid or superficial application . . . where other considerations show that Congress did not intend to create federal rights actionable under § 1983." *Torraco v. Port Auth. of New York & New Jersey*, 615 F.3d 129, 136 (2d Cir. 2010) (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 322 (2d Cir. 2005)).

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

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

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

I focus principally here on the second *Blessing* factor—that is, whether the asserted right is so deeply "undefined" that its enforcement would "strain judicial

competence." *Blessing*, 520 U.S. at 345 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994)). In fact, conscientious consideration of this factor alone is sufficient to establish that Congress did not intend §§ 672(a)(1) and 675(4)(A) to provide individually enforceable rights. *Cf., e.g.*, *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344–45 (2d Cir. 2015) (finding, through an analysis of the second *Blessing* factor alone, that a federal provision did not create enforceable rights under § 1983); *Torraco*, 615 F.3d at 137–39 (same). The majority disregards Supreme Court precedent in concluding otherwise, and its ruling will impose on foster care programs within this Circuit an unfortunate and unsupportable risk of "increased litigation, inconsistent results, and disorderly administration," none of which will inure to those programs' benefit. *Armstrong*, 135 S. Ct. at 1389 (Breyer, *J.*, concurring in part and concurring in the judgment).

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

maintenance payments do not "cover the cost of (and the cost of providing)" each of the items listed in § 675(4)(A), and that New York caregivers receiving inadequate payments have a § 1983 right to sue for the deficiency.

This argument raises the threshold question of how to calculate "the cost of (and the cost of providing)" the items listed in § 675(4)(A). The Plaintiff-Appellant essentially contends that there is an objective "cost" to each of the enumerated items, and that New York caregivers receiving foster care maintenance payments have a § 1983 right to payments sufficient to cover that "cost." Relying on a 2007 study by the National Foster Parent Association, Children's Rights and the University of Maryland School of Social Work ("the 2007 Study"),[11] the Plaintiff-Appellant's complaint alleges that New York's foster care maintenance payments fail to cover the "cost" of the § 675(4)(A) items by as much as 43%. The Plaintiff-Appellant also claims that by consulting "readily available data" on the cost of the enumerated items, calculating the amount that these caregivers *should* be paid involves "nothing more than basic arithmetic." Br. for Pl.-Appellant at 33. The majority largely concurs, arguing that settling upon the appropriate payments is

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

both a judicially administrable task and one requiring "only very limited review of policy determinations." Maj. Op. at 25.

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

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

lower"). Whether and how a state should take account of geography in setting its maintenance rates is not addressed in the CWA and is certainly not a question of "basic arithmetic."

Furthermore, the 2007 Study's recommended payment rates do not vary based on a family's income level. *See* 2007 Study at 40. Instead, the 2007 Study creates a uniform maintenance rate based on the national spending habits of *middle-income* families, on the assumption that the spending habits of these families represent an accurate cost estimate for all families. *Id.* at 21. Yet the "cost" of a § 675(4)(A) item may vary based on a given family's income.[12] Should family income level affect the payment to which a subset of a state's foster child caregivers are entitled? The majority does not provide an answer. Nor does the CWA. Finally, the 2007 Study addresses only a "basic" foster care rate and does not even attempt to calculate the costs of caring for a foster child with special needs, including both physical disabilities and emotional difficulties. *See id.* at 2 n.1. So what is a judge to do, when the CWA itself contains nothing "sufficiently specific

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

and definite," *Wright*, 479 U.S. at 432, to guide the court's evaluation of any rate on which a state might settle for this important category of children?

The above-listed issues provide just a sampling of the problems inherent in recognizing a § 1983 right in §§ 672(a)(1) and 675(4)(A) of the CWA. This sampling is enough to show that it is fanciful to claim that Congress manifested in the CWA an unambiguous intent to confer on a subset of foster child caregivers this private right of action, with nary a statutory word as to the criteria to be used in reaching judgments about whether a state's payments for the items enumerated in § 675(4)(A) are sufficient. The Supreme Court has been particularly reluctant to conclude that a federal cause of action exists where, as here, the required remedy would entail judicial ratemaking, given that "[t]he history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges." *Armstrong*, 135 S. Ct. at 1388 (Breyer, *J.*, concurring in part and concurring in the judgment). Still less are federal courts suited for this rate-setting task in the family-relations sphere, a "traditional area of state concern." *See Moore v. Sims*, 442 U.S. 415, 435 (1979); *see also Thompson v. Thompson*, 484 U.S. 174, 186 (1988) (holding that the Parental Kidnapping Prevention Act did not create a private cause of

action enforceable in federal court because doing so would "entangle[] [federal courts] in traditional state-law questions that they have little expertise to resolve").

