CASE NO. 16-5461

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

D.O., ET AL.,
Plaintiffs-Appellants,

v.

VICKIE YATES BROWN GLISSON, IN HER OFFICAL CAPACITY AS SECRETARY FOR THE CABINET FOR HEALTH AND FAMILY SERVICES
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION
CASE NO. 5:15-cv-00048

BRIEF OF DEFENDANT-APPELLEE VICKIE YATES BROWN GLISSON

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellee Vickie Yates Brown Glisson makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   No.

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Not applicable.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   Not applicable.

/s/ David Brent Irvin
David Brent Irvin
CHFS Deputy General Counsel
Counsel for Defendant-Appellee

July 27, 2016
Date

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COUNTERSTATEMENT OF ISSUES

Appellants' federal civil rights claims are premised on the alleged deprivation of federal statutory and constitutional rights based on their statutory construction of the federal Child Welfare Act found in Title IV-E of the Social Security Act.

The first issue on appeal derives from Appellants' federal statutory rights claim: Does the Child Welfare Act unambiguously confer upon adult relative guardians or their wards, or any kinship foster-care relatives, any individual rights enforceable through 42 U.S.C. § 1983, to compel States to pay them long term foster care benefits, when (1) the text, structure, and legislative history of the Act show that the Act makes such Guardianship Assistance Program payments optional on States that submits plan amendments to the federal government; (2) the Act identifies expenses eligible for federal reimbursement, not minimum levels of foster care or guardianship assistance funding to individuals; and (3) the Act has its own enforcement and review mechanisms that would be inconsistent with private enforcement through § 1983?

The remaining issues derive from Appellants' constitutional claims premised on alleged violations of the Fourteenth Amendment to the Constitution of the United States: (1) does the Child Welfare Act give Appellants any "property" interests in childcare support from Kentucky that was denied them without due

process of law? (2) Applying the rational basis standard of review, may Congress and the Kentucky Legislature distinguish between paying child care benefits to approved licensed and trained foster family homes that care for foster children on a short-term basis prior to permanency being achieved, but not pay the same benefits to adult untrained and unapproved guardians caring for wards that are no longer in state custody, without offending the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

This appeal stems from the parties differing understandings of the federal Child Welfare Act. At a more basic level, this case stems from Appellants blurring the crucial legal distinctions between "foster care" and "kinship care" when children are *temporarily* in state custody and placed in a foster care home or relative's home, having been removed from abusive or neglectful parents; and the changed legal status of children when a minor child, the "ward" as defined in Ky. Rev. Stat. (hereafter KRS) § 387.010, has an adult guardian appointed by a state court to have *permanent* care, custody, and control of a minor child and to manage the minor's financial resources - at which point in time the ward is *no longer* in state custody; hence not a "foster child." Appellants argue the Child Welfare entitles them to benefits as a matter of right. The district court disagreed.

We shall begin by discussing the legislative history and text of the CWA, and how it has been implemented in Kentucky, before we discuss Appellants' federal claims and underlying case history.

A. Statutory and Regulatory Background

1. The Child Welfare Act

a. Legislative history and the state plan requirement

In the late 1970s, there were an estimated 400,000 children living in foster family care in the United States. S. REP. 96-336, 11, 1980 U.S.C.C.A.N. 1448, 1460. These were children who had been orphaned or removed from the homes of abusive and neglectful parents and placed into the custody of the States, but *not yet* adopted or permanently placed with other family members under court sanctioned permanent guardianship.

At that time, each State administered its own foster care program with distinct rates, areas of coverage, and administrative structures, and some federal funds were also available to reimburse state expenses for certain eligible children through a general program called Aid to Families with Dependent Children. House Comm. on Ways and Means, Background Material and Data on the Programs Within the Jurisdiction of the Committee on Ways and Means ("Green Book"), Ch. 11, Legislative History (2011). Congress concluded this general program was inadequate because the system provided "open-ended" payments to States. 123

Cong. Rec. 24,861 (1977). These open-ended payments discouraged States from seeking permanent placements for foster children (adoption, guardianship, or returning the children to their birth parents), which Congress deemed to be in those children's best interests. *Id.*[1] Congress responded by enacting the Adoption Assistance and Child Welfare Act of 1980 ("the CWA"), Pub. L. 96-272, 94 Stat. 500. The CWA is codified in subchapter IV-E of the Social Security Act.

As the Secretary of U.S. Department of Health and Human Services explained in his Report to Congress on Kinship Foster Care ("HHS Congressional Report"),[2] the CWA was not originally designed to address public or private "kinship care." The CWA still imposes no federal mandate on States to pay adult relatives any childcare financial assistance, before or after any guardianship appointment. Many States pay long-term kinship care payments to legal guardians to assist with childcare expenses from various federal and state funding sources,

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[1] Federal law has long disfavored any state plans that lead to long-term foster care. See Green Book's recitation of federal child welfare law from1912 to 2011. In 2014, Congress banned long-term foster care plans as a condition of federal funding to states for all children under 16. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112 (codified at 42 U.S.C. § 675(5)(C)(i) (2015)).

[2] When it enacted the Adoption and Safe Families Act of 1997, Congress directed the Secretary of Health and Human Services to convene an advisory panel on the extent to which children in foster care are placed in the care of relatives ("kinship care") and for the Secretary to report back to Congress with policy recommendations. This report followed. See https://aspe.hhs.gov/report/report - congress-kinship-foster-care.

but that is not a federal mandate imposed by the CWA, or any later amendments to the Title IV-E foster care funding program.

Instead, the CWA enables each State that accepts and agrees to the conditions for federal money to provide foster care and other programs for children. Part E of Subchapter IV of the Act describes the conditions States must satisfy to receive federal payments for foster care and adoption assistance. See 42 USC §§ 670 to 679c. In order to be eligible for federal assistance, a State must submit a plan approved by the Secretary of Health and Human Services ("HHS") providing, among other things, for foster care maintenance payments in accordance with section 672 of that title. The HHS Secretary delegated federal oversight to the U.S. Department of Health and Human Services Administration for Children and Families Children's Bureau.

The CWA was enacted in part to "enabl[e] each State to provide, in appropriate cases, foster care" . . . for needy children. 42 U.S.C. § 670. The Act, passed under Congress's Spending Clause power, *Suter v. Artist M.*, 503 U.S. 347, 356 (1992), created a new federal reimbursement mechanism with an "incentive structure" that would "lessen the emphasis on foster care placement" and "encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." 126 Cong. Rec. 14,761 (1980). In 1997, Congress created an incentive

program to expedite the adoption of children in foster care and address a phenomenon labeled "foster care drift." See *Cabinet for Families and Children v. G.C.W.*, 139 S.W.3d 172, 177 (Ky. App. 2004) (citing 42 U.S.C. § 675(5)(c)(2000) and Gordon, Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997, 83 Minn. L. Rev. 637, 650–651 (1999)). In *GCW*, the Kentucky Court of Appeals discussed how Kentucky amended its Dependency, Neglect and Abuse statutes in response to AFSA.

States are not required to participate in the federal program. But those that do may receive partial federal reimbursement for a defined class of expenses--known as "foster care maintenance payments"--which they make in compliance with the CWA's requirements. 42 U.S.C. § 674(a)(1). States must submit their plans for approval to HHS showing they will "provide for foster care maintenance payments in accordance with [42 U.S.C. § 672]." 42 U.S.C. § 671(a)(1).

Section 671(a) now lists 35 qualifications which state plans must contain to gain the HHS Secretary's approval. As relevant here, the Act states:

> (a) Requisite features of State plan
>
> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> (1) provides for foster care maintenance payments in accordance with section 672 of this title . . . ;
>
> . . . . .
>
> (10) provides--

(A) for the establishment or designation of a State authority or authorities that shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and which shall permit use of the reasonable and prudent parenting standard;

(B) *that the standards established pursuant to subparagraph (A) shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter* and shall require, as a condition of each contract entered into by a child care institution to provide foster care, the presence on-site of at least 1 official who, with respect to any child placed at the child care institution, is designated to be the caregiver who is authorized to apply the reasonable and prudent parent standard to decisions involving the participation of the child in age or developmentally-appropriate activities, and who is provided with training in how to use and apply the reasonable and prudent parent standard in the same manner as prospective foster parents are provided the training pursuant to paragraph (24);

(C) that the standards established pursuant to subparagraph (A) shall include policies related to the liability of foster parents and private entities under contract by the State involving the application of the reasonable and prudent parent standard, to ensure appropriate liability for caregivers when a child participates in an approved activity and the caregiver approving the activity acts in accordance with the reasonable and prudent parent standard; and

(D) *that a waiver of any standards established pursuant to subparagraph (A)* ***may be made only on a case-by-case basis*** *for nonsafety standards (as determined by the State) in relative foster family homes for specific children in care*;

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing

appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

. . . . .

