In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2017

No. 14-2919-cv

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,
Appellant,

v.

SHEILA J. POOLE, ACTING COMMISSIONER FOR THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, IN HIS OFFICIAL CAPACITY,
Appellee,

On Appeal from the United States District Court
for the Eastern District of New York

ARGUED: JUNE 15, 2015
DECIDED: APRIL 19, 2019

Before: CALABRESI, LIVINGSTON, *Circuit Judges*, and SESSIONS, District Judge.*

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*The Honorable William K. Sessions, III, of the United States District Court for the District of Vermont, sitting by designation.

Plaintiff, the New York State Citizens' Coalition for Children, sues Defendant, the Acting Commissioner for the New York State Office of Children and Family Services, on behalf of the Coalition's foster parent members. The Coalition alleges that the State pays its foster parents members inadequate rates to cover the costs of caring for their foster children, in violation of the Adoption Assistance and Child Welfare Act of 1980. The district court dismissed the suit, holding that the Act does not create an enforceable right to payments, but finding that the Coalition does have standing to sue. We AFFIRM the finding that the Coalition has standing to sue on behalf of its members under *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011) and reject the State's argument that the Coalition is barred by the third-party standing rule. We REVERSE the district court's dismissal of the Coalition's claims and hold that the Act grants foster parents a right to payments, enforceable through 42 U.S.C. § 1983.

Judge Livingston dissents in a separate opinion.

CALABRESI, *Circuit Judge*:

This case asks whether Spending Clause legislation that directs specific payments to identified beneficiaries creates a right enforceable through 42 U.S.C. § 1983. We hold that it does.

Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("the Act") "to strengthen the program of foster care assistance for needy and dependent children." Pub. L. 96-272,94 Stat. 500 (1980). One of the ways the Act does so is by creating a foster care maintenance payment program. 42 U.S.C. § 671(a)(1). Under this program, participating states receive federal aid in

exchange for making payments to foster parents "on behalf of each child who has been removed from the home of a relative." *Id.* § 672(a)(1), (2). These payments are calculated to help foster parents provide their foster children with basic necessities like food, clothing, and shelter.

The particular question before us is whether the Act grants foster parents a right to these payments enforceable through a Section 1983 action. Three Courts of Appeals have reached this issue. The Sixth and Ninth Circuits have held that it does. *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974 (9th Cir. 2010); *D.O. v. Glisson*, 847 F.3d 374 (6th Cir. 2017). The Eighth Circuit has held that it does not. *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013).

We join the Sixth and Ninth Circuits in holding that the 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. The district court, Kuntz *J.*, held to the contrary. Accordingly, we **VACATE** the order dismissing the case and **REMAND** for further proceedings.

I. Background

This appeal arises from a Section 1983 action filed in federal district court by the New York State Citizens' Coalition for Children ("the Coalition"). The

Coalition's suit, brought on behalf of its foster parent members, alleges that the New York State Office of Children and Family Services ("the State") has failed to make adequate foster care maintenance payments as required by the Act.

The district court dismissed the Coalition's suit, holding that the Act creates no federally enforceable right to receive foster care maintenance payments. The Coalition appealed. On appeal, the State asserted, for the first time, that the Coalition lacked standing to bring this suit on behalf of its members. We remanded the case to the district court for additional factfinding on that issue. On remand, the district court found that the Coalition has standing: The Coalition must expend resources to advise and assist foster parents because of the State's allegedly inadequate reimbursement rates.

The Coalition then returned to this Court for review of the district court's original holding that they could not enforce the Act through Section 1983. The State, yet again, raised a new argument on appeal, this time that the Coalition lacks standing to bring this suit under the third-party standing rule.

Before considering the original issue before us—that is, whether the Act creates a federally enforceable right to receive foster care maintenance payments—

we must address the State's claim that the Coalition lacks organizational and third-party standing to litigate these claims on behalf of its foster parent members.

II. Standing

To bring a Section 1983 suit on behalf of its members, an organization must clear two hurdles. First, it must show that the violation of its members' rights has caused the organization to suffer an injury independent of that suffered by its members. *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011). Second, it must "demonstrat[e] a close relation to the injured third part[ies]," and "a hindrance" to those parties' "ability to protect [their] own interests." *Mid-Hudson Catskill Rural Migrant Ministry v. Fine Host Corp.*, 418 F.3d 168, 174 (2d Cir. 2005). We conclude that the Coalition has cleared both hurdles.