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

Whatever the majority's good intentions, exposing New York's foster care system to amorphous § 1983 claims that are not contemplated in the CWA is no

way to further the CWA's goals, nor to benefit foster care systems more generally. Indeed, the majority's decision raises the prospect that scarce foster care resources, instead of going to foster children, will be squandered in litigation destined to produce arbitrary and inconsistent results.[13] As the *Blessing* Court reminds us, when an asserted right is sufficiently amorphous that its "enforcement would strain judicial competence," this is a clear indication that Congress did not intend to create such a right. *See Blessing*, 520 U.S. 329 at 341 (quoting *Livadas*, 512 U.S. at 132). Such is the case here.

C

In its hurried desire to create a right enforceable under § 1983, the majority also misconstrues the controlling precedent provided by the Supreme Court's 2015 *Armstrong* decision. The majority observes that "[t]he only federal review provided under the [CWA] is review by the Secretary for substantial conformity . . . , with the possibility of funding cutoffs as the sole remedy." Maj. Op. at 29. According to the majority, this limited remedy signifies that Congress

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

did not intend to foreclose private enforcement of §§ 672(a)(1) and 675(4)(A). But *Armstrong* dictates the opposite conclusion: when Congress passes a statute that is "judicially unadministrable," and the "sole remedy" for a state's noncompliance is the Secretary's withholding of funds, Congress has manifested an intent for "the agency remedy that it provided [to be] exclusive." *Armstrong*, 135 S. Ct. at 1385 (quoting *Gonzaga*, 536 U.S. at 292 (Breyer, *J.*, concurring in the judgment)).

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

administrative guidance that can accompany agency decisionmaking," while "*avoiding* the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Id.* (emphasis added) (quoting *Gonzaga*, 536 U.S. at 292 (Breyer, *J.*, concurring in the judgment)).

Armstrong squarely controls our case. Not only does defining "the cost of" all the § 675(4)(A) items require myriad policy choices that have no legal answer, as in *Armstrong*,[14] but the Medicaid Act and CWA also have near-identical enforcement schemes. Under the CWA, HHS must issue regulations specifying criteria to determine whether a state is in substantial conformity with the CWA and may ultimately withhold funding from states that do not meet these standards. Similarly, under the Medicaid Act, "the sole remedy Congress provided for" was "the withholding of Medicaid funds by" HHS. *Armstrong*, 135 S. Ct. at 1385.

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

The majority attempts to distinguish *Armstrong* by noting that *Armstrong* concerned a suit in equity rather than a suit under § 1983. But it is *harder* for a private plaintiff to enforce a federal provision under § 1983 than it is for that plaintiff to enforce a federal provision by suing to enjoin allegedly unlawful actions, as the *Armstrong* plaintiffs sought to do. *See Armstrong*, 135 S. Ct. at 1392 (Sotomayor, *J.*, dissenting).; *id.* at 1384 (majority opinion). Such a plaintiff, seeking to enforce a provision in equity, benefits from a presumption that an equitable cause of action exists and that Congress did not intend to foreclose such a cause of action. *Id.*; *see also id.* at 1384–86 (majority opinion). A plaintiff seeking to enforce a provision under § 1983, however, faces the opposite presumption: a plaintiff "must demonstrate specific congressional intent to *create*" an enforceable right. *Id.* at 1392; *see also Gonzaga*, 536 U.S. at 286. For this reason, the plaintiffs in *Armstrong* did not even attempt to enforce § 30(A) pursuant to § 1983; if they could not enforce the provision in equity, *a fortiori*, they could not do so pursuant to a § 1983 theory like the one relied on here.[15] *See Armstrong*, 135 S. Ct. at 1386 n.*; *id.* at 1392

[15] The majority argues that it must be easier to bring a claim under § 1983 than in equity because Congress passed § 1983 to create an additional means by which "plaintiffs [can] sue the government for civil rights violations." Maj. Op. at 30–31. But its comparison is inapt. Section 1983 provides different *remedies* against different *defendants* for civil rights violations, unavailable in equity. It is precisely because of the "variety of remedies—including damages—[available] from a broad range of parties" under § 1983 that a

(Sotomayor, *J.*, dissenting). Any distinctions between this case and *Armstrong*, then, actually hurt the Plaintiff-Appellant.

D

Rather than acknowledging the controlling weight of the Court's *Armstrong* precedent, the majority invokes out-of-circuit case law, as well as two cases—each three decades old—in which the Supreme Court held that Spending Clause legislation provided a source of individually enforceable rights. *See Wright*, 479 U.S. at 418; *Wilder*, 496 U.S. at 498. The majority's approach to the slim precedent on which it *does* rely is flawed for at least four reasons.

