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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Jeremiah M., *et al.,* Plaintiffs, v. KIM KOVOL, *et al.,* Defendants.	Case No. 3:22-cv-00129-SLG **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT THREE**

INTRODUCTION

Plaintiffs' third cause of action alleges that the State is violating provisions of the Adoption Assistance and Child Welfare Act ("CWA"). ECF No. 16 at 80. These CWA provisions are vital for protecting foster children and for ensuring compliance with federal standards. In general, Plaintiffs allege that the State violates the CWA by failing to place foster children in proper settings, failing to give foster children the services needed for their safety, health or well-being, failing to provide foster children with appropriate case plans or case plan reviews, and failing to timely petition to terminate parental rights for foster children that are trapped for too long in foster care. *Id.* at 80-81.

Rather than defend these CWA allegations on the merits, the State asks this Court to rule that the CWA does not create individually enforceable rights, and that, even if it does, the specific provisions that Plaintiffs rely on are not individually enforceable. ECF No. 119. This radical argument asks this Court to overturn the Ninth Circuit's on-point decision in *Henry A. v. Willden,* 678 F.3d 991 (9th Cir. 2012), which explicitly holds that

foster children can indeed enforce CWA provisions. *Id.* at 14.

The State relies on a maze of arguments. The State argues that *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), a case which *Willden* reconciled with earlier Supreme Court case law that approved the individual enforcement of various Social Security Act state plan funding conditions, actually overruled that earlier case law. *Id.* at 11. The State also argues that, despite Congress's 1994 efforts to preserve Social Security Act litigation, those efforts failed. *Id.* at 18. Further, the State argues that *Blessing v. Freestone*, 520 U.S. 329 (1997), a case which approved the individual enforcement of some Child Support Enforcement provisions, is no longer good law. *Id.* at 14. Finally, the State argues that the Supreme Court confirmed all of this in *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023), a case which does not mention overruling anything and does not discuss Congress's 1994 legislation. *Id.* at 11. All of this, the State concludes, requires this Court to overturn *Willden*, a controlling Ninth Circuit case, and to cast its own new decision in terms that would question a well-established body of federal law under which the Supreme Court, since 1968, has allowed beneficiaries to enforce similar Social Security Act funding conditions against State officials like Defendants.

The State is off base. As the Fourth Circuit cautioned about a similar attack, *Talevski* did not overrule *Blessing*, and should not be read "as toppling the existing doctrinal regime."[1] Even if it arguably did, the State must let the Supreme Court itself decide when its cases are no longer good law. As the Fourth Circuit also cautioned, the job of lower

[1] *Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 155 (4th Cir. 2024).

courts "is not to read between the lines, but rather to adhere faithfully to the lines as written," and so "[p]erhaps we will someday be told to abandon *Blessing* once and for all, but it takes more than a whisper to supplant the force of Supreme Court precedent."[2]

Meanwhile, taking them one by one, this Court should find the individual CWA provisions included in the Complaint to be fully enforceable.

Finally, Defendants' motion should be discarded as a waste of scarce judicial resources. Defendants did not move to dismiss Plaintiffs' third cause of action alleging violations of other provisions of CWA, nor did they amend their motion to dismiss following *Talevski*. Now—two years after their motion to dismiss, one year after the district court's decision—Defendants attempt to do so in a so-called "Motion for Summary Judgment." This Court should adhere to the strong policy prescription expressed in Rule 1 and reject Defendants' dilatory and costly motion.[3]

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[2] *Id.* at 164.

[3] The Federal Rules of Civil Procedure must "'be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.'" Pepper v. Apple Inc. *(In re Apple iPhone Antitrust Litig.)*, 846 F.3d 313, 318 (9th Cir. 2017) (quoting Fed. R. Civ. P. 1). Courts may exercise discretion to entertain late-filed 12(b)(6) motions if doing so would prevent "unnecessary and costly delays" consistent with Rule 1. *Id*. at 318-19. But Defendants have not fashioned its arguments for dismissal in a late-filed 12(b)(6). Instead, Defendants attempt to circumvent Rule 12(g)(2) by disguising their defense as a question of law that may be resolved in a motion for summary judgment. *See* Dkt. 119 at 9. But whether presented as a motion to dismiss or a motion for summary judgment, Defendants' motion would not prevent "unnecessary and costly delays." Just the opposite. Plaintiffs and Defendants have expended significant resources in discovery related to the claims that Defendants now seek to dismiss, and the court will have wasted scarce resources refereeing discovery disputes.

ARGUMENT

I. The State Seeks to Overturn a Deeply Rooted Body of Law.

The State's motion sometimes purports merely to be asking this Court to engage in "statutory construction" to hold that "the CWA is not an individual rights-creating statute." ECF No. 119 at 2. Yet the State is asking for something much more radical. After all, the result sought by the State would flout on-point law from the Ninth Circuit, and undermine how beneficiaries have enforced similar statutory provisions since 1968.