(19) *provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards*;

. . . . .

(22) provides that, not later than January 1, 1999, 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;

. . . . .

(24) includes a certification that, before a child in foster care under the responsibility of the State is placed with prospective foster parents, the prospective foster parents will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child, that the preparation will be continued, as necessary, after the placement of the child, and that the preparation shall include knowledge and skills relating to the reasonable and prudent parent standard for the participation of the child in age or developmentally-appropriate activities, including knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child, and knowledge and skills relating to applying the standard to decisions such as whether to allow the child to engage in social, extracurricular, enrichment, cultural, and social activities, including sports, field trips, and overnight activities lasting 1 or more days, and to decisions involving the signing of permission slips and arranging of transportation for the child to and from extracurricular, enrichment, and social activities;

. . . . .

(28) ***at the option of the State***, provides for the State to enter into kinship guardianship assistance agreements to provide kinship guardianship assistance payments on behalf of children to grandparents and other relatives who have assumed legal guardianship of the children for whom they have cared as foster parents and for

> whom they have committed to care on a permanent basis, as provided in section 673(d) of this title;
> . . . . .

§§ 671(a)(10), (11), (12), (19), (22), (24), (28) (italicized and bold text added for emphasis).

In turn, § 672--which describes the "foster care maintenance payments program"--provides that each State receiving federal reimbursement "shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative" and who satisfies three *additional* prerequisites: (1) the child is eligible for certain other federal assistance, (2) the removal was done according to certain procedural requirements, and (3) the child must be placed in a "foster family home or child-care institution." 42 U.S.C. § 672(a)(1) (2)(3).

§ 672(c) defines the terms "foster family home" and "child-care institution:

> For the purposes of this part, (1) the term "foster family home" means a foster family home for children ***which is licensed by the State*** **in which it is situated** ***or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing***; and (2) the term "child-care institution" means a private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, ***which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing*** . . . .(emphasis added).

The federal administrative regulation makes it clear States ***may not*** use federal funds to pay "kinship care" relatives unless the family caregiver satisfies

the State's safety standards mandated on fully licensed or approved non-kin foster family homes:

> Foster family home means, for the purpose of title IV–E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the licensing or approval authority(ies), that provides 24–hour out-of-home care for children. The licensing authority must be a State authority in the State in which the foster family home is located, a Tribal authority with respect to a foster family home on or near an Indian Reservation, or a Tribal authority of a Tribal title IV–E agency with respect to a foster family home in the Tribal title IV–E agency's service area. The term may include group homes, agency-operated boarding homes or other facilities licensed or approved for the purpose of providing foster care by the State or Tribal agency responsible for approval or licensing of such facilities. ***Foster family homes that are approved must be held to the same standards as foster family homes that are licensed. Anything less than full licensure or approval is insufficient for meeting title IV–E eligibility requirements.*** Title IV–E agencies may, however, claim title IV–E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.

45 C.F.R. § 1355.20(1)(2) (emphasis added).[3]

Taken together, these statutes provide that federal reimbursement is only available for a defined class of "foster care maintenance payments" that States make to *licensed* and *approved* foster parents of certain eligible children. Indeed,

[3] The HHS Congressional Report regarding kinship foster care shows States differ on what standards they require to license or approve a relative as a "foster family home." This is left to the States' discretion so long as *all* foster care homes satisfy the State's safety standards. The CWA does not dictate how States pay or approve unlicensed kinship care homes that are not paid with Title IV-E funds.

States *may not* use federal Title IV-E funds to pay relatives to care for children *unless* they satisfy the same safety standards as licensed foster family homes. See *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1198 (8th Cir. 2013) ("The function of § 672(a) is to serve as a roadmap for the conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds.").

In addition, these provisions show as a condition for funding, Congress requires States consider give preference for relative placements during child abuse and neglect cases, as an alternative to placing such children in licensed foster family homes, 42 U.S.C. § 671(a)(19); but there is no federal mandate requiring States adopt the long-term Guardianship Assistance Program described in § 673(d) of the Act, or to pay relatives "who have assumed legal guardianship of the children for whom they have cared as foster parents and for whom they have committed to care on a permanent basis." That provision is "optional" on the States under the plain text of the statute. § 671(a)(28).

Congress's definition of "foster care maintenance payments" reflects the limited nature of federal reimbursement. While States spend money on a wide range of foster care expenses, the "foster care maintenance payments" eligible for federal reimbursement are limited to "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." 42 U.S.C. § 675(4)(A). This definition presumes the foster child is still in state custody residing in a state licensed or approved foster care home, which could include an adult relative. But Congress understood once guardianship or adoption was achieved a child's status as a "foster care child" ceased to exist because States do not retain custody of children after their adoption or permanent guardianship.

This definition of foster care maintenance payment was included in the Act because, in 1980, federal law had no general definition of a "foster care maintenance payment" that would limit federal reimbursement to "only those items which are included in the case of foster care provided in a foster family home." H.R. Conf. Rep. 96-900, at 49 (1980) (Conf. Rep.). Responding to "general confusion about what can be called a foster care maintenance payment," for which a State may expend Title IV-E funds, the Senate then crafted a definition, which was codified at § 675(4)(A). S. Rep. 96–336.[4] Specifically, as the Conference Report notes, by providing a uniform definition of the term "foster care maintenance payments," Congress wished to make clear that "payments for the costs of providing care to foster children are not intended to include reimbursement in the nature of a salary for the exercise by the foster family parent of ordinary

[4] *See* 1980 U.S.C.C.A.N. 1448, *1464, 1979 WL 10361 *15.

parental duties." *Id*. at 50. This furthered the Congressional idea that children should be placed in permanent homes, as it lessened the incentive for people to provide foster care indefinitely.

Indeed, the overarching purpose of the CWA and AFSA was to encourage States to limit the duration of foster care so that dependency, neglect and abuse cases are expedited within mandated deadlines so foster care children are more quickly adopted, permanently placed with guardians, or returned to their birth parents. *See* 42 U.S.C. § 675 (5)(B) and (C) (requiring that States have "case review systems" that include six month status hearings and final permanency hearings "no later than 12 months after the date the child is considered to have entered foster care"). In other words, the CWA "sought to provide the states with fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system." *Scrivner v. Andrews*, 816 F.2d 261, 263 (6th Cir. 1987), 1987) (quoting *State of Vermont Dept. of Social and Rehab. Svcs. v. U.S. Dept. of Health and Human Svcs.*, 798 F.2d 57, 59 (2d Cir.1986)).

In summary, the CWA was never intended to mandate States pay legal guardians a stipend to care for their wards, but other federal statutes allow guardians to receive the same benefits their wards would receive if the children resided with their birth parents. A later added provision of the CWA which is *optional* on the States permits Title IV-E funded guardianship assistance similar to

adoption assistance when a State plan is amended and other conditions are satisfied. The plan requirements in the CWA focus on how a State may spend Title IV-E funds, and were never designed to confer federal rights on persons who care for foster-children, much less court appointed guardians after foster care ends.

b. The Act's enforcement and review mechanism

States that implement eligible plans are partially reimbursed for eligible expenses according to a complex formula. See 42 C.F.R. § 433.10 *et seq*.; 45 C.F.R. § 1356.60. But federal reimbursement is not immediately denied if a State fails to comply with the Act. Instead, the Act contains its own enforcement scheme that requires the federal Department of Health and Human Services (HHS) to determine whether the State's plan and its implementation are in "substantial conformity" with federal laws and regulations. 42 U.S.C. § 1320a-2a(a). Once a State establishes a so-called Primary Plan that is approved by HHS, State programs are subject to federal review approximately every three years. See 45 C.F.R. §§ 1355.31--37, *id*. § 1356.71 (regulations detailing multiple reviews).

