No. 16-5461

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

D.O., ET AL.,

Plaintiffs-Appellants,

v.

VICKIE YATES BROWN GLISSON, IN HER OFFICIAL 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
D.C. No. 5:15-cv-00048

REPLY BRIEF OF D.O., A.O. and R.O.

Richard F. Dawahare
McClelland & Associates, PLLC
1795 Alysheba Way,
Suite 2102
Lexington, Kentucky 40509
(859) 608-0200

Counsel for Plaintiffs-Appellants

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SUMMARY OF REPLY

Brothers D.O. and A.O. are entitled to pursue their claim for foster care maintenance payments. Under 42 U.S.C. § 672(a)(1) they meet every test for granting them and their great-aunt, R.O., a private right of action under 42 U.S.C. § 1983 to enforce their federal right.

Secretary Glisson did not refute the family's arguments. Contrary to her assertions, *Gonzaga V. Doe*, 536 U.S. 273 (2002) and *Blessing V. Freestone*, 520 U.S. 329 (1997), support the family's claim on every count. Instead, Secretary Glisson repeated misstatements of fact and law that undermine her position.

First, contrary to the Secretary's argument D.O., A.O. and R.O. have never made a claim for "kinship care" or "guardianship assistance payments." The family's claim has always and only been for the foster care maintenance payments of 42 U.S.C. § 672(a)(1). It was never for the "kinship care" or "guardianship assistance payments" of 42 U.S.C. § 673.

Second, the Secretary claims that she did not approve R.O. as a foster home placement within the rules of 42 U.S.C. § 672. This is patently untrue: the Cabinet performed the required background and home checks before approving R.O. as a foster home placement for D.O. and A.O.

Third, the Secretary argues that the family's claim is now moot and that the children lack standing. But this is not true for at least two reasons. First, the

Secretary's unlawful conduct fits into the "capable of repetition, yet evading review" exception to mootness. This is especially true in child abuse and neglect situations where children often suffer multiple moves.

The second reason the family's claim is not moot is that the DNA case closed with only *temporary custody*, not permanent. The children remain in temporary custody, a fact that highlights a problem within Kentucky's DNA system in that children in relative care, like D.O. and A.O., are often having their DNA cases closed with only temporary custody. This opposes the goals of the Child Welfare Act, which Congress passed for the express purpose of ensuring protection and permanency for vulnerable children like D.O. and A.O.

The family's position supports the federal policy goals of the Child Welfare Act. The foster care maintenance payments are crucial for the support of these brothers and other children in their hapless situation. They are innocent victims of both child neglect and poverty. Foster caregivers take on a heroic commitment. This is especially so for relative foster care providers like R.O. who do so without prior warning or planning and despite being of limited means. The Secretary's

position opposes the Child Welfare Law's child-focused policy, which is always to promote the best interest of the child.

The Secretary's denial of the family's rights is also a violation of their due process and equal protection rights. She did not have a rational basis on which to discriminate against them.

The family is eligible for the foster care maintenance payments. The law grants them a private right of action to enforce this essential federal right. They respectfully ask this Court to reverse the District Court's grant of summary judgment, declare the family eligible for these payments, grant them a private right of action to pursue them, and command the Secretary to make the payments and to otherwise follow the law.

ARGUMENT

I. THE SECRETARY DID NOT REFUTE THE FAMILY'S ARGUMENT THAT 42 U.S.C. § 672(A)(1) GRANTS THEM A PRIVATE RIGHT OF ACTION TO ENFORCE ITS PROVISION OF FOSTER CARE MAINTENANCE PAYMENTS.

The Secretary did not disprove the family's arguments. Instead she focused much of her Brief on non-issues and scenarios based on her misstatements of facts,

A. The Secretary misconstrued the *Blessing* and *Gonzaga* tests for private enforceability.

The family's Brief explained how they meet every condition for foster care maintenance payment eligibility under 42 U.S.C. § 672(a)(1) and that the statute fulfills each of the *Gonzaga* and *Blessing* tests for private enforceability.

The key provision directs that "Each 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…" It therefore couches its language in mandatory terms that are unmistakably focused on the intended beneficiaries, i.e., the children. This is exactly the type of "individually focused rights-creating language" required by *Gonzaga* and *Blessing*. The statute is focused on the person benefited, not the person regulated and thus has an individual focus, not aggregate. There can be no aggregate focus when provision speaks to "each child."

Yet the Secretary adopted the District Court's misinterpretations of this and other *Gonzaga* and *Blessing* holdings. Like the District Court she also took *Blessing's* "substantial compliance" holding out of context. *Blessing* held that an Act of Congress *as a whole* could not create enforceable rights, but that only specific provisions could do so. The Supreme Court directed would-be claimants and courts to do exactly as the family did here: pinpoint with specificity the exact provision granting them their rights. The holding was not, as the District Court held and the Secretary argues, that the general "substantial compliance" language of 42 U.S.C. § 1320a-2a(b)(3)(C) foreclosed the creation of individually

enforceable rights. The children based their claim on the specific, child-focused 42 U.S.C. § 672(a)(1), not the CWA as a whole.

The Secretary also misreads the crucial fact that the CWA does not provide for an alternative federal review mechanism in its statutory scheme, a factor *Gonzaga* held was key to finding a private right of action. Kentucky's administrative review system does not replace this federal review test of *Gonzaga*.

B. Contrary to the Secretary's argument the Family never based their claim on "kinship care" or "guardianship assistance payments."

The family's claim has always and only been for the foster care maintenance payments of 42 U.S.C. § 672. They have never made a claim for the "kinship care" or "guardianship assistance payments" of 42 U.S.C. § 673. In fact, these terms never appeared in any of the family's pleadings beginning with their first claim in the underlying DNA action up through this appeal. The Secretary's misdirection only serves to detract attention away from the soundness of the family's actual claim.

C. The Secretary wrongly claims that the Cabinet did not approve R.O. as a foster family home for D.O. and A.O. when it did.

Incredibly, the Secretary claims that the Cabinet under her direction did not approve R.O. as a placement for D.O. and A.O. (Brief of Defendant-Appellee Vickie Yates Brown Glisson, RE # 20, Page ID # 33). This is not true. In fact, the Cabinet could not have placed D.O. and A.O. with R.O. unless she was so

approved. The Cabinet performed the required criminal background checks and home evaluations before approving R.O. as a foster home placement for her great-nephews.

42 U.S.C. § 672(c)(1) states that "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* (emphasis