A. Ninth Circuit precedent supports foster children enforcing CWA provisions.

In *Willden*, foster children from Nevada filed a lawsuit challenging "systemic failures" that "plagued" a county's foster care system.[4] This included the children alleging that Nevada was violating, *inter alia,* "their federal statutory rights under the [CWA], 42 U.S.C. § 670 *et seq*."[5] However, "[t]he district court dismissed these claims" and ruled that the CWA provisions were not "privately enforceable."[6]

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[4] *Henry A. v. Willden,* 678 F.3d 991, 996-997 (9th Cir. 2012) ("The specific allegations include[d] the failure to provide caseworkers with even basic training; the failure to provide foster children and their foster parents with case plans and medical records; the failure to provide foster children with necessary medical care; the failure to provide foster children with guardians ad litem; the failure to investigate reports of abuse and neglect in foster homes; the failure of Clark County to incorporate state and federal requirements into its child welfare policies; and the failure of the State to ensure that Clark County is operating its foster care system in compliance with federal law.").

[5] *Id.* at 996; *see also id.* at 1006 (noting allegations about CWA-required case plans); *id.* at 1008 (noting allegations about CWA-required case review systems).

[6] *Id.* at 1006.

The Ninth Circuit reversed the dismissal of the CWA claims.[7] In detailed findings, which applied *Blessing* and *Gonzaga*, the Ninth Circuit analyzed the CWA and the text of the provisions at issue, and concluded that they were indeed enforceable via § 1983.[8]

B. Beneficiaries have been enforcing provisions of Social Security Act funding conditions, which include CWA provisions, since 1968.

Willden was not an anomaly. It is among a well-established body of federal law that has, for decades, endorsed that beneficiaries can indeed enforce various funding conditions of the Social Security Act (which includes the CWA within its Title IV-E).

In 1968, in *King v. Smith,* the Supreme Court enforced a Social Security Act state plan condition against State officials.[9] The Court found that Alabama officials were bound by a requirement in the Aid to Families with Dependent Children ("AFDC") statutes for benefits-to-eligible-individuals-with-reasonable-promptness [then 42 U.S.C. § 602(a)(9)], and by the statutes' definition of children with an absent parent [then 42 U.S.C. § 606(a)].[10]

Two years later, in *Rosado v. Wyman*, a case brought by petitioner welfare recipients, the Supreme Court held New York's AFDC system did not appropriately set standards of need pursuant to 42 U.S.C. § 602(a)(23).[11] The Court held that disputes about this requirement could go directly to Federal court, which did not need to defer to the then Department of Health, Education and Welfare, and which did not need to refer the disputes

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[7] *Id.* at 1012.
[8] *Id.* at 1005-1009.
[9] 392 U.S. 309 (1968).
[10] *Id.* at 333.
[11] 397 U.S. 397 (1970).

to that department's primary jurisdiction.[12] Because § 602(a)(23) was complex, the Court held that a remand to see if New York could come into compliance was appropriate; if the statute's requirements were simpler, and if it had been possible for a court to identify a "discrete and severable" state policy that violated federal funding conditions, the federal court could have enjoined that policy's implementation.[13]

This case concerns the CWA's state plan conditions within the Social Security Act. The CWA has a similar structure to other statutes that the Supreme Court has considered, including: the AFDC statute at issue in *King v. Smith*, *Rosado v. Wyman*, and other cases such as *Maine v. Thiboutot*, 448 U.S. 1 (1980); the Aid to the Aged, Blind, and Disabled statute at issue in *Edelman v. Jordan*, 415 U.S. 651 (1974); the Title IV-D child support statutes at issue in *Blessing*; and the Medicaid Act.

There are strong structural similarities among these Social Security Act programs. The CWA has a statement of purpose, e.g., 42 U.S.C. § 670. The CWA has provisions for States to submit a state plan to the Federal oversight authority, and detailed requirements about what that state plan must contain if federal officials are to approve it, e.g., 42 U.S.C. § 671(a). The CWA has provisions through which the federal authority may partially defund state operations if the state is no longer substantially complying with the requirements, e.g., 42 U.S.C. §§ 674 and 1320a-2a.

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[12] *Id.* at 415 and 405-07 (over a dissent by Justice Black and Chief Justice Burger).

[13] *Id.* at 421.

Of course, there are not explicit federal rights of action in the CWA; nor are there in these other programs. Yet since *Rosado v. Wyman* in 1970, States have been aware that individual people, the intended beneficiaries of Congress's conditions, may sue to compel State compliance. Moreover, Congress enacted the CWA ten years later, in 1980. That was the year that the Supreme Court confirmed, in *Maine v. Thiboutot*, that enforcement suits about plan conditions can be brought under 42 U.S.C. § 1983.[14] Indeed, in *Thiboutot*, after Maine officials denied the plaintiffs rights secured by the AFDC statutes, the Court held that those "laws," and not just civil rights laws, could be enforced under § 1983.[15]

So, by 1980, the system had decided that Social Security Act cooperative-federalism programs contained rights that are individually enforceable. Further, that system had also added the CWA to the roster of such Social Security Act programs. And, in the 1980s, this jurisprudence deepened in other areas. For instance, in 1987, the Supreme Court approved enforcement of provisions of the Brooke Amendment to the Housing Act of 1987.[16] The same followed, in 1990, for the Medicaid Act.[17]