If a State is not in substantial conformity with federal law, the State is given an opportunity to implement a "corrective action plan" to bring the State into conformity. 42 U.S.C. § 1320a-2a(b)(4). If a State works with HHS to develop and implement a corrective plan, HHS may not withhold from the State any federal funds that would otherwise have been provided. *Id*. § 1320a-2a(b)(4)(C). Other

provisions of the Act allow for administrative and judicial review. One set of procedures governs the relationship between HHS and the States. If HHS finds that any state plan is not in substantial conformity with federal requirements, the State may appeal that determination to an administrative appeals board within HHS. *Id*. § 1320a-2a(c)(2). If the appeals board affirms the finding of non-conformity, the State may appeal that adverse finding to a federal district court. 42 U.S.C. § 1320a-2a(c)(3). See 45 C.F.R. § 1355.39

Another set of procedures governs relationships between the States and foster parents. The Act requires that States grant foster parents an "opportunity for a fair hearing before a State agency" when they believe they have been improperly denied payments available to them--including payments for foster care expenses. *Id*. § 671(a)(12). For instance, in Kentucky, foster parents are eligible for differing rates of pay according to their training and the special needs of their foster children. See 922 KAR 1:350 §10. Kentucky foster parents have administrative appeal rights under 922 KAR 1:350 § 9(20) and 922 KAR 1:320. The State agency's decision after fair hearing may then be reviewed through Kentucky's method for judicial review of administrative decisions. See KRS Ch. 13B (Kentucky's Administrative Appeals Act).

2. Kentucky's Foster Care Program

Under Kentucky's Unified Juvenile Code, KRS Chapters 600 to 645, it is the policy of state government to protect abused and neglected children. Kentucky receives federal funding for some of these expenses under the CWA. Kentucky's state plan is found on the CHFS webpage.[5] Kentucky follows all federal requirements mandated by Congress by the CWA but it has not amended its plan or sought HHS approval for the optional Guardianship Assistance Program.

The provision of the CWA entitled "Foster Care Maintenance Payments Program" provides in applicable part that "[e]ach State with a plan approved under this part shall make foster care maintenance payments" with respect to particular foster children defined therein. 42 U.S.C. § 672. "Foster care maintenance payments" are "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, and reasonable travel to the child's home for visitation." 42 U.S.C. § 675(4)(A).

Kentucky's plan includes all mandatory provisions for federal funding for foster care children. Kentucky's plan was approved by the HHS Administration for Children and Families Children's Bureau. Section 2 of Kentucky's plan concerns foster care maintenance payments. Page 8 of the plan refers to KRS § 605.120 in

[5] http://chfs.ky.gov/dcbs/dpp/childandfamilyservicesplanning.htm

explaining how foster care providers are paid. That statute says:

> (1) The cabinet is authorized to expend available funds to provide for the board, lodging, and care of children who would otherwise be placed in foster care or who are placed by the cabinet in a foster home or boarding home, or may arrange for payments or contributions by any local governmental unit, or public or private agency or organization, willing to make payments or contributions for such purpose. The cabinet may accept any gift, devise, or bequest made to it for its purposes.
>
> (2) The cabinet shall establish a reimbursement system, within existing appropriation amounts, for foster parents that comes as close as possible to meeting the actual cost of caring for foster children. The cabinet shall consider providing additional reimbursement for foster parents who obtain additional training, and foster parents who have served for an extended period of time. In establishing a reimbursement system, the cabinet shall, to the extent possible within existing appropriation amounts, address the additional cost associated with providing care to children with exceptional needs.
>
> (3) The cabinet shall review reimbursement rates paid to foster parents on a biennial basis and shall issue a report in October of each odd-numbered year to the Legislative Research Commission comparing the rates paid by Kentucky to the figures presented in the Expenditures on Children by Families Annual Report prepared by the United States Department of Agriculture and the rates paid to foster parents by other states. To the extent that funding is available, reimbursement rates paid to foster parents shall be increased on an annual basis to reflect cost of living increases.
>
> . . . .
>
> (5) *To the extent funds are available*, the cabinet ***may*** establish a program for kinship care that provides a more permanent placement with a qualified relative for a child that would otherwise be placed in foster care due to abuse, neglect, or death of both parents.

KRS § 605.120 (bold and italicized text added for emphasis).

Consistent with federal requirements, Kentucky law defines a "foster family home" as "a private home in which children are placed for foster family care under supervision of the cabinet or a licensed child-placing agency." See KRS § 199.011(9) and §600.020(28).

Moreover, another condition for receipt of Title IV-E funding, 42 USC § 671(a) (10), requires States to provide training to foster care home providers. States must certify to HHS foster family homes and child care institutions "are reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and which shall permit use of the reasonable and prudent parenting standard." 42 U.S.C. § 671(a)(10).

Consistent with this eligibility requirement for Title IV-E funding, Kentucky's administrative regulations impose training requirements on foster care family homes. 922 KAR 1:495, entitled, "Training requirements for foster parents, adoptive parents, and respite care providers for children in the custody of the cabinet" mandates foster or adoptive parent applicants shall complete a minimum of fifteen (15) hours of curricula in the following topic areas: 1. Information about the rights, responsibilities, and expectations of a foster or adoptive parent; 2. The importance of birth parents and culture; 3. The process of a child entering foster

care; 4. Types of child maltreatment; 5. Impact of childhood trauma; 6. Stages of grief; 7. Long term effects of separation and loss; 8. Permanency planning for a child, including independent living for transitioning youth; 9. Importance of attachment on a child's growth and development and the way a child maintains and develops a healthy attachment; 10. Family functioning, values, and expectations of a foster or adoptive home; 11. Cultural competency; 12. Emergency preparedness; 13. Child development; 14. Basic discipline and behavior management skills; and 15. Reasonable and prudent parent standard.

Kentucky has not submitted a plan amendment or sought HHS approval for a Guardian Assistance Plan funded under Title IV-E.[6] Kentucky suspended new enrollees in its existing "kinship care" program established under KRS § 605.120(5) because of inadequate state appropriations for new applicants.

B. Proceedings Below Under Stipulated Facts

Appellants filed their underlying civil action in state court on September 19, 2014, identifying themselves as "children in ***active*** Dependency, Neglect and Abuse ("DNA") actions who were removed from their parents and placed with "the relative custodians (*sic*) of the subject children." (Complaint, RE 1-1, Page ID

[6] According to the HHS Children's Bureau, as of March 2016, 39 Title IV-E Agencies (States and tribes) have submitted Title IV-E plan amendments to enable them to make claims for federal support of eligible guardianship assistance. *See*, http://www.acf.hhs.gov/programs/cb/resource/title-iv-e-guardianship-assistance.

6) (Emphasis added). Their amended complaint named then Kentucky Governor Steve Beshear, then Kentucky Attorney General Jack Conway, and then Secretary of the Kentucky Cabinet for Health and Family Services ("CHFS") Audrey Haynes as defendants in their official capacities. (Amended Complaint, RE 1-1, Page ID # 23-39). Appellants concede now on appeal to this Court the state DNA case was ***not*** active when they filed suit. They admit it closed September 10, 2014, with R.O.'s guardianship appointment. Appellants' Brief, p. 3. This admission may be decisive to this appeal. It shows state custody ended ***before*** Appellants raised their federal claims based on the alleged "rights" of foster children.

Plaintiffs asserted three federal claims: Count I, entitled "Deprivation of federal benefits in violation of the Social Security Law and the Due Process Clause of the Fourteenth Amendment to the United States Constitution (42 U.S.C. §1983)" and Count III, entitled "arbitrary denial of federal benefits in Violation of Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (42 U.S.C. §1983)." (Amended Complaint, RE 1-1, Page ID # 30 and 34). Defendants removed the case to federal court. (Notice of Removal, RE 1, Page ID # 1-3). Plaintiffs later conceded Governor Beshear and State Attorney General Conway should be dismissed, leaving former Cabinet Secretary Haynes as the only remaining defendant from which they sought injunctive relief.