A. Organizational Standing

In 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. *Nnebe*, 644 F.3d at 156-58; *League of Women Voters v. Nassau Cty.*, 737 F.2d 155, 160-61 (2d Cir. 1984); *Aguayo v. Richardson*, 473 F.2d 1090, 1099-1100 (2d Cir. 1973). To establish its

own injury, an organization must show that it has suffered a "perceptible impairment" to its activities. *Nnebe*, 644 F.3d at 157. This showing can be met by identifying "some perceptible opportunity cost" that the organization has incurred because of the violation of its members' rights. *Id.*

The Coalition asserts that the State's alleged violations of the Act has cost it hundreds of hours in the form of phone calls from aggrieved foster families. The district court found, and we agree, that the Coalition has spent nontrivial resources fielding these calls, and that it will continue to have to do so absent relief. This showing is sufficient to establish that the Coalition has suffered its own injury.

B. Third Party Standing

When any plaintiff asserts the rights of others, it has traditionally also faced, in our court, a rule of prudential standing: the so-called third-party standing bar. With some exceptions, this rule prevents "litigants from asserting the rights or legal interests of others [simply] to obtain relief from injury to themselves." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 40 (2d Cir. 2015) (quoting *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79, 86 (2d Cir. 2014)).

There is considerable uncertainty as to whether the third-party standing rule continues to apply following the Supreme Court's recent decision in *Lexmark*

v. Static Control Components, Inc., 134 S. Ct. 1377 (2014). In *Lexmark*, the Supreme Court cast doubt on the entire doctrine of prudential standing, explaining that a court can no more "limit a cause of action that Congress has created" than it can "apply its independent policy judgment to recognize a cause of action that Congress has denied." *Id.*at 1388. Nevertheless, in *United States v. Suarez*, a post-*Lexmark* case, we continued to hold that courts are required to address third-party standing. 791 F.3d 363, 367 (2d Cir. 2015). In *Suarez*, however, we did not address *Lexmark*.

But we need not, in the case before us, resolve this tension. Whatever the status of the third-party standing bar, our cases have developed an exception to it where a plaintiff can show "(1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests." *Keepers, Inc.*, 807 F.3d at 41. That exception applies here.

It is evident that the Coalition enjoys a close relationship with the foster parents it counsels, not least because those foster parents have authorized the Coalition to file suit on their behalf. The State argues, however, that the Coalition has failed to show that it would be "difficult if not impossible" for the foster parents to protect their own rights. December 22, 2017 Appellee Letter Br. at 14.

But the third-party standing rule does not demand anything near impossibility of suit. *See* 15 James William Moore, *Moore's Federal Practice* § 101.51[3][c][iii] (3d ed. 2008). Instead, a mere "practical disincentive to sue"—such as a desire for anonymity or the fear of reprisal—can suffice to overcome the third-party standing bar. *Id.*; *See also Keepers*, 807 F.3d at 42; *Comacho v. Brandon*, 317 F.3d 153, 160 (2d Cir. 2003).

And here, the Coalition has demonstrated that the manifest desire of their foster parent members for anonymity constitutes a significant disincentive for those parents to sue in their own names. It did so by submitting an anonymous affidavit from one of its members articulating two reasons the member desired anonymity. First, the member feared retaliation because a state agency had previously retaliated against them after they had lodged a complaint against it. Second, the parent also sought to protect their anonymity out of concern for their foster children's well-being:

> Even if the names of my children are filed under seal or redacted from public documents, disclosure of my name… puts my foster children's anonymity at risk… The children that have come from traumatic and often abusive environments. Any negative repercussions resulting from the public disclosure of the fact that they are all in foster care will only add to their history of trauma, and I want to protect my children from that.

D. Ct. Dkt. # 17-3 ¶¶ 10-11. It is no stretch to believe that foster parents, who have opened their homes to children in need, would forgo financial benefits to protect those children.

We are thus satisfied that the Coalition is properly positioned to represent its members' rights effectively. And we are satisfied that those members are significantly impaired from pursuing those rights on their own. Accordingly, we conclude that the third-party standing rule does not bar the Coalition from pursuing its claims.