Yet in 1992, then Chief Justice Rehnquist, in *Suter v. Artist M*, held that a provision of the CWA, 42 U.S.C. § 671(a)(15), was too vague to enforce, and raised more sweeping questions about whether or not state plan conditions gave rise to enforceable rights.[18] The

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[14] 448 U.S. 1 (1980).
[15] *Id.* at 4.
[16] *Wright v. Roanoke Redevelopment & Hous. Auth.,* 479 U.S. 418 (1987).
[17] *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498 (1990).
[18] 503 U.S. 347 (1992).

statute, his opinion said, is directed at Federal and State officials and does not contain any explicit enforcement provisions.[19] Congress promptly responded to this 1992 decision, though, by twice enacting the so-called "Suter v. Artist M fix" in 1994:

> Effect of failure to carry out State plan:
>
> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.[20]

This "fix" generally applies to the CWA for two textual reasons. First, in the fix, "this chapter" refers to the Social Security Act, of which the CWA is Title IV-E. Second, *Suter v. Artist M*, referenced in the two fix statutes, is itself a CWA case.

If the State is suggesting here that, because 42 U.S.C. § 1320a-2a sets out particular standards for federal enforcement of the CWA against States, this thus rules out enforcement by beneficiaries of CWA provisions, that is not well taken. One version of the fix is section 211 of Pub. L. 103-342, the same statute that includes the CWA enforcement language in § 1320a-2a (§§ 202-210), and there is no indication in the statute or its legislative history that the fix is meant to apply to all titles of the Social Security Act except

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[19] *Id.* at 358-62.

[20] 42 U.S.C. §§ 1320a-2, 1320a-10 (1994) (enacted by § 555(a) of Pub. L. 103-382 and § 221(a) of Pub. L. 103-432).

for the title construed in *Suter v. Artist M*. Also, *Rosado v. Wyman*, noted above, establishes that the presence of federal enforcement mechanisms does not rule out private enforcement.[21]

Nor should the statutory exception within the fix, which rules out private claims to enforce 42 U.S.C. § 671(a)(15), be construed to apply to any other provision of the CWA. § 671(a)(15) was found unenforceable in *Artist M* because it was too vague to enforce[22] – a ground not overturned by the *Artist M* fix – and perhaps because it was "inclu[ded] in a section of this chapter requiring a State plan or specifying the required contents of a State plan" – an issue the *Artist M* fix was very much meant to address. The fix's exception must be construed to fit its text and not to go beyond it.[23] States are free to argue, as the State is here, that particular provisions are too vague to enforce; but the State should not be allowed to argue that this Court dismiss claims that the *Suter v. Artist M* fix squarely protects.

Three years after Congress validated state plan enforcement litigation in the Suter v. Artist M fix, in 1997, the Supreme Court did the same thing in *Blessing*.[24] Justice O'Connor criticized any "blanket approach" to whether the Child Support Enforcement

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[21] *See generally,* 397 U.S. 397 at 423-30 (Douglas, J., concurring). *See also Health and Hosp. Corp. v. Talevski*, discussed below.

[22] 503 U.S. 347 at 359-61.

[23] *See, e.g., Atl. C. L. R. Co. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 287 (1970) ("exceptions should not be enlarged by loose statutory construction.")

[24] 520 U.S. 329 (1997)

statutes create individual rights.[25] While some provisions do not give rise to individually enforceable rights,

> We do not foreclose the possibility that some provisions of Title IV–D give rise to individual rights. The lower court did not separate out the particular rights it believed arise from the statutory scheme, and we think the complaint is less than clear in this regard. For example, respondent Madrid alleged that the state agency managed to collect some support payments from her ex-husband but failed to pass through the first $50 of each payment, to which she was purportedly entitled under the pre–1996 version of § 657(b)(1). App. 13 (Complaint ¶ 48). Although § 657 may give her a federal right to receive a specified portion of the money collected on her behalf by Arizona, she did not explicitly request such relief in the complaint.[26]

In addition to providing this example of an individually enforceable provision, Justice O'Connor made it clear that the Federal defunding mechanisms that apply to child support enforcement do not constitute the kind of "remedial scheme … sufficiently comprehensive to supplant § 1983."[27] "To the extent that Title IV–D may give rise to individual rights, therefore, we agree with the Court of Appeals that the Secretary's oversight powers are not comprehensive enough to close the door on § 1983 liability. 68 F.3d, at 1151–1156."[28]

It is *Blessing v. Freestone*, a case which has supported Social Security Act state plan conditions enforcement since 1997, that the State now contends has been overruled – and overruled so completely that this Court ought itself to overrule an otherwise controlling decision from the Court of Appeals.

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[25] *Id.* at 344.
[26] *Id.* at 345-46.
[27] *Blessing v. Freestone*, 520 U.S. at 347.
[28] *Id.* at 348.

II. The State Attacks Plaintiffs' CWA Claims by Incorrectly Arguing that *Willden* and *Blessing* are no longer "good law."

A. *Gonzaga* never "rejected" *Blessing.*

Part of the State's theory is that the law changed since *Blessing.* ECF No. 119 at 11. Yet a weakness of that theory is that *Gonzaga,* a case that the State claims to have overruled *Blessing*, was issued 22 years ago and was already analyzed by the Ninth Circuit in *Willden* 12 years ago.