Secretary Haynes moved for dismissal or summary judgment, under Federal Rule 12(b)(1) or (6), or Rule 56, on agreed stipulated facts and submitted affidavits of Cabinet officials familiar with Kentucky's foster care and now suspended kinship care program. (CHFS motion, RE 8, Page ID # 80-81). Todd Trapp, a manager with the Cabinet's Department for Community Based Services, explained how Kentucky had paid kinship care benefits for family members raising children under the discretionary federal "TANF" block grant. (Trapp Affidavit, RE 8-2, Page ID # 88-90). Gretchen Marshall, quality assurance and policy development branch manager of the same department, explained how Kentucky administers its Title IV-E funded programs and state plan. (Marshall Affidavit, RE 8-3, Page ID # 91-94). Plaintiffs did not dispute the sworn affidavits or submit evidence R.O. had ever applied for licensure as a foster care home, taken the foster care training mandated by 922 KAR 1:495, or was approved for Title IV-E funded child support on the case-by-case discretionary authority the CWA permits States to approve caregivers who satisfy all safety standards under 42 U.S.C. §671(a)(10)(D).

Plaintiffs stipulated R.O. was granted temporary custody of her great-nephews in consolidated state court DNA proceedings brought against the children's birth mother; and at the conclusion of this proceeding, R.O. was granted joint legal custody with the birth mother. They stipulated the state family court declined to rule on motions their Guardian Ad Litem ("GAL") filed for the State to

pay R.O. kinship care payments. After permanency was achieved, the family court had no jurisdiction over a closed case. This led plaintiffs, represented by their former GAL, to file their federal civil rights claims in state circuit court, which defendants removed to federal court.

Although R.O. is not eligible for Title IV-E funded support as permanent guardian, her wards receive TANF benefits, Supplemental Nutrition Assistance Program benefits and Medicaid child healthcare benefits, just as they would have if they resided with their mother. (Stipulation, RE 8-1, Page ID # 82-87).

Secretary Haynes argued Congress did not intend to confer any enforceable federal right to foster care payments for licensed or approved foster family homes, ***much less*** require Kentucky pay legal guardians - like R.O. - a child care stipend to care for their wards, **after** final permanency adjudication in a DNA case. Haynes argued plaintiffs labeling themselves "foster-care parents" or "foster-care children" did not give them that status or standing to sue in that capacity. (Mem. of Law in Supp. of Mot. to Dismiss or for Summary Judgment, RE 8-4, Page ID # 118-131; Reply Memo, RE 12, Page ID # 162-176).

Because plaintiffs identified no "property" deprived them, Secretary Haynes argued their Fourteenth Amendment Due Process claim failed as a matter of law. (Mem. of Law in Supp. of Mot. to Dismiss or for Summary Judgment, RE 8-4, Page ID # 131-132). She argued plaintiffs' Equal Protection claims failed under the

highly deferential rational basis standard of review. Congress was not compelled by the Equal Protection Clause of the Fourteenth Amendment to force States to enter into the optional Title IV-E funded Guardianship Assistance Program. Haynes argued there are many rational distinctions between kinship care relatives who have undergone mandated state training to become a foster family home and those who have not done so. There are additional rational distinctions between paying childcare costs for children in state custody while DNA cases are still pending, but not paying them after children have left state custody upon their adoption, restoration to their birth parents, or a guardian is appointed. States have limited resources and must decide how to expend them. (Mem. of Law in Supp. of Mot. to Dismiss or for Summary Judgment, RE 8-4, Page ID # 132-134).

The district court agreed with the Secretary's arguments and dismissed the case, substituting the current Cabinet Secretary for her predecessor. (Judgement, RE 14, Page ID # 196-197.) The court said it was unnecessary to determine if R.O. was a "foster care family home" within the meaning of the CWA; because the court agreed with the United States Eighth Circuit Court of Appeals, which held in *Midwest Foster Care and Adoption Ass'n v. Kincade*, the CWA does not confer any privately enforceable federal rights that may be pursued by foster parents against state officers under 42 U.S.C. § 1983. (Memorandum Opinion and Order, RE 13, Page ID # 177-195).

The court also rejected plaintiffs' due process claim having already held 42 U.S.C. §§ 670–72 did not convey upon plaintiffs any entitlements that could create any valid property rights. (*Id*., Page ID # 191). And the court agreed with the Cabinet that plaintiffs' equal protection claims failed when measured against the highly deferential rational basis test. The court said, "[G]overnmental action subject to equal protection scrutiny under the rational basis test must be sustained if any conceivable basis rationally supports it," and went on to discuss rational distinctions that could support these laws. (*Id*., RE 13, Page ID # 193, quoting *Fed. Commc'n Comm'n v. Beach Commc'ns, Inc*., 508 U.S. 307, 313–14 (1993)).

This appeal followed.

STANDARD OF REVIEW

Secretary Glisson agrees a district court's legal conclusions when granting summary judgment are subject to *de novo* review. "This Court may affirm a decision of the district court for any reason supported by the record, including on grounds different from those on which the district court relied." *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 786 (6th Cir. 2016).

SUMMARY OF ARGUMENT

In *Blessing v. Freestone*, 520 U.S. 329 (1997) and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the Supreme Court of the United States defined a set of criteria to be used to determine when a federal statute creates a right that private

citizens can enforce via suit brought under the civil rights law, 42 U.S.C. § 1983. The key criterion here is that only those rights that are "unambiguously conferred" on individuals can form the basis for such a suit.

The Appellant children were **not** in state foster care when they filed suit. Appellants concede the family court case concluded before they filed their federal civil rights claims. Their great-aunt was never a foster care family home licensed or approved by the Cabinet. She never had mandated state training. And by the time plaintiffs filed suit seeking federal benefits, R.O. had been appointed legal guardian, with no plausible claim for federal benefits under the Child Welfare Act.

Appellants ignore the crucial legal distinctions between children that are in state custody during a child abuse or neglect case, and the status of these children after permanency is achieved through adoption or legal guardianship. Foster care ends when a State no longer has custody of a child. Therefore, any claim to prospective childcare benefits failed as a matter of law. Retrospective claims are barred by the Eleventh Amendment. *Green v. Mansour*, 474 U.S. 64 (1985).

This makes this appeal and Appellants' case distinguishable from any court challenges filed by licensed family care homes or by associations of licensed foster family care homes in other States that have challenged the rates they are paid. Appellants' reliance on these out-of-circuit opinions as persuasive authority for this Court conferring federal statutory rights on *licensed* foster care providers or

the children they care for is therefore misplaced. *Unlicensed* kinship foster care is distinguishable from *licensed* family foster care. Appellants ignore these distinctions, as well as the distinctions between *long-term* guardianship and *short-term* foster care. The language of 42 U.S.C. § 671(a)(1) and § 672(c) limits the eligibility for CWA funded support to licensed or approved foster family homes and children they care for, which in turn must satisfy a States' training standards for caring for foster children. R.O. was not eligible because she did not have the training. Once she was appointed as guardian, her nephews' status as foster care children ended; and the CWA does not compel Kentucky pay R.O. guardianship assistance. See 42 U.S.C. § 671(a) (28).

The district court did not err when it held the CWA does not promise anything to even licensed or approved foster care family homes. The Act cannot be read as a whole to promise individual payments; it creates instead an approach under which the federal and state governments work together to ensure that federal reimbursements are covering only the costs Congress intended to fund. The district court correctly held the provisions at issue lack the individual focus that the Supreme Court has required for finding that a federal spending program gives rise to a cause of action under 42 U.S.C. § 1983. This Court should join the Eighth Circuit, which held in *Midwest Foster Care and Adoption Ass'n v. Kincade*, the CWA when analyzed under the *Blessing/Gonzaga University* criteria does not

unambiguously confer any federal statutory rights on foster care providers or foster children for which they may file a civil rights claim.

Appellants' constitutional claims also fail. The district court correctly held the CWA does not confer any property interest protected under the Due Process Clause of the Fourteenth Amendment; and Congress had many conceivable rational reasons to offer States federal funding if they satisfy the conditions imposed by the CWA, but not require States pay guardianship assistance payments.

ARGUMENT

I. APPELLANTS ARE NOT FOSTER CARE PARENTS OR FOSTER CHILDREN UNDER THE FEDERAL CHILD WELFARE ACT AND KENTUCKY IS NOT REQUIRED TO PAY THEM GUARDIANSHIP ASSISTANCE UNDER THE ACT.