III. A Right to Foster Care Maintenance Payments Enforceable through Section 1983.

Having found that the Coalition has standing, we turn to the main question in this case: Do foster parents have a right to foster care maintenance payments enforceable through a Section 1983 action? Section 1983 is a vehicle for individuals to enforce "any *right*[] . . . secured" by federal law. 42 U.S.C. § 1983 (emphasis added). Whether that vehicle is available to foster parents seeking to obtain foster care maintenance payments turns on whether (a) the Act means to confer on foster parents a right to those payments, in which case Section 1983 would be available. Or, whether the Act, instead, intends (b) simply to focus on the operations of the

regulated entity (the states), and is designed only to give states guidance in administering aid to foster parents; or (c) relies solely on the regulatory authority (the Secretary of Health and Human Services) to see to it that the Act's requirements are met, with the result that Section 1983 would be foreclosed.

Our review of the Act's text and statutory structure leads us to conclude that Congress did indeed create a specific monetary entitlement aimed at assisting foster parents in meeting the needs of each foster child under their care. What is more, we find that the Act's provision of (limited) federal agency review for a state's substantial compliance is insufficient to supplant enforcement through Section 1983. We therefore hold that the Coalition can bring a Section 1983 action on behalf of its foster parent members.

A. Statutory Background

The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 *et seq.*, is Spending Clause legislation directed at state administration of foster care and adoption assistance services. Relevant here, the Act creates a "Foster Care Maintenance Payments Program," the details of which must be recounted in some detail.

1. State Plan Requirements. To receive federal aid under the Act, states must submit a plan for approval to the Secretary of Health and Human Services (the Secretary). Section 671 details what a state plan must provide to qualify. Section 671's requirements are numerous and far-ranging; they run from dictating how information about individuals involved in the foster care system may be disclosed, *Id.* § 671(a)(8), to providing guidelines on how and when a state should give priority to reuniting families, *Id.* § 671(a)(15). Significantly, one of Section 671's thirty-five requirements is that the state plan provide for foster care maintenance payments. *Id.* § 671(a)(1).

2. Foster Care Maintenance Payments. Once a state plan has been approved, Section 672, titled "Foster care maintenance payments programs," directs participating states—that is, states with an approved plan—to make maintenance payments to foster parents on behalf of each foster child under their care. Section 675 then defines the costs that compose those payments.

The mandate appears in Subsection 672(a)(1). This subsection, titled "Eligibility," has two components. The first provides that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child . . . ." *Id.* § 672(a)(1). The second addresses which foster children are

eligible for foster care maintenance payments to be made on their behalf. *Id.* § 672(a)(1)(A),(B) (incorporating Section 672(a)(2),(3)). Eligibility is dictated by the financial resources of the child, how the child was removed from the home, who is responsible for the child, and where the child is placed. *Id.* § 672(a)(2),(3).

Subsection 672(b) provides that the state can make these payments either to the child's foster parent, to the institution where the child is placed, or to a local agency.

Section 675 then defines what exactly constitutes a "foster care maintenance payment":

> [T]he term "foster care maintenance payments" means 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.

Section 675(4) further states that these payments "shall include," for institutional placements, the reasonable costs of operating the institution, and "shall also include" the costs of caring for the offspring of any foster children if the foster

child and his or her children are in the same placement. In defining foster care maintenance payments, the Act exclusively uses mandatory language.[1]

3. Federal Reimbursement. Section 674 details when a state is entitled to reimbursement from the Federal Government. Briefly put, states are entitled to reimbursement of a percentage of payments made under Section 672, as well as other costs including training and information systems expenditures. *Id.* § 674(a)(1),(3).

4. Review and Enforcement Mechanisms. The Act creates three avenues for review of a state's compliance with its obligations under the Act: two through the state and one through the Secretary.

Both avenues for state review are dictated by Section 671, the section governing the requirements the state must meet to qualify for the program. First, Section 671 requires the state to conduct "periodic review of the . . .amounts paid as foster care maintenance payments . . .to assure their continuing appropriateness." *Id.* § 671(a)(11). The second avenue of state review is addressed to recipients of benefits under the Act. Section 671 requires the state to provide "an

[1] Since children remain in foster care until they are eighteen, it occasionally occurs that a foster child has children.

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." *Id.* § 671(a)(12).

The third avenue for review, found in Section 1320a-2a, is the only avenue for federal review expressly provided for in the Act. Section 1320a-2a directs the Secretary to create regulations to ensure states' "substantial conformity" with the dictates of federal law and the state's own plan. *Id.* § 1320a-2a(a). If a state fails to conform substantially, then the Secretary may withhold funds "to the extent of the [state's] failure to so conform." *Id.* § 1320a-2a(b)(3)(C).