Gonzaga did not reject *Blessing*. If anything, *Gonzaga* instead observed that some lower courts had over-read a passage in *Blessing* about Congress's having meant to support individual rights when the statute in question was meant to benefit plaintiffs:

> Some 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: "Congress must have intended that the provision in question benefit the plaintiff," "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," and "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." 520 U.S., at 340-341. In the same paragraph, however, *Blessing* emphasizes that it is only violations of rights, not laws, which give rise to § 1983 actions. *Id.,* at 340. This confusion has led some courts to interpret *Blessing* as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action ….[29]

This did not in any way overrule *Blessing*; instead, it limited the misreading of *Blessing* that some lower courts had been doing. Since *Gonzaga*, courts have spent more

[29] *Gonzaga,* 536 U.S. at 282-83.

than 20 years reconciling and harmonizing those two cases. *Willden* is an example. Its analysis, while to the point, is not the "lip service" the State would make of it:

> Section 1983 can also be used to enforce federal statutes. *Blessing v. Freestone,* 520 U.S. 329, 340 (1997). For a statutory provision to be privately enforceable, however, it must create an individual right. *See id.* ("In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law*.").
>
> *Blessing* established a three-prong test for determining whether a federal statute creates an individual right. "The *Blessing* test requires: 1) that Congress intended the statutory provision to benefit the plaintiff; 2) that the asserted right is not so 'vague and amorphous' that its enforcement would strain judicial competence; and 3) that the provision couch the asserted right in mandatory rather than precatory terms." *Watson v. Weeks,* 436 F.3d 1152, 1158 (9th Cir.2006) (citing *Blessing,* 520 U.S. at 340-41). In *Gonzaga University v. Doe,* the Supreme Court clarified that the first prong of the *Blessing* test is meant to determine whether Congress "unambiguously conferred" a federal right. 536 U.S. 273, 283 (2002). This requires "rights-creating language," meaning that the text of the statute "must be phrased in terms of the persons benefited." *Id.* at 284, 284 n. 3 (quotation marks and citations omitted).
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> If a statutory provision satisfies the *Blessing* test, it is presumptively enforceable through § 1983. *Watson,* 436 F.3d at 1158 (citing *Blessing,* 520 U.S. at 341). This presumption is rebutted "if Congress expressly or impliedly foreclosed enforcement under section 1983." *Id.* "[A]n implied foreclosure occurs if Congress created 'a comprehensive enforcement scheme that is incompatible with individual enforcement.'" *Id.* at 1158–59 (quoting *Blessing,* 520 U.S. at 341).[30]

This analysis by the Ninth Circuit in *Willden* is, for lack of a better word, correct, and it belies the State's contention that the decision is no longer "good law."[31] In turn, instead of citing something about *Willden* that was wrong at the time, the State now asserts that a

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[30] *Willden,* 678 at 1005-06.

[31] *See, e.g.,* ECF No. 119 at 14 ("*Willden* cannot be considered good law. . ."); *id* at 16 (". . . *Willden* is no longer good law."); *id.* at 28 ("if it were still good law. . .")

2023 case, *Talevski,* recently "rejected" *Blessing*, and so it claims that this Court thus must disregard *Willden*.[32] This is not a tenable way to read *Talevski* or the other cases.

B. *Talevski* never "rejected" *Blessing*, either.

The State's attack on *Willden* sits on an incorrect premise, as *Talevski* never rejected *Blessing* in the first place. *Talevski* never stated that *Blessing* is no longer good law, and it never purported to alter the legal inquiry about whether a statute confers a private right of action under § 1983. It is a-textual for the State to assert otherwise.

To be sure, *Talevski* was an opportunity for the Supreme Court to reject *Blessing*, as this was something that two dissenting justices angled at.[33] Yet no other justices ruled accordingly and, instead, the majority opinion favorably cited *Blessing*.[34]

Since *Talevski*, lower federal courts have also found that it did not alter the law as the State suggests. In *Drumm v. Beaver Area School District,* a federal district court in Pennsylvania recently stated that it "reads *Talevski* as the Supreme Court merely examining and illuminating its prior precedent – not establishing a new regime."[35] *Drumm* reiterated that "nothing in *Talevski* indicates the Supreme Court intended to alter precedent."[36]

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[32] *See, e.g.,* ECF No. 119 at 11-12, 14, and 16.

[33] *Talevski,* 599 U.S. at 230 (Alito J., joined by Thomas J., dissenting).

[34] *Id.* at 189. The Supreme Court also favorably cited *Blessing* just one year before *Talevski*. *See Vega v. Tekoh,* 597 U.S. 134, 150 n. 6 (2022) (citing *Rancho Palos Verdes v. Abrams,* 544 U. S. 113, 119 (2005)).

[35] 2024 U.S. Dist. LEXIS 207309, *13 (W.D. Pa. Nov. 14, 2024).