The district court assumed without deciding for its analysis that D.O. and A.O. are foster care children and that R.O. is a "foster care family home" under the Child Welfare Act. But the court concluded even if these assumptions were true that Appellants' federal civil rights claim failed as a matter of law. Although the district court's holding is correct and the judgment should be affirmed, this Court could also affirm on an alternative ground because R.O. is not and never was a trained licensed or approved "foster-family home" and her nephews are no longer foster children in state custody.

Waiver of safety standards is done on a case-by-case basis, which means R.O. lacked any unambiguously conferred federal right or entitlement for any Title IV-E funded benefits to care for her nephews.

Appellants also lack standing to complain on behalf of foster care children because they are now in a permanent guardianship. See *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003) (holding adopted children's claims against state officials in Texas were moot, they were no longer in the defendants' physical or legal custody). In pretending to have a justiciable cause of action to sue as "foster children", Appellants have blurred distinctions between foster care and what is known as "kinship care" and post-permanency "kinship guardian care."

According to the 2002 "Report to Congress on Kinship Foster Care" by the Secretary of HHS,[7] "Kinship care is any living arrangement in which a relative or someone else emotionally close to the child takes primary responsibility for rearing the child." Kinship foster care occurs when relatives "act as foster parents for children in state custody." HHS Congressional Report, pp. 5, 7. This practice varies from State to State as shown by the report and the tables appended to the report. States vary in their definitions of "kin", their rates of payment to kin, and whether full licensure or modified licensure is required. HHS Report, Executive Summary, pp. vi-viii, and Apx. A and B.

[7] *See* n. 2 *supra*.

The CWA does not dictate to States how to structure or fund public kinship care. But the Act does make it clear that Title IV-E funds cannot be paid to public kinship care providers who have not been licensed or approved as meeting the same standards as licensed non-kin foster care homes. "With limited Federal guidance, States' child welfare policies have developed in a manner that treats public kinship care differently than non-kin foster care." HHS Congressional Report, Executive Summary, p. vi. (See also full Report, Ch. 2).

"Foster care standards are designed to ensure that foster children receive quality care. In creating different standards or making exceptions for kin, States balance the benefits to children of maintaining family ties with the risk that such exceptions or different standards will lead to a lower quality of care." HHS Congressional Report, p. 20. Nothing in the CWA contradicts that goal or mandates States pay non-licensed untrained kinship care providers the same rate they pay licensed or approved non-kin foster care providers, much less mandates continued payment of any child care stipend after a guardianship appointment.

"While all kin are eligible for child-only grants under the Temporary Assistance for Needy Families (TANF) program, state foster care payments to public kinship caregivers are directly related to how they are licensed." HHS Congressional Report, p. 21. Moreover, because the CWA prohibits states from waiving safety standards for kinship care providers, many State use state funds or

unrestricted TANF funds to pay untrained and unlicensed kinship care providers, which was what Kentucky did before its program was suspended. There are other non-safety policy reasons not to pay kinship providers the same rate as licensed and trained foster care providers, because some policy experts believe it could provide an incentive for parents to abandon their children so that kin can get a foster care payment that could be much higher than the TANF grant parents receive to help care for their children. HHS Congressional Report, p. 21.

"The most salient distinction between kinship caregivers is whether the children they care for are in State custody or not." HHS Congressional Report, pp. 19-20. The CWA makes a clear distinction between licensed or approved kinship care providers caring for children in State custody, which State's may expend Title IV-E funds to defray these costs; and the CWA Guardianship Assistance Program. The later ***optional*** program is aimed at adult guardians caring for a relative's children, after State custody has ended. It is modeled on the Act's Adoption Assistance Program.

Turning to the facts of this case, Appellants made a judicial admission in their Appellants' Brief that the state family court case closed on September 10, 2014 by the final permanency adjudication granting joint custody of the children to R.O. and their birth mother. Appellants' Brief, p. 3. Plaintiffs did not assert any federal statutory rights claims for prospective relief for Title IV-E foster-care

benefits until September 19, 2014. But that was too late to claim whatever benefits licensed foster care providers could plausibly but erroneously claim under the terms of the CWA. When R.O. was appointed co-guardian, permanency was achieved. The juvenile case is over. Foster care is no longer needed.

Kentucky fully complies with the CWA. Its statutes are designed to ensure foster care children are either returned to their birth homes or given other permanent homes within a reasonable amount of time after their removal from the birth home. See Louise Everett Graham, James E. Keller, § 6:26.Protective services—Permanency planning for committed children, 15 Ky. Prac. Domestic Relations L. § 6:26 (describing Kentucky law). Among those amendments to Kentucky law designed to hasten permanency are initiatives providing for kinship care placement. "Kinship care" has always been understood as an alternative to foster-care and adoption. Kentucky law is in accord with the CWA making these same distinctions, which the HHS Secretary reported to Congress

As defined under Kentucky law, "'Foster care' means the provision of ***temporary*** twenty-four (24) hour care for a child for a planned period of time when the child is: (a) Removed from his parents or person exercising custodial control or supervision and subsequently placed in the custody of the cabinet; and (b) Placed in a foster home or private child-caring facility or child-placing agency but remains under the supervision of the cabinet." KRS 620.020(5) (emphasis added).

Consistent with the CWA's funding system, foster-family homes in Kentucky are licensed and meet minimal standards including mandatory training of at least 15 hours by prospective foster care families. The CWA does not allow Kentucky to waive safety standards in relative foster family homes 42 U.S.C. § 671(a)(10), R.O. did not apply to become an approved or licensed foster-care provider, or complete the mandatory fifteen hours of the training requirements for foster parents, adoptive parents, and respite care providers set forth in 922 KAR 1:495, which are the standards Kentucky requires of licensed foster family homes and child care institutions. That is why R.O. did not receive temporary support funded by Title IV-E dollars, prior to her appointment as legal guardian.

Moreover, because R.O.'s nephews are no longer in state custody, they are no longer foster-care children. Congress did not mandate States "enter into kinship guardianship agreements to provide kinship assistance payments to grandparents and other relatives for whom they have assumed legal guardianship of the children and other relatives" . . . and for whom they have committed to care on a permanent basis" as a condition for federal Title IV-E funding. See 42 U.S.C. § 671(a)(28). That program is "at the option of the State." *Id.*

This Court should affirm the judgment because the CWA does not confer any right to benefits on children or adults, and this is especially obvious when applied to wards of court appointed adult guardians once permanency is achieved

when foster care has ended. As explained more fully in the next argument, a mere desire for government benefits is not sufficient to create a federal statutory "right" to government benefits enforceable under 42 U.S.C. § 1983. Unless Congress "speaks with a clear voice," and manifests an "unambiguous" intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983.

Moreover, to sustain a § 1983 action, a plaintiff must demonstrate that the federal statute creates an individually enforceable right *in the class of beneficiaries to which he belongs*." *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 120 (2005) (emphasis added). Appellants do not fall within such a class of beneficiaries, *even if* this Court assumed licensed foster caregivers might be able to satisfy the *Blessing/Gonzaga* criteria, as Appellants contend. This Court could simply hold Appellants lack standing to raise such claims.

II. THE CHILD WELFARE ACT CONTAINS NO INDIVIDUAL RIGHT TO ANY FOSTER CARE PAYMENTS THAT MAY BE ENFORCED UNDER 42 U.S.C. § 1983

The district court correctly held the CWA does not unambiguously confer individual rights on childcare providers of foster care children, whether the children are placed in licensed foster care homes, private or public institutions, or temporary kinship relationships. This Court should affirm that sound holding.

A. Principles of Federalism Guide the Interpretation of Spending Clause Legislation

Spending Clause legislation has the potential to "alter the 'usual constitutional balance between the States and the Federal Government.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). "Congress has the power to fix the terms under which it disburses federal money to the States," by forming what is essentially a contract. *Suter v. Artist M.*, 503 U.S., at, 356 (partially superseded by statute on other grounds). Through that "contract," Congress has the ability to entice the States to accept obligations that Congress otherwise could not directly mandate. *New York v. United States*, 505 U.S. 144, 166-67 (1992).

Spending Clause legislation can only give rise to a private cause of action for noncompliance if it does so clearly and unambiguously. As the *Suter* Court explained:

> The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys [such as private enforcement of the statute], it must do so unambiguously.