The State has not pointed us to any mechanism for the Act's beneficiaries to obtain federal review of their claims. Thus, the only mechanism of federal control over state behavior is the cutting off of funds. Nor has the State pointed us to any claim-processing requirements—e.g., no burdens of proof, exhaustion requirements, or limitation of remedies—that allowing a Section 1983 action would upset.

* * *

In sum, the Act requires a state to submit a plan to the Secretary for approval. Once the Secretary approves the state's plan, the Act directs the state to

make payments to foster parents on behalf of each eligible child to cover costs such as food, clothing, and school supplies. The Federal Government then reimburses the state for a percentage of those payments so long as it remains in "substantial compliance" with its own plan, the regulations of the Secretary, and the requirements of the Act. While the Act requires states to conduct internal review and contemplates that the Secretary will ensure that the state remains in substantial compliance, the only individual review mechanism specifically provided for in the Act is at the state level.

B. The Presumption

The Supreme Court, in *Blessing v. Freestone*, 520 U.S. 329 (1997), articulated a three-factor test for determining whether a statute creates a right enforceable through Section 1983. First, "Congress must have intended that the provision in question benefit the plaintiff." *Id*. at 340. In *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), the Court clarified that this factor requires more than a showing that the "plaintiff falls within the general zone of interest that the statute is intended to protect." The statute must confer a right on the plaintiff as shown by use of rights-creating language—that is, language that demonstrates a statutory focus on the needs of the individual, rather than the operations of the regulated entity. *Id.* at

287-88. Second, the plaintiff must "demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41 (internal quotation marks omitted). And, third, the "statute must unambiguously impose a binding obligation on the States." *Id.* at 341.

If a statute grants a right to a plaintiff class, the right is fit for judicial enforcement, and the state is obligated to fulfill the right, then a rebuttable presumption attaches that a Section 1983 action enforcing the right is available. *Id.*; *Gonzaga*, 536 U.S. at 284 & n. 4. A state defendant can overcome this presumption, however, by showing that Congress intended to foreclose a remedy under Section 1983, either expressly "or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Blessing*, 520 U.S. at 3441.

The dissent attempts to cast doubt on whether *Blessing*'s three-factor test remains good law after *Gonzaga*. [Dissent at 20-21] *Gonzaga*, however, did not overrule *Blessing*; rather, it clarified the rule in *Blessing* by correcting a misinterpretation of that rule that had been adopted by some lower courts. *See Gonzaga*, 536 U.S. at 282-83. To the extent that the dissent is trying to read the tea

leaves to predict that the Supreme Court may move away from *Blessing* in the future, this Court is not tasked with—and is, in fact, prohibited from—such guesswork. We are bound to follow the existing precedent of the Supreme Court until that Court tells us otherwise. *See Agostini v. Felton*, 521 U.S. 203, 238 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Thus, we apply the *Blessing* test with the principles enunciated in *Gonzaga* firmly in mind. *See Briggs v. Bremby*, 792 F.3d 239, 242-45 (2d Cir. 2015) (applying *Blessing*'s three-factor test after, and in light of, *Gonzaga*).

1. Binding Obligation. Since the State argues that the Act's regulation of foster care maintenance payments is permissive and not mandatory, we first consider whether the Act imposes a binding obligation on participating states. In the State's view, the Act merely details what expenses *may* be included in the payments (*i.e.* will be reimbursed by the Federal Government), not what expenses *must* be included.

This construction is belied by the Act's text. As we pointed out earlier, the Act does not use permissive language—either in creating the obligation for the state to make payments to foster parents, or in defining what expenses those payments must account for. The Act, instead, uses clearly mandatory language—

"shall"—binding states to make these payments. *Id.* § 672(a). The Act then defines, with particularity and in absolute terms, what expenses constitute those payments. *See Id.* § 675(4) ("foster care maintenance payments means," "shall include," "shall also include"). Significantly, the State points to no statutory text in support of its position that the expenses listed in the definition of foster care maintenance payments are optional, rather than mandatory.

Undaunted, the State argues that the title of Section 672(a), "Eligibility," demonstrates that Section 672 is intended to outline only which portions of the foster care maintenance payments made by a state are eligible for federal reimbursement. But the State plainly misreads Section 672(a). Its title is a reference to which *foster children* are eligible to have maintenance payments made on their behalf, not which *payments by a state* are eligible for federal reimbursement.