[36] *Id.*

Similarly, in *Planned Parenthood South Atlantic v. Kerr*, the Fourth Circuit taught: "While *Talevski* offered an illuminating analysis of the issue before us and a useful new example of provisions enforceable via § 1983, we do not read it as toppling the existing doctrinal regime."[37] In that same opinion, the Fourth Circuit also went on to reiterate why it was not moved by an argument similar to the one before this Court:

> South Carolina insists that we revisit our previous deliberations. In light of *Talevski*, the State posits, our prior position is no longer tenable and this court should decline to follow it.
>
> We are unconvinced that *Talevski* effected such a clear doctrinal transformation. Instead, the decision emphasized a well-known point: that the key inquiry in discerning whether a federal statute creates individually enforceable rights is whether Congress has unambiguously conferred individual rights upon a class of beneficiaries to which the plaintiff belongs. Our previous decisions relied on the same textual probe.
>
> Nonetheless, the State here contends that *Talevski* requires a do-over. We disagree.[38]

Indeed, since *Talevski*, district courts have cited *Blessing* and *Talevski* alongside one another.[39] This only further rejects the idea that *Talevski* rejected *Blessing.*

Even if this Court doubts the viability of *Blessing*, fealty to *Willden* is appropriate until the Supreme Court or Ninth Circuit hold otherwise. A trial court is not the place for

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[37] 95 F.4th 152, 155 (4th Cir. 2024).

[38] *Id.* at 160 (internal citations and quotations omitted).

[39] *See, e.g., Jackson v. Seifried,* 2023 U.S. Dist. LEXIS 124047, *10-12 (D.N.J. Jul. 19, 2023) (finding a Medicaid Act provision enforceable by applying *Blessing*, and citing *Talevski*). Note that *Jackson* begins with a "not for publication" advisory. *See also United States v. Freestone*, 2023 U.S. Dist. LEXIS 130306, *14 (M.D. Fla. Jul. 27, 2023) (applying *Blessing* to determine enforceability of a right in a criminal case, and citing *Talevski*).

this dispute. As this Court has noted, "until the Supreme Court changes the law, the Ninth circuit and the district court are bound by the Ninth Circuit's earlier precedent."[40]

This reiterates, wisely, precedent from the Ninth Circuit about how difficult it is to alter circuit precedent from the district court level. If a court is going to rule that the Ninth Circuit miscited *Blessing*, or misapplied *Gonzaga,* the Ninth Circuit, likely *en banc,* should be the court to do so.[41]

Further, in the context of this precise legal dispute, the Fourth Circuit has channeled the Supreme Court to also echo caution. In the opinion noted above, *Planned Parenthood South Atlantic v. Kerr*, the Fourth Circuit cautioned about how, even if doubts abound, *Blessing* remains viable unless the Supreme Court says otherwise:

> Our role in a system of vertical *stare decisis* is subordinate. It is not our prerogative to proclaim a Supreme Court precedent overthrown. The Supreme Court has been clear that its "decisions remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States,* 524 U.S. 236, 252-53 (1998). We therefore remain bound by *Blessing* until given explicit instructions to the contrary—instructions that have yet to come. The *Talevski* Court did not reckon with the fate of *Blessing*. It did not examine whether the "traditional justifications" to overturn the

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[40] *Tholson v. Taylor,* 2015 U.S. Dist. LEXIS 55337, *3 n.8 (D. Alaska Apr. 28, 2015) (citing *Day v. Apoliona,* 496 F.3d 1027, 1031 (9th Cir. 2007)) (cleaned up); *see also United States v. Lawson,* 2018 U.S. Dist. LEXIS 46387, *9 (D. Alaska Mar. 16, 2018) (internal citations and quotations omitted) ("Stare decisis requires the District Court to adhere to the Ninth Circuit's holdings unless they are subsequently overruled by the Supreme Court or a decision en banc. District courts not permitted to resolve splits between the circuits no matter how egregiously in error they may feel their own circuit to be.").

[41] *See, e.g., Lopez v. Garland,* 116 F.4th 1032, 1045 (9th Cir. 2024) (internal citations and quotations omitted) ("as a three-judge panel, we lack the authority to overrule existing circuit precedent absent intervening higher authority that is clearly irreconcilable."); *Murray v. Cable NBC,* 86 F.3d 858, 860 (9th Cir. 1996) (internal citations and quotations omitted) ("Only a panel sitting *en banc* may overturn existing Ninth Circuit precedent.").

> precedent had been met. *See Kimble v. Marvel Ent.,* LLC, 576 U.S. 446, 458-59 (2015). It did not inquire into "the quality of [Blessing's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, [or] reliance on the decision." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,* 585 U.S. 878 (2018). We would certainly expect some discussion of *Blessing* had it been jettisoned. *See Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 266-67 (2022) ("[O]verruling a precedent is a serious matter. It is not a step that should be taken lightly."). Our job is not to read between the lines, but rather to adhere faithfully to the lines as written. Perhaps we will someday be told to abandon *Blessing* once and for all, but it takes more than a whisper to supplant the force of Supreme Court precedent.[42]

Blessing remains good law, and the Court should deny Defendants' Motion for Summary Judgment on those grounds.

III. Plaintiffs Have Individually Enforceable Rights to a Case Plan, a Case Review System, and Access to Services under Section 671(a) of CWA.