Suter, 503 U.S. at 356 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

It is this voluntariness that allows Congress to entice the States to accept obligations that Congress otherwise could not directly mandate. *New York*, 505 U.S. at 166-67. In recent years, after *Gonzaga University*, federal courts have only sparingly found Congress unmistakably and clearly manifested an intention to create a private cause of action in spending clause legislation. As this Court observed:

> In *Blessing v. Freestone*, the Court set out the following three-step inquiry to determine whether a statute gives rise to a federal right:
>
> First, Congress must have intended that the provision in question benefit the plaintiff. 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. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory terms.520 U.S. 329, 340 (1997) (internal citations omitted).
>
> Later, in *Gonzaga University v. Doe*, the Supreme Court clarified the first *Blessing* inquiry, ruling that it is not enough for a plaintiff to fall "within the general zone of interest that the statute is intended to protect." 536 U.S. 273, 283 (2002). "Anything short of an unambiguously conferred right" will not support a cause of action under § 1983. *Id*. at 282. The Court explained that although the first *Blessing* inquiry requires a determination as to whether Congress intended the provision to benefit the plaintiff, it is only the violation of a conferred right that gives rise to an action under § 1983. "[I]t is rights, not the broader or vaguer 'benefits' or 'interests' that may be enforced under [Section 1983]." *Id*. at 283; accord *Harris v. Olszewski*, 442 F.3d 456, 460 (6th Cir.2006).
>
> The *Gonzaga* Court engaged in a three-part analysis to decide whether a statute created an actionable right. First, the statute must contain rights-creating language that is unmistakably focused on the

> individuals benefitted. *Gonzaga*, 536 U.S. at 287. Second, the statute must have an individual focus, rather than a systemwide or aggregate focus. *Id*. at 288. And third, the statute must lack an enforcement scheme for aggrieved individuals. *Id*. at 290.

Hughlett v. Romer-Sensky, 497 F.3d 557, 562 (6th Cir. 2006) (parallel cites omitted). See also, *Westside Mothers v. Olszewski*, 454 F.3d 532, 541 (6th Cir. 2006) (discussing *Gonzaga*'s refinement of *Blessing*). Appellants agree this Court must use this three-part test, which the district court employed; they ask this Court to rebalance these factors and arrive at a different conclusion.

B. The Child Welfare Act's Provisions on Foster Care Maintenance Payments and Guardianship Assistance Payments Limit Federal Reimbursement, Rather Than Mandating any Minimum Level of State Payment to Individual Caregivers

Appellants argue that the CWA provides foster parents and children with individually enforceable rights to demand that the States pay them foster care maintenance payments. They claim such a right in one provision of the Act, § 672(a)(1) and a Federal Regulation defining the phrase "Foster Care." Appellant's Brief, at 5, 12. But, as the Eighth Circuit squarely held, § 672(a)(1) [and § 675(4)(A)] "do not speak directly to the interests" of foster parents; rather, they "speak to the states as regulated participants in the [Act] and enumerate limitations on when the states' expenditures will be matched with federal dollars." *Midwest Foster Care*, 712 F.3d, at 1197.

Nothing in these provisions guarantees any foster care payments as a matter of federal law--let alone a privately enforceable right to compel such payments from a State under § 1983.

Appellants' reliance on a Federal Regulation to confer a federal right is even more suspect than their relying on text found in the statute. Regulations and definitions in federal statutes standing alone do not confer any federal rights. *Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006); *Midwest Foster Care*, at 1197 (where sections "are definitional in nature, they alone cannot and do not supply a basis for conferring rights enforceable under § 1983") (quoting *31 Foster Children v. Bush*, 329 F.3d , at 1271).

Putting aside the fact that D.O. and A.O. are not in foster-care, the district court correctly held nothing in the Child Welfare Act establishes they be paid any foster care payments by Kentucky--let alone one enforceable by a private party. Instead, Congress left both the scope and amount of foster care and kinship care payments primarily to the States, subject to review by federal authorities only to determine whether certain payments are eligible for federal reimbursement.

Appellants rely on 42 U.S.C. § 672(a)(1) which requires "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative ... into foster care" if certain conditions are satisfied, but HHS has consistently rejected

interpretations that would impose any spending mandate on the States. For example, the Children's Bureau Child Welfare Policy Manual, most recently updated as of July 27, 2016, recites the various administrative costs that States may claim against the federal match for Title IV-E funding. Section 8.1 explains to States allowable administrative costs that may be claimed by a State as part of the federal Title IV-E match funding. None of these allowable costs are phrased in terms of mandated costs. Instead, as illustrated by Question 11, which asked: May the State claim Federal financial participation (FFP) for the administrative costs of an otherwise title IV-E eligible child who is placed in an unlicensed or unapproved foster family home?, the answers are phrased in terms of a State's eligibility to seek partial federal reimbursement. The answer provided in the manual here states:

> Answer: Under certain circumstances, yes. The State may claim administrative costs on behalf of an otherwise eligible child placed in an unlicensed or unapproved relative home for 12 months or the average length of time it takes the State to license or approve a foster family home, whichever is less. During this time, an application for licensure or approval of the relative home as a foster family home must be pending (section 472(i)(1)(A) of the Social Security Act). The State is prohibited from claiming administrative costs for a child placed in an unlicensed or unapproved foster family home that is not related to the child. For the purposes of this provision, a relative is defined by section 406(a) of the Social Security Act as in effect on July 16, 1996, and implemented in 45 CFR 233.90(v).

In interpreting the law, HHS made clear that States are not required to pay costs claimed by unlicensed or unapproved relative homes, but may allow such costs when an application for licensure or approval as a foster family home is

pending; such expense reimbursement being limited to 12 months or the average time the State takes to approve. This interpretation is at odds with Appellants' arguments that otherwise eligible children, removed from neglectful parents and placed in kinship care are entitled to Title IV-E benefits by virtue of the definition of foster care family homes. The response speaks in terms of what the State may claim back as part of the federal match for eligible expenses.

In a 2013 study by the Kerry DeVooght and others for the Annie E. Casey Foundation the authors concluded, "Although the Federal government has certain requirements regarding the provision of foster care payments (if the state chooses to seek Federal reimbursement for some of the costs for children in care through the title IV-E program), there are no national requirements regarding the specific payment structures or amounts provided. Rather, states have considerable discretion in designing and administering their own foster care payment systems." A table included in study's report show States pay varying basic rates plus additional amount for special needs children that need therapy. If HHS believed the CWA mandated a uniform level of payment it would either promulgate regulations listing minimum and maximum rates, or it would have taken administrative action against all the States to defund their programs for lack of compliance.

In a 2012, Congressional Report by Emilie Stoltzfus of the Congressional Research Service, she noted that the Title IV-E program in some respects consists

of three separate programs - with foster care, kinship care, and kinship guardian assistance; with foster care being limited to children temporarily removed from their children. The first goal is always family reunification. The Title IV-E plan requirements affect allowable spending because they largely define "eligible costs." 2012 Report, at 6. Her report also explains the optional Guardianship Assistance Program. It was authorized in 2008 with the enactment of the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351). For states that amend their state plans and gain HHS approval, the same general rules apply with regard to the general kinds of costs and the types of reimbursement that may be claimed. There also must be a kinship guardianship assistance agreement in place. Prospective kinship guardians must have been the foster parent of the child for at least 6 consecutive months, must have met the foster family homes licensure requirements, must not have a felony conviction, must be a relative as determined by the State, and must have a strong commitment to permanently care for the child through legal guardianship. Report, at 56. The report makes it clear guardianship assistance is not mandated on Kentucky or any other State. It is an option States may seek federal funding for, if they amend their state plan and HHS approves the amendment.

Simply put, the Child Welfare Act does not dictate the amounts that States must pay to foster parents. "[T]here is no federal minimum or maximum foster

care maintenance payment rate." 2012 Congressional Report, at 17. The Act does not require, much less mandate paying kinship assistance payments in States that have not yet opted to apply for federal funding through the Guardianship Assistance Program; and even in those States that have done so, States have flexibility in determining the rates of payments. This is not the type of statutory language that is "sufficiently specific and definite to qualify as enforceable" under § 1983. *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 432 (1987).

The Child Welfare Act provides little concrete guidance as to how States should pay foster parents for caring for foster children; or adult kinship providers. Instead, the Act at most requires States to periodically review the "amounts paid as foster care maintenance payments . . . to assure their continuing appropriateness." 42 U.S.C § 671(a)(11).