The overall statutory structure confirms the untenability of the State's reading. Where Congress limited which *state payments* are eligible for federal reimbursement, it did so explicitly. So in Subsections 672(d) and (e), which are addressed to children who have been removed from the home pursuant to a voluntary placement agreement, the Act clearly states that "Federal payments may" (or may not) be made. And it is not Section 672, but another section

entirely—Section 674, titled "Payment to States"— that delineates the specifics of a state's entitlement to reimbursement from the Federal Government.[2] In effect, Congress has offered the states a reasonable bargain: pay for the expenses that we deem essential and we will partially reimburse you for them.

2. Conferral of Rights. Having determined that the Act creates an obligation for participating states to make payments covering the costs detailed in Section 675(4), the question remains whether that obligation is also an enforceable right vested in foster parents.[3]

As mentioned earlier, a statute must "manifest[]" Congress's "'unambiguous' intent to confer individual rights" in order to support a Section 1983 action. *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst State Sch. & Hosp. v.*

[2] To support its position that the statutory text is permissive, the State relies in part on a piece of informal guidance from the Department of Health and Human Services, which refers to the expenses listed in § 675(4) as "allowable expenses." U.S. Dep't of Health & Human Servs., *Child Welfare Policy Manual*, http://perma.cc/2KYA-SHTT. The Child Welfare Policy Manual, however, is not a product of notice and comment rulemaking and is not entitled to *Chevron* deference. *See United States v. Mead*, 533 U.S. 218 (2001). The State also points to 45 C.F.R. § 1355.20(a). This regulation, which is a product of notice and comment rulemaking, in relevant part states only, "Local travel associated with providing the items listed is also an allowable expense." 45 C.F.R. § 1355.20(a). It is unlikely that the agency, in this one sentence, purported to resolve the issue of whether states are required to make foster care maintenance payments that cover the costs detailed in Section 675(4). Indeed, it would be a strange and oblique way of answering so central a question.

[3] For the reasons discussed in Part I, the Coalition is an appropriate representative of the plaintiff class of foster parents.

Halderman, 451 U.S. 1, 17 (1981)). To discern Congress's intent, the Supreme Court has directed us to look to whether a statute focuses on the needs of the individual, as opposed to the operations of the regulated entity. *E.g.*, *id.* at 287-88.

Such an inquiry has led the High Court to hold that statutory provisions with a programmatic focus do not create enforceable rights. In *Gonzaga*, a student plaintiff sought to enforce a provision of the Family Educational Rights and Privacy Act of 1974. The provision the student plaintiff relied on read:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization.

Gonzaga, 526 U.S. at 279 (quoting 20 U.S.C. § 1232g(b)(1)). The Supreme Court held that this provision of FERPA, directed as it is to the "policy or practice" of educational institutions, evinced that Congress lacked the intent to create a right in individuals that would be enforceable through Section 1983.

Similarly, in *Blessing*, custodial parents sought to enforce Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669b (1994), which directs participating states to operate an enforcement program for child support payments. The plaintiffs in

Blessing sought to enforce the state's substantial compliance with the entire statutory regime, including provisions aimed at managing bureaucratic matters like staffing and data processing. 520 U.S. at 337, 344-45. While holding open the possibility that some provisions of Title IV-D might create enforceable rights, the Supreme Court rejected the plaintiffs' efforts to rectify "the State's systemic failures." *Id.* at 344-45. As the Court explained, "[f]ar from creating an *individual* entitlement to services, the [substantial compliance] standard is simply a yardstick for the Secretary to measure the *systemwide* performance of" the state. *Blessing*, 520 U.S. at 343.

In contrast, "[t]he Supreme Court has repeatedly recognized that a federal statute [that] explicitly confers a specific monetary entitlement on an identified beneficiary" *does* create an enforceable right. *Cal. State Foster Parent Ass'n*, 624 F.3d at 978. Thus, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987) and *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the Supreme Court found that the Federal Housing Act and the Medicaid Act created enforceable rights because they bestowed on the plaintiff class a "mandatory

benefit focus[ed] on the individual" and a "specific monetary entitlement," respectively.[4] *Gonzaga*, 536 U.S. at 280.

Section 672(a) and (b) of the Child Welfare Act grants precisely such a specific entitlement to an identified class of beneficiaries. The Act is aimed directly at the needs of individual foster children, and, to meet those needs, it grants a monetary entitlement to those children's foster parents.