As discussed above, federal statutes create §1983-enforceable rights when the statutory provisions at issue "'unambiguously confe[r]' individual rights, making those rights 'presumptively enforceable.'"[43] The Supreme Court's "established method for ascertaining unambiguous conferral" is to "employ traditional tools of statutory construction" to determine whether "'Congress intended to create a federal right' *for* the identified class, not merely that the plaintiffs fall 'within the general zone of interest that the statute is intended to protect.'"[44] The "test is satisfied where the provision in question

[42] *Kerr,* 95 F.4th at 164.
[43] *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 283-284).
[44] *Id.* (quoting *Gonzaga*, 536 U.S. at 283) (orig. emph.).

is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'"[45]

If the court finds that the statutory provisions satisfy the unambiguous conferral test, then "the rights they recognize are presumptively enforceable under §1983."[46] The burden then shifts to defendants to rebut the presumption by demonstrating that Congress expressly or impliedly precluded § 1983 enforcement.[47] The mere existence of an explicit enforcement mechanism contained within the statute does not preclude enforcement under §1983.[48] Defendants must show that § 1983 enforcement would be incompatible with—by either supplanting or circumventing—the statutory scheme.[49]

Instructive here are the cases in which the Court found no unambiguously conferred rights. In *Suter*, the Court held that the statute's requirement that the state have a "plan" to make "reasonable efforts" to keep children out of foster homes imposed a "generalized duty on the State" to be enforced by the federal government.[50] In *Blessing*, the Court held that the statute's mandate to "substantially comply" with requirements designed to ensure timely child support payments was "simply a yardstick for the Secretary to measure

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[45] *Id.* (quoting *Gonzaga*, 536 U.S. at 284, 287). As discussed above, in *Blessing*, the Court "set forth three 'factors' to guide judicial inquiry into whether or not a statute confers a right. But these additional factors are merely interpretive tools to help answer the fundamental question: whether the asserted right was unambiguously conferred. *See Gonzaga*, 536 U.S. at 283; *Talevski*, 599 U.S. at 183.

[46] *Id.* at 186.

[47] *Id.* (quoting *Rancho Palos Verdes*, 544 U.S. at 120).

[48] *Id.* at 187-90.

[49] *Id*.

[50] *Gonzaga*, 536 U.S. at 281 (quoting *Suter*, 503 U.S. at 363).

the *systemwide* performance" and focused on "'the aggregate services provided by the State,' rather than 'the needs of any particular person…'"[51] And in *Gonzaga*, the Court held the statute's bare direction that "'no funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice'" was not "individually focused terminology" and therefore did not create a private right of action for students whose educational information was disclosed.[52] In each case, the statutory provisions lacked individual-centric language, imposed vague and amorphous goals rather than specific entitlements, and lacked specific mandates that could be enforced by a court without second-guessing the state's discretion.

A. There is an individually enforceable right to a case plan.

A foster child's right to a case plan under § 671(a)(16) is clear and unambiguous: States "shall have a plan…which…provides for the development of a case plan…for each child…" 42 U.S.C §671(a)(16) (emph. added). And "Section 675(1) provides a detailed definition of what a case plan must include, such as the child's health and educational records, a description of the child's permanency plan, and a plan for ensuring the child's educational stability."[53] The language is mandatory, the mandate is specific, and the individual-centric language shows that each foster child is Congress' intended beneficiary of a case plan. The Ninth Circuit's holding in *Willden* compels this court to find that

[51] *Id*. at 281-82 (quoting *Blessing*, 520 U.S. at 323) (orig. emph.).
[52] *Gonzaga*, 536 U.S. at 287.
[53] *Henry A. v. Willden*, 678 F.3d 991, 1006 (9th Cir. 2012).

Plaintiffs' asserted rights to case plans under §§ 671(a)(16) and 675(1) are presumptively enforceable.[54] This conclusion finds overwhelming support in this circuit and elsewhere.[55]

Defendants do not attempt to rebut this presumption. Instead, they ask this court to either distinguish, ignore, or overrule *Willden*.

First, attempting to distinguish *Willden*, Defendants observe that, unlike the *Willden* plaintiffs who alleged that they lacked a case plan as required under § 671(a)(16), Plaintiffs here allege that their case plans existed but were not properly implemented as required under § 675(1). ECF 119 at 24-25. This is distinction is legally meaningless. The relevant inquiry is whether the statutory provisions at issue unambiguously confer rights. Just like the plaintiffs in *Willden*, Plaintiffs in this case asserted rights to case plans under §§ 671(a)(16) and 675(1). And *Willden*'s holding was based on an analysis of both provisions. Defendants argument is also factually incorrect. § 675(1) does not govern how a case plan is implemented. It defines what a case plan is. If a case plan does not meet the specifications of § 675(1), it is not, as Defendants understand it, a *bad* case plan. By definition, it is *not* a

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[54] *Id*.