The Child Welfare Act preserves the historical autonomy of the States by "afford[ing] the states considerable flexibility to develop administrative procedures compatible with their own unique foster care circumstances." *State of Vt. Dep't of Soc. & Rehab. Servs.*, 798 F.2d, at 60.

As the Eighth Circuit concluded, and the district court here agreed:

> [A]lthough § 672(a)(1) requires participating state plans to remit foster care maintenance payments in certain contexts, the overwhelming focus is upon the conditions precedent that trigger this obligation. The function of § 672(a) is to serve as a roadmap for the

> conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds; otherwise, the state bears the full cost of these payments.

Midwest Foster Care, 712 F.3d, at 1198.

This Court should reach the same conclusion based on the text, legislative history and federal oversight agency's interpretation of its own statute. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). An agency's construction is entitled to deference unless "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, at 884.

C. The Child Welfare Act's Enforcement Mechanisms Are Inconsistent with Individual Enforcement Under § 1983

The CWA's defined procedures for ensuring compliance with federal requirements provide further support for the district court's conclusion that the Act contains no § 1983-enforceable right to adequate foster care payments. Individual § 1983 lawsuits would conflict with the enforcement mechanisms that Congress has chosen.

1. The Act's "substantial conformity" regime demonstrates Congress did not intend to confer individually enforceable rights.

Federal reimbursement under the Child Welfare Act does not require perfect compliance. Rather, reimbursement is provided if a state plan is "in substantial conformity with . . . [s]tate plan requirements" as specified by federal law, including the provisions Appellants rely on here. See 42 U.S.C. §1320a-2a(a). And

when a State is not in substantial conformity with federal requirements, the federal government does not automatically withhold funding. Instead, HHS must "afford the State an opportunity to adopt and implement a corrective action plan" that is "designed to end the failure to so conform"--and HHS may not "withhold[] . . . any Federal matching funds under this section while such a corrective action plan is in effect." *Id*. at § 1320a-2a(b)(4).

This substantial compliance scheme cannot be reconciled with Appellants' argument that Congress intended the Child Welfare Act to be enforced through individual § 1983 actions that could seek redress for every instance of noncompliance. In *Gonzaga*, for instance, the recipients of federal funding under the Family Educational Rights and Privacy Act would continue to receive federal funds so long as they "compl[ied] substantially" with the statute. *Gonzaga*, 536 U.S. at 288 (quotation marks omitted). This substantial compliance regime supported the Supreme Court's conclusion that the statute had an "aggregate focus" that spoke "in terms of institutional policy and practice, not individual instances" of noncompliance. *Id*. Likewise, the Court had earlier held in *Blessing* that "the requirement that a State operate its child support program in 'substantial compliance' with Title IV--D [of the Social Security Act] was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right." *Blessing*, 520 U.S. at 343. Rather, a substantial

compliance standard "is simply a yardstick for the Secretary to measure systemwide performance of a State's . . . program." *Id.*

The Eighth Circuit concluded based on this precedent, "A substantial compliance regime cuts against an individually enforceable right because, even where a state substantially complies with its federal responsibilities, a sizeable minority of its beneficiaries may nonetheless fail to receive the full panoply of offered benefits. Focusing on substantial compliance is tantamount to focusing on the aggregate practices of a state funding recipient." *Midwest Foster Care*, 712 F.3d, at 1200–01.

Appellants' argument to the contrary is based primarily on out-of-date and out-of-circuit case-law. They rely in part on *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498 (1990), a Supreme Court case--later overruled by Congress--that found that a hospital association could sue under § 1983 to enforce a requirement that Medicaid reimbursement rates be "'reasonable and adequate to meet the costs . . . incurred by efficiently and economically operated facilities.'" *Wilder*, 496 U.S. at 503 (quoting 42 U.S.C. § 1396a(13)(A)). The Supreme Court did not there address the impact of the fact that compliance with that provision only had to be "substantial," not perfect. See *id.* at 521 (noting that the Medicaid Act authorizes the federal government to "curtail federal funds to States whose plans are not in compliance with the Act."). In any event, when the scheme became unworkable in

the wake of the Court's authorization for federal lawsuits using that vague standard, Congress overturned the decision in *Wilder*. See Balanced Budget Act of 1997, Pub. L. 105-33, § 4711, 111 Stat. 251 (amending 42 U.S.C. 1396a(a)(13)).

On the two occasions when the Supreme Court actually addressed the question of the impact of a "substantial compliance" regime--*Blessing* and *Gonzaga*--it held that this type of enforcement mechanism strongly cuts against finding a private right of action. Appellants' overbroad reading of *Wilder* fails to reflect the Supreme Court's substantial narrowing of that decision in *Gonzaga* and *Blessing*. In *Blessing*, the Court observed that a provision requiring child support programs to operate in "substantial compliance" with Title IV–D of the Social Security Act "[f]ar from creat[es] an individual entitlement to services," and instead provides a "standard [that] is simply a yardstick for the Secretary to measure ... systemwide performance." 520 U.S. at 343. This Court understands the significance of *Blessing* after *Gonzaga*. *See Westside Mothers v. Olszewski*, 454 F.3d, at 543 (quoting *Blessing*).

As this Court said in *Johnson v. City of Detroit*, 446 F.3d, at 624, any old cases "premised upon a 'benefits' analysis must be reexamined in light of *Gonzaga*." The statutory remedy the CWA provides for States that are not substantially in compliance alone might not be sufficient to foreclose a private cause of action but it counsels strongly against it, when the aggregate focus of the

CWA is examined in light of the flexibility afforded states in structuring their kinship care and foster care payment, licensing, and training regimes; which in turn affords HHS flexibility to work with states in partnership to address the specific foster care issues in each State. See *Armstrong v. Exceptional Child Center, Inc*., 135 S. Ct. 1378, 1385 (2015).

Appellants' reliance on any Ninth Circuit decisions that found private rights of action in this or other provisions of the CWA--despite the presence of a substantial compliance provision--is also unpersuasive. The Ninth Circuit's opinion in *California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 981 (9th Cir. 2010) fails to consider the effect of a "substantial compliance" regime. It also fails to analyze the legislative history or purpose of the relevant provisions.

In contrast, the appellate courts that have expressly considered the full range of relevant factors have uniformly reached the conclusion that Congress did not intend to create a private right of action in these provisions. *Midwest Foster Care*, 712 F.3d at 1198; see also *31 Foster Children v. Bush*, 329 F.3d, at 1271 (42 U.S.C. §§ 675(5)(D) and (E) do not create rights enforceable rights under § 1983). The district court correctly found this more in-depth analysis reasoning more persuasive, and so should this Court.

2. Congress intended to channel individual claims about foster care payments through state-level review.

Congress did not ignore foster parents' right to individualized review of their claims. The Child Welfare Act requires that States grant foster parents an "opportunity for a fair hearing before a State agency" when they believe they have been improperly denied payments--including adequate payments for foster care expenses. 42 U.S.C. § 671(a)(12). Kentucky's plan complies with that requirement, as it must. See 922 KAR 1:350 § 9(20). Appellants did not ask for a fair hearing.

It makes sense for these types of claims to be routed through state administrative and judicial review, as Congress intended, rather than costly federal litigation. Appellants could have availed themselves of the administrative and judicial remedies *if* they had raised their claims in a timely manner. There is no indication in the CWA that Congress intended to add still a third layer of review about foster care maintenance payments through private § 1983 civil rights claims.

3. Congress's express creation of a private right of action to enforce other provisions of the Act shows that it did not intend private enforcement of the foster care maintenance provisions.

Finally, Congress's intent to preclude private enforcement of the foster care maintenance provisions is confirmed by the fact that it knew how to legislate a privately enforceable right under the Child Welfare Act--but declined to create such a right for grievances about foster care maintenance payments.

In 1996, Congress passed amendments to the Act to remove the barriers to interethnic adoption. Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1808, 110 Stat. 1755 (1996). The amendments added a state plan requirement that prohibited States from denying opportunities for adoption or foster care placements on the basis of the race, color, or national origin of the prospective parents or children. Id. § 1808(a) (codified at 42 U.S.C. § 671(a)(18)). Congress also added a provision to make clear that the new requirement was privately enforceable. *Id*. § 1808(b) (codified at 42 U.S.C. § 674(d)(3)(A)). But Congress did not amend the CWA to create a private right of action in any other provision of the Act, despite the Court's then-recent decision in *Suter* holding that one of the eligibility provisions in § 671(a) was not privately enforceable.