First, Section 672(a) is focused on the needs of individual foster children. The Act's use of the term "each child" indicates an individual focus. 42 U.S.C. § 672(a) (Participating states "shall make foster care maintenance payments on behalf of *each* child . . . ." (emphasis added)). "Each" is "used to refer to every one of two or more people or things, *regarded and identified separately*." Oxford English Dictionary, "each," (Online ed., Accessed May 16, 2018) (emphasis added). By referencing "each child"—rather than, for example, stating the state must establish

[4] The dissent gloms on to one sentence of dicta in a footnote in *Armstrong v. Exceptional Child Center*, — U.S. —, 135 S. Ct. 1378, 1386 n.*, to suggest that *Wright* and *Wilder* are no longer good law. [Dissent at 34] But this Circuit has continued to follow *Wright* and *Wilder* even after *Armstrong*. *See, e.g.*, *Briggs*, 792 F.3d at 242-45. And this panel does not have the authority to overrule *Briggs*, nor does this Court have the authority to fail to follow *Wilder* and *Wright* where the Supreme Court has not overruled them. *See supra* text at 16-17.

The dissent attempts to avoid *Briggs* by noting that it did not address *Armstrong*. Indeed, *Briggs* did not address *Armstrong*—but there is no reason to view this as an oversight rather than as an indication that the panel in *Briggs* did not consider *Armstrong* to govern the facts before it. We, likewise, do not consider *Armstrong* to be controlling on the facts now before us. *See infra* text at 30-31.

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."

The definition of "foster care maintenance payments" in Section 675(4) buttresses this reading of Section 672(a). These payments relate to basic life essentials: food, clothing, shelter. Congress, in employing this definition of foster care maintenance payments, again demonstrates a concern with individual need in its most basic sense.

Second, the Act designates foster parents as the intended recipients of the payments. Section 672(a) states that payments are made "on behalf of" each foster child and Subsection (b) nominates foster parents as one of three proper recipients of the payments. Thus, the Act, which is directly concerned with the needs of foster children, *id.* § 672(a), designates foster parents as the holders of the right, *id.* § 672(b). This statutory design is fully understandable: foster parents are the ones who incur the costs of caring for foster children. If the Act intends to ensure that foster children's basic needs are provided for, it makes sense for Congress to vest the right to defined payments in those who do the providing.

This case is therefore much closer to *Wilder* and *Wright*, where the Supreme Court found an enforceable right, than it is to *Gonzaga* and *Blessing*, where it did not. As in *Wilder* and *Wright*, the Act "unambiguously confer[s]" a "mandatory benefit," or "entitlement," to a discernible group of rights holders. *See Gonzaga*, 536 U.S. at 280. And in contrast to *Gonzaga* and *Blessing*, that entitlement is "specific and definite" and "focus[ed] on the individual." *Id.* Accordingly, we conclude that Section 672(a), read in conjunction with Subsection (b) and Section 675(4), creates a right to payments enforceable by foster parents.[5]

3. Fit for Judicial Enforcement. Even if a statute seems to vest rights in plaintiffs, those rights must be fit for judicial enforcement for a Section 1983 suit

[5] The State, relying on passing language in *Gonzaga*, seems to suggest that the presence of substantial conformity review, instead of individualized review, shows that the Act does not grant a right in the first place. In *Gonzaga*, the Court reflected on the fact that "Congress did not contemplate terminating funding on the basis of one violation of the privacy standards, but only where an institution had broader policies and practices that violated FERPA" to confirm its view that the statute, as a whole, was oriented only towards institutional policy. *Cal. State*, 624 F.3d at 980. The presence of substantial conformity review, which only garnered passing mention in *Gonzaga*, merely reinforced the absence of individually focused language. And it was actually the presence of individual federal review that drew the Court's focus. *See Gonzaga*, 536 U.S. at 289 ("Our conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions.").

In any event, the State's suggestion proves too much. Under the State's reasoning, a plaintiff would be damned if the statute provides its own individual remedy, and damned if the statute does not. The only time Section 1983 would not be supplanted as a remedy would be when a statute provides for neither individual review, nor substantial compliance review. We decline to narrow the scope of the Section 1983 remedy so dramatically. We therefore limit the consideration of the agency review mechanism to the State's case for rebutting the presumption.

to lie. In other words, the right cannot be "so vague and amorphous that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41.