[55] *See, e.g.*, *Willden*, 678 F.3d at 1006-07; *L.J. v. Wilbon*, 633 F.3d 297, 310 (4th Cir. 2011) (case plan and case review system); *K.S. v. City of New York*, No. 21-CV-04649 (PAC), 2023 WL 6608739, at *12-13 (S.D.N.Y. Oct. 10, 2023) (case plan and case review system); *Elisa W. v. City of N.Y.*, No. 15 CV 5273-LTS-HBP, 2016 U.S. Dist. LEXIS 123332, at *17 (S.D.N.Y. Sep. 12, 2016) (case plan and case review system); *Kenny A. v. Perdue*, 218 F.R.D. 277, 291-92 (N.D. Ga. 2003) (case plan and case review system); Brian A. by *Brooks v. Sundquist*, 149 F. Supp. 2d 941, 947 (M.D. Tenn. 2000) (case plan and case review system); *Lynch v. Dukakis*, 719 F.2d 504, 509-12 (1st Cir. 1983) (case plan and case review system); *Bryan C. v. Lambrew*, 340 F.R.D. 501, 520-30 (D. Me. 2021) (case plan and case review system); *Connor B. v. Patrick*, 771 F. Supp. 2d 142, 172 (D. Mass. 2011) (case plan and case review system); *Sam M. v. Chafee*, 800 F. Supp. 2d 363, 388 (D.R.I. 2011) (case plan and case review system).

case plan at all. Finally, this argument was recently rejected by a district court in the Ninth Circuit.[56]

Second, Defendants assert that the Ninth Circuit failed to analyze § 675(1) independent of § 671(a)(16), and that had the court analyzed them separately it would have found that none of the case plan provisions in 675(1) contained "rights-creating language." ECF 119 at 24-25. As a preliminary matter, Defendants do not dispute *Willden*'s holding that the case plan provision in § 671(a)(16) contained sufficient "rights-creating language" and was therefore "enforceable through § 1983."[57] Nor do Defendants dispute Willden's holding that § 675 contained sufficiently specific mandatory language such that its enforcement would not strain judicial resources. ECF 119 at 24. But the fundamental flaw with Defendants' argument is that the two provisions are not severable. This is why the Ninth Circuit analyzed them as a unit.[58] § 671(a)(16) sets out the case plan requirement, and § 675 defines a case plan. Reading one provision in isolation, as Defendants do, renders the other provision meaningless. And the Ninth Circuit has forcefully rejected this acontextual approach to statutory interpretation.[59] This court should reject Defendants' acontextual interpretation of the statute.

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[56] *Gary G. v. Newsom*, No. 5:23-cv-00947-MEMF-BFM, 2024 U.S. Dist. LEXIS 177977, at *27 (C.D. Cal. Sep. 30, 2024).
[57] *Willden*, 678 F.3d at 1006.
[58] *See Willden*, 678 F.3d at 1006 ("The case plan provisions of the CWA are codified at 42 U.S.C. §§ 671(a)(16) and 675(1)").
[59] *See Shelby v. Bartlett*, 391 F.3d 1061, 1064 (9th Cir. 2004) (quoting *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)) ("We must 'interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision

B. There is an individually enforceable right to a case review system.

A foster child's right to a case review system is equally clear and unambiguous: States "shall have a plan…which…provides for a case review system…with respect to each such child." 42 U.S.C §671(a)(16) (emphasis added).

Section 675(5)(A) provides that "each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child," and further requires the case plan to state reasons why a child was placed far away from their parents or in another state, and requires the agency to visit a child placed out-of-state no less than every six months. (emph. added). Once again, the language is focused on the individual child, and it contains specific and mandatory language indicating that each child is entitled to a case plan designed to achieve the outlined objectives and to periodic visits when placed out of state.

The court need not second-guess the agency's or the juvenile courts' conclusions regarding the safety, restrictiveness, appropriateness of the placement, nor its consistency with the child's individualized needs, nor its reasons for distant or out-of-state placement. This court need only determine whether each child has a case plan designed to achieve these objectives. Plaintiffs do not, as Defendants claim, assert a right "to such a placement." ECF 119 at 26. Plaintiffs assert that their case plans are not designed to achieve those goals;

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in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'").

indeed, they cannot be designed to achieve those objectives because unmanageable caseloads prevent caseworkers from doing so, and the lack of foster home capacity means that Defendants are fundamentally incapable of designing case plans to achieve those objectives.

Under the Ninth Circuit's reasoning in *Willden*, this is sufficient to establish that such a case plan is unambiguously conferred: "A case review system must be provided with respect to each child;" the child's case plan must be designed to achieve the objectives outlined in § 675(5)(A); and the agency must provide reasons for distant and out-of-state placements, and must visit the child placed out-of-state at least once every six months.[60] Like the case plan requirement, the "case review system requirements" have "multiple, highly specific components that are easy enough for a court to assess."[61] And as with the case plan requirement, courts have routinely held the case review system enforceable under §1983.[62]

C. There is an individually enforceable right to the filing of a petition to terminate parental rights.

Congress also unambiguously conferred a right for children to be freed for adoption when they have languished in foster care for a specified period of time. § 675(5)(E) provides "in the case of a child who has been in foster care under the responsibility of the

[60] *Willden*, 678 F.3d at 1008-09.
[61] *Bryan C.*, 340 F.R.D. at 529 (finding that it would be "no particular challenge" and not "unusually difficult" to determine if a case plan and case review system met the requirements of §§ 675(1)(A)-(C), (G) and 675(5)(A)-(B), (D)).
[62] *See supra* note 55.