This is strong evidence Congress did not intend these other various state plan elements in 42 U.S.C. § 671(a) to confer rights enforceable pursuant to § 1983. Congress not only knew how to create an express private right of action--it also knew how to create individual rights, using familiar rights-creating language "framed in terms of the individuals who benefit, rather than the persons or institutions that are regulated." *Midwest Foster Care*, 712 F.3d at 1196. The absence of such language in the foster care maintenance provisions also confirms Congress did not intend those provisions to confer individually enforceable rights.

III. THE DISTRICT CORRECTLY FOUND FOR THE CABINET WHEN IT REJECTED APPELLANTS' DUE PROCESS CLAIM

The Due Process Clause of the Fourteenth Amendment guarantees that "[n]o State ... shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To sustain a procedural due process claim, a plaintiff must first demonstrate the existence of a protected liberty or property interest. *Joelson v. United States*, 86 F.3d 1413, 1420 (6th Cir. 1996). "Only after identifying such a right [does a court] continue to consider whether the deprivation of that interest contravened notions of due process." *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002) (citations omitted). Appellants concede they have no right to kinship care payments under state law.

Appellants' due process claims are premised on their erroneous belief that the Child Welfare Act confers a property interest upon them, even though R.O. was never a licensed or approved Kentucky foster family home and her nephews are longer State "foster children" following R.O.'s appointment as their guardian. The district court correctly held the CWA did not confer any legitimate property interest claim in foster care facilities or foster care children, and this is even more obvious for adult guardians who have agreed to care for children permanently given that Kentucky has not amended its state plan to include the optional kinship Guardianship Assistance Program.

IV. THE DISTRICT COURT CORRECTLY FOUND FOR THE CABINET WHEN IT REJECTED APPELLANTS' EQUAL PROTECTION CLAIM

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This provision is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). However, a classification that neither involves fundamental rights nor proceeds along suspect lines "'is accorded a strong presumption of validity,'" *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)), and is constitutional "'so long as it bears a rational relation to some legitimate end,'" *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 530 (6th Cir. 2007) (quoting *Vacco v. Quill*, 521 U.S. 793, 799 (1997)).

Appellants say it is "unfair" that federal and state law make distinctions between licensed, trained, and approved family caregivers that are eligible for a child care maintenance benefits caring for foster children, but adult guardians after permanency is achieved receive the same benefits their wards would receive if the children lived with their birth parents. The Supreme Court says courts must leave such policy decisions to Congress and State lawmakers.

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom,

> fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

F.C.C. v. Beach Communications, Inc., 508 U.S., at 313.

On rational-basis review, a classification in a statute bears a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." *Beach Communications,* 508 U.S. at 314-15. "Thus, if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny." *American Exp. Travel Related Services Co., Inc. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011).

The district court cited many rational reasons Congress and the Kentucky legislature could choose to make distinctions between licensed, trained and approved foster care families when compared to kinship care relatives that are not trained or approved. States and Congress want to make sure these children are safely cared for, which is why the CWA does not permit States to waive safety standards when approving kin to care for children, and allows other waivers only on a case-by-case basis. There are other rational reasons Congress does not mandate States pay guardianship assistance payments to adult guardians who permanently care for children. Such children are no longer in the custody of the

State. States are not obligated to care for children when not in state custody, whether children reside with their parents or with court appointed guardians.

Finally, there are practical reasons to pay non-kin foster care parents but not pay relatives the same rate. Not only could paying the same benefits encourage birth parents to abandon children or maximize the child care benefits and delay permanent placements, State may not need to pay relatives the same amount as strangers to induce them to care for foster care children. In *Lipscomb By and Through DeFehr v. Simmons*, 962 F.2d 1374 (9th Cir. 1992), the Ninth Circuit quoted *Dandridge v. Williams*, 397 U.S. 471 (1970), which said:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)
> .....
>
> [T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg v. Kelly*, [397 U.S. 254 (1970)]. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Lipscomb, 962 F.2d at 1377-78, quoting *Dandridge*, 397 U.S. at 485–87 (parallel citations omitted). The *Lipscomb* Court noted other rational distinctions in an

Oregon law that used state funds to pay nonfamily members to care for foster children but not pay kinship care family members the same payments:

> The state has a rational basis for not paying state funds to family members who provide foster care: The state wishes to take advantage of relatives who are willing and able to take care of foster children regardless of whether they receive help from the state. Thus, the state hopes to maximize the amount of money available for the benefit of abused and neglected children in need of foster care. Larger CSD foster care payments per child may serve at least two purposes. They may give foster parents the ability to provide better care for unrelated children. They may also expand the pool of qualified foster parents by attracting more people into the foster care market.
>
> The problem confronting Oregon is straightforward: It simply does not have enough money to pay for every child needing foster care. The legislature reasonably could have decided to spend more of the funds allocated to the foster care program to recruit well-qualified providers who might need the additional financial incentive to be willing to serve as foster parents and to enable them to provide a higher level of care, rather than to spread the money equally among a smaller universe of providers that would include relatives. In addition, the availability of federal AFDC monies for needy relatives willing to serve as foster parents could have persuaded the Oregon policy makers that their decision not to extend CSD benefits to related foster parents was the most rational way to allocate the finite resources available to the state. By traditional standards of judicial review of social welfare legislation, such reasoning is not irrational.

Lipscomb, 962 F.2d at 1380.

The *Lipscomb* Court concluded:

> Oregon's decision to spend more money per child not placed with relatives while depriving some children of the option of living with relatives—instead of paying less money per child but enabling more children to live with relatives—is a policy decision. That decision may or may not be the decision that the members of this court would make after balancing the social costs against the social benefits. But

> that cost-benefit analysis is appropriately made by Oregon officials, not by the federal judiciary. Our inquiry is limited to whether Oregon's policy choice bears a rational relationship to the legitimate purpose of maximizing the level of benefits available to all the children in the foster care program. We conclude that it does.

Id.

All these are conceivable rational reasons for Congress and the Kentucky Legislature to make the funding choices and distinctions at issue in this appeal. The district court correctly rejected Appellants' equal protection challenge and this Court should affirm that holding.

CONCLUSION

For all these reasons, this Court should affirm the district court's summary judgment dismissing Plaintiff-Appellants claims for failure to state actionable claims upon which relief can be granted.

Dated: July 27, 2016.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

1. This brief complies with the type-volume limitations of Fed. R. App P. 32(a)(7)(B) because:

This brief contains 13,288 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point typeface.

/s/ David Brent Irvin
David Brent Irvin
Attorney for Defendant-Appellee
Dated: July 27, 2016

CERTIFICATE OF SERVICE

I certify that on July 27, 2016, I filed Appellee's brief through the federal CM/ECF filing system which will serve a copy on all counsel of record in this appeal.

/s/ David Brent Irvin
David Brent Irvin

ADDENDUM

Pursuant to 6th Cir. R. 30(b), Defendant-Appellee CHFS Cabinet Secretary Vickie Glisson designates the electronic record as shown below in this table:

Record No.	Date Filed	Description	Page ID Nos.
1	Feb. 25, 2015	Notice of Removal from State Court to U.S. Dist. Ct.	# 1-3
1-1	Feb. 25, 2015	Plaintiffs' original summons, and complaint, and amended complaint removed from state circuit court, Fayette Circuit Court Civil Action No. 14-CI-3544, originally filed in state court on September 19, 2014	# 4-39
8	April 7, 2015	Defendant's motion to dismiss or for summary judgment	# 80-81
8-1	April 7, 2015	Agreed Stipulation of Facts	# 82-87
8-2	April 7, 2015	Affidavit of Todd Trapp	# 88-90
8-3	April 7, 2015	Affidavit of Gretchen Marshall	# 91-94
8-4	April 7, 2015	Cabinet Secretary's Supporting Memorandum of Law	# 95-134
12	May 13, 2015	Cabinet Secretary's Reply Memorandum of Law	# 162-176
13	March 23, 2016	Memorandum Opinion and Order	# 177-195
14	March 23, 2016	Judgment	# 196-197
15	April 7, 2016	Notice of Appeal	# 198