The provisions of the Act requiring states to make foster care maintenance payments are fit for judicial enforcement. Section 672(a), read with Sections 672(b) and 675(4), creates a right to payments that cover certain expenses like food, shelter, and school supplies. In enforcing foster parents' right to sue for such payments, courts would, therefore, be required to review how a state had determined the amounts it pays, including how it has quantified the costs of the specific expenses listed in Section 675(4). This review falls comfortably within what courts regularly do: it requires primarily fact-finding and only very limited review of policy determinations.

The Child Welfare Act does give states some discretion as to how to calculate costs and to distribute payments. And courts may well defer to reasonable exercises of that discretion. *See Wagner*, 624 F.3d at 981 (holding that the court may "give deference to a reasonable methodology employed by the State" for calculating costs, and that, even with such deference, "the absence of a uniform federal methodology for setting rates 'does not render the [statute] unenforceable by a court" (quoting *Wilder*, 496 U.S. at 519)). Significantly, the

State's discretion under the Act is considerably more cabined than that afforded states under the Medicaid Act in *Wilder* and the Federal Housing Act in *Wright*, both cases where the Supreme Court found that the asserted rights were enforceable.

The provision of the Medicaid Act at issue in *Wilder* required states to set rates that were "reasonable and adequate" to reimburse "efficiently and economically operated" health care facilities. 496 U.S. at 503 (quoting 42 U.S.C. § 1396a(a)(13)(A) (1982)). To determine whether a given rate satisfied these requirements, the statute set forth certain factors for consideration, such as "the unique situation (financial and otherwise) of a hospital that serves a disproportionate number of low income patients." *Id.* at 519 n. 17. The Supreme Court found that this provision provided sufficient guidance to be fit for judicial enforcement. In fact, the Supreme Court noted that the Medicaid Act "provide[d], if anything, more guidance than the provision at issue in *Wright*, which vested in the housing authority substantial discretion for setting utility allowances." *Id.*

If rate-settings that require a state to determine what is reasonable, adequate, efficient, and economical are fit for judicial review, then rate-setting that merely requires a state to quantify costs for set expenses must also be. Accordingly,

we find that foster parents' right to receive foster care maintenance payments is fit for judicial enforcement.

* * *

In sum, applying the *Blessing* factors to this case, we conclude 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.[6]

C. The Rebuttal

But even when a statute grants such a right to a plaintiff class, 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." *See Wright*, 479 U.S. at 425. The State argues that the Act, by directing the Secretary to review the state's

[6] "Plaintiffs suing under [Section] 1983 do not have the burden of showing an intent to create a private remedy because [Section] 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Gonzaga*, 536 U.S. at 284. Hence, we start with the presumption that foster parents may bring a Section 1983 action. *See Blessing*, 520 U.S. at 340-41.

actions for substantial conformity with the Act's commands, forecloses Section 1983 remedies.[7]

The State is mistaken. The Supreme Court has often rejected arguments that a statute's remedial scheme forecloses a Section 1983 action. *Blessing*, 520 U.S. at 346-48; *Wilder*, 496 U.S. at 428-29; *Wright*, 479 U.S. at 428-29; *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-07 (1979); *see also Briggs*, 792 F.3d at 245. Indeed, the Supreme Court has generally found a remedial scheme sufficiently comprehensive to supplant Section 1983 only where it "culminate[s] in a right to judicial review" in federal court. *Wilder*, 496 U.S. at 521 (describing *Smith v. Robinson*, 468 U.S. 992, 1010-1011 (1984) and *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981)). Time and again, the Supreme Court has stressed the importance that some avenue for federal review exist to hear the claims of "aggrieved

[7] The State also argues that a Section 1983 action is not a proper remedy because the Act is Spending Clause legislation. It is true that the "typical remedy" for "state noncompliance" with Spending Clause legislation is federal action to terminate funds to the state, rather than private causes of action, *Pennhurst*, 451 U.S. at 28. But the fact that a law is based on the Spending Clause is by no means determinative. Thus, in *Maine v. Thiboutot*, 448 U.S. 1 (1980), *Wright*, and *Wilder*, the Supreme Court found that Spending Clause legislation supported a cause of action under Section 1983. And, with respect to the entire Social Security Act, including this Child Welfare Act, Congress explicitly anticipated the possibility of Section 1983 actions. Thus, Congress amended the Act to override the reasoning in *Suter v. Artist M.*, 503 U.S. 347 (1992), and thereby to enable appropriate provisions of the Social Security Act to give rise to a private enforcement action (*Suter* would have foreclosed a private enforcement action under any section governing state plan requirements). *See* 42 U.S.C. § 1320a-2. It 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.

individuals." *See Gonzaga*, 536 U.S. at 289-90; *Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 521-22; *Wright*, 479 U.S. at 428; *see also City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005) ("[T]he existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which [the Court has] held that an action would lie under [Section] 1983 and those in which [the Court has] held that it would not.").