State for 15 of the most recent 22 months…the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption…" (emph. added). Here again, the language is focused on an individual child, and it contains specific and mandatory language requiring the state to concurrently file a petition for termination for parental rights and approve an adoptive home.[63]

Defendants' argument against § 675(5)(E) leans heavily on its three exceptions. See ECF 119 at 27-28. But "the Court need not 'go behind' defendants' discretionary determinations that an exception applies."[64] "In cases where the State relies upon this exception, the plaintiffs merely seek the right to *documentation* that the exception does, in fact, apply. Construed in this narrow fashion, subparagraphs (i)-(iii) of subsection (5)(E) do not render the rights conferred by the subsection judicially unmanageable."[65]

[63] *Elisa W. v. City of N.Y.*, No. 15 CV 5273-LTS-HBP, 2016 U.S. Dist. LEXIS 123332, at *22 (S.D.N.Y. Sep. 12, 2016); *Kenny A. v. Perdue*, 218 F.R.D. 277, 292 (N.D. Ga. 2003); *Jeanine B. v. McCallum*, Case No. 93-C-0547, 2001 U.S. Dist. LEXIS 12091, at *17 (E.D. Wis. June 19, 2001). *But see Arrington v. Helms*, 438 F.3d 1336, 1345 (11th Cir. 2006); D.G. v. Henry, 594 F. Supp. 2d 1273, 1279 (N.D. Okla. 2009); *Foreman v. Heineman*, 240 F.R.D. 456, 544 (D. Neb. 2006).
[64] *Jeanine B.*, 2001 U.S. Dist. LEXIS 12091, at *15.
[65] *Id*. at *16-17 (emph. added).

D. There is an individually enforceable right to the implementation of standards that ensure foster children are provided access to appropriate services and treatment

§ 671(a)(22) provides that "the State shall develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children." Here, Congress intended foster children to receive quality services to ensure their safety and wellbeing, and it instructed states to develop and implement standards to ensure that those services exist for the benefit of children in state custody.[66] Far from vague or amorphous, a factfinder need only determine whether the state did, in fact, develop standards to ensure such services; and if so, whether the state did, in fact, implement those standards. The allegations of Plaintiffs allegations, the report of the Department of Justice, and the conclusions of Plaintiffs' expert all indicate that Defendants have not implemented standards to ensure that foster children are provided quality services.[67]

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[66] *See Kenny A. v. Perdue*, 218 F.R.D. 277, 292 (N.D. Ga. 2003). Courts finding to the contrary do so on the assumption that the right asserted is a right to access quality services rather than a right to the development and implementation of standards to ensure access to quality services. *See, e.g.*, *S.M. v. City of N.Y.*, No. 20-CV-5164 (JPO), 2021 U.S. Dist. LEXIS 138883, at *17 (S.D.N.Y. July 26, 2021); *Elisa W. v. City of N.Y.*, No. 15 CV 5273-LTS-HBP, 2016 U.S. Dist. LEXIS 123332, at *23 (S.D.N.Y. Sep. 12, 2016); *Gary G. v. Newsom*, No. 5:23-cv-00947-MEMF-BFM, 2024 U.S. Dist. LEXIS 177977, at *28 (C.D. Cal. Sep. 30, 2024); *Clark K. v. Guinn*, No. 2:06-CV-1068-RCJ-RJJ, 2007 U.S. Dist. LEXIS 35232, at *30 (D. Nev. May 9, 2007); *Whitley v. N.M. Children, Youth & Families Dep't*, 184 F. Supp. 2d 1146, 1165 (D.N.M. 2001); *Foreman v. Heineman*, 240 F.R.D. 456, 542 (D. Neb. 2006); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 490 n.3 (D.N.J. 2000).

[67] *See, e.g.,* ECF 136-78 at 16 (The Department of Justice's clinical expert "concluded that the types of services established through the State's Medicaid program, if provided and

CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court deny the State's Motion for Summary Judgment in full.

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Respectfully submitted,

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staffed consistently with the State's standards, would meet the needs of many children in Alaska who are placed in psychiatric hospitals or PRTFs."); *id*. at 24-25 ("By boosting provider capacity and making the necessary infrastructure investments to support statewide implementation of its Section 1115 waiver, the State could leverage existing resources to fulfill its obligation under Title II of the ADA to serve children in the most integrated setting appropriate to their needs."); ECF 136-70 at 63 (quoting Alaska's 2020-2024 CFSP) ("OCS is great at new ideas, and starting new initiatives, but is lacking on the necessary focused follow-through of implementation that allows for changes to new initiatives along the way. If new efforts do not work, they are generally eliminated with little assessment, evaluation or changes that could make the effort successful. OCS needs assistance in strengthening its change and implementation practices."); *id*. at 64; *id*. at 35-38 (providing examples of how failed implementation of standards deprived named plaintiffs of quality services).

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2024, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in Case No. 3:22-cv-00129-SLG who are registered CM/ECF users will be served by the CM/ECF system.

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