First, as explained above, the Court has stated on more than one occasion that "the ready implication of a § 1983 action that *Wilder* exemplified" has been "repudiate[d]" by more recent precedent. *See Armstrong*, 135 S. Ct. at 1386 n.* (citing *Gonzaga*, 536 U.S. at 283). Thus, *Wilder*'s precedential value (along with

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plaintiff "invoking § 1983" cannot "simply point[] to background equitable principles authorizing the action," but must instead "demonstrate specific congressional intent to *create* a statutory right." *Armstrong*, 135 S. Ct. at 1392 (Sotomayor *J.*, dissenting); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy *J.*, concurring) (noting that equity does "not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983").

Wright's) is limited at best.[16] *See Does v. Gillespie*, 867 F.3d 1034, 1040 (8th Cir. 2017) ("Later decisions, however, show that the governing standard for identifying enforceable federal rights in spending statutes is more rigorous [than *Wilder*] . . . . [T]he Court's 'repudiation' of *Wilder* is the functional equivalent of 'overruling,' as the Court uses the terms interchangeably.").

Second, even ignoring their precarious status as precedent, *Wright* and *Wilder* involved statutory provisions that were notably different from those at issue here. The majority's approach to the CWA here echoes that of the Sixth and Ninth Circuits, which have both concluded that §§ 672(a)(1) and 675(4)(A) are judicially administrable under § 1983 because courts can assess the states' rate calculations for "reasonable[ness]." Maj. Op. at 25–26; *D.O. v. Glisson*, 847 F.3d 374, 380 (6th Cir. 2017); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 981 (9th Cir. 2010). Yet "[i]n both *Wright* and *Wilder* the word 'reasonable' occupied a prominent place in the critical language of the statute or regulation."[17] *Suter*, 503

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

[17] *Wilder* involved the (since-repealed) Boren Amendment, 42 U.S.C. § 1396a(a)(13)(A), which required a state plan for medical assistance to provide payments "which the State finds, and makes assurances satisfactory to the Secretary, *are reasonable and adequate*." 496 U.S. at 502–03 (emphasis removed). And *Wright* involved a regulation requiring state

U.S. at 357. By contrast, the word "reasonable" is entirely absent from § 672(a)(1), the relevant provision of the CWA. *Cf. Armstrong*, 135 S. Ct. at 1389 (Breyer, *J.*, concurring in part and concurring in the judgment) (distinguishing statutes that require courts to review rates for "reasonableness," which are administrable, from those that require courts "to engage in [] direct rate-setting," which are not). Given that the ultimate inquiry in this case is one of congressional intent, and *unambiguous* intent at that, the majority should not follow the Sixth and Ninth Circuits in improperly rewriting the text of the CWA. *Cf. E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1601 (2014) ("[A] court's task is to apply the text of [a] statute, not to improve upon it." (quoting *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989))).

Third, in both *Wright* and *Wilder*, the relevant statute and regulations provided detailed guidance to the states as to how they should calculate the rates in question.[18] *See Wilder*, 496 U.S. at 519; *Wright*, 479 U.S. at 431–32; *see also Suter*,

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public housing authorities to impose a ceiling on the rent charged to low-income tenants that took into account, among other things, "*reasonable* amounts of utilities." 479 U.S. at 419–21 & n.3 (emphasis added).

[18] That said, the Court would probably now hold that the *statute*, rather than its implementing regulations, must provide an adequate benchmark; the existence of a right enforceable pursuant to § 1983 is a matter of Congressional rather than agency intent. *Cf. Alexander*, 532 U.S. at 291 ("Language in a regulation may invoke a private right of action

503 U.S. at 359 (noting that the Court in *Wilder* "relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates"). As a result, in *Wright* and *Wilder*, a reviewing federal court had some objective benchmark for evaluating state rates. Sections 672(a)(1) and 675(4)(A), by contrast, provide *no* guidance as to how a state should calculate its rates, nor do HHS's regulations.

Finally, as the Eighth Circuit has noted, "unlike the CWA sections at issue here, the relevant provisions in the Medicaid Act [at issue in *Wilder*] did not focus on defining the conditions that must be met in order for a participating state's expenditures to be eligible for federal matching funds and, therefore, did not evince the degree of removal [from the provision's purported beneficiaries] we now confront." *Midwest Foster Care*, 712 F.3d at 1199; *see also Wright*, 479 U.S. at 420 (finding individual right to claim rent overcharges under a statute that provided that "[a] family shall pay as rent the highest of" specifically defined amounts). In sum, then, the CWA does not even meet the lenient standard for articulating an enforceable right that was set during what the Court has characterized as its

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that Congress through statutory text created, but it may not create a right that Congress has not."). This is yet another reason why neither *Wilder* nor *Wright* controls here.

"*ancien regime*" of implied rights jurisprudence. *Alexander*, 532 U.S. at 287. It certainly cannot meet the more exacting test the Court now employs.

* * *

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