No such avenue exists here. The Act provides no federal court review of an individual's claim, other than what, under *Blessing*, is presumptively available under Section 1983.[8] Nor is there federal agency review for claims by an aggrieved individual. The only federal review provided under the Act is review by the Secretary for substantial conformity with the Act and with the state's approved plan, with the possibility of funding cutoffs as the sole remedy.

The Supreme Court has made clear that a federal agency's "generalized powers are insufficient to indicate a congressional intent to foreclose [Section] 1983 remedies." *Wright*, 479 U.S. at 428. And, in *Blessing*, the High Court explicitly

[8] There is also no avenue for state court review The Act provides only for state agency proceedings for aggrieved individuals. Yet, confoundingly, the State argues that this state agency review is sufficient to foreclose resort to Section 1983. State review, standing alone, has never been deemed sufficient to supplant a Section 1983 action. *See Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 522-23; *Wright*, 479 U.S. at 427-28. And we will not deviate from that course here.

rejected the notion that substantial compliance review, coupled with funding cut-offs, is sufficient to supplant a private right of action under Section 1983. 520 U.S. at 348; *see also Wright*, 479 U.S. at 428. Accordingly, we reject the state's contention that the substantial conformity review provided for in the Act supplants the Section 1983 remedy. *See Briggs*, 792 F.3d at 239.

This outcome is wholly consistent with the Supreme Court's precedent in *Armstrong v. Exceptional Child Center, Inc.*, — U.S. —, 135 S. Ct. 1378 (2015). The dissent accuses us of ignoring *Armstrong*, which, it claims, "squarely controls our case." Dissent at 30-32. In fact, *Armstrong* is readily distinguishable on multiple grounds. First, *Armstrong* addressed the question of whether the plaintiffs had a cause of action *in equity* to enforce Section 30(A) of the Medicaid Act. *Id.* at 1385. *Armstrong* did not consider whether the plaintiffs would have had a private cause of action under Section 1983. *See id.* at 1392 (Sotomayor, J., dissenting) (distinguishing actions in equity from Section 1983 suits). The dissent, going beyond the holding in *Armstrong*, argues that, "if [the plaintiffs] could not enforce the provision in equity, *a fortiori*, they could not do so pursuant to a § 1983 theory." Dissent at 33. This reasoning is fundamentally flawed. It belittles the purpose of the Civil Rights Act of 1871, which established Section 1983 claims precisely to

permit plaintiffs to sue the government for civil rights violations where they might not otherwise have had a remedy. To limit Section 1983 claims only to instances where plaintiffs would have a claim in equity would be totally inconsistent with the purposes of Section 1983.

Second, the court in *Armstrong*, in denying the existence of a cause of action in equity as to the statute before it, relied on "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy." *Armstrong*, 135 S. Ct. at 1385. Indeed, *Armstrong* specifically states that "[t]he provision for the Secretary's enforcement by withholding funds might not, *by itself*, preclude the availability of equitable relief. But it does so when combined with the judicially unadministrable nature of § 30(A)'s text." *Id.* For the reasons discussed above in Section III.B.3, the provisions of the Child Welfare Act requiring states to make foster care maintenance payments are not judicially unadministrable. Therefore, *Armstrong* is in no way inconsistent with our holding that a cause of action under Section 1983 exists here.

* * * * *

The Act uses mandatory language, binding participating states. It evinces a Congressional focus on meeting the needs of individual foster children and

translates that focus into a specific monetary entitlement granted to an identified class of beneficiaries: foster parents. The Act, moreover, provides sufficient guidance to courts to make the right appropriate for judicial enforcement. Since the Act does not provide any other federal avenues for foster parents to vindicate that right, the right is enforceable through Section 1983. Accordingly, we **VACATE** the order of the district court and **REMAND** for further proceedings.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: April 19, 2019
Docket #: 14-2919cv
Short Title: New York State Citizens' Coali v. Velez

DC Docket #: 10-cv-3485
DC Court: EDNY (BROOKLYN)
DC Judge: Reyes
DC Judge: Kuntz

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
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VERIFIED ITEMIZED BILL OF COSTS

Counsel for
_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the
_____

and in favor of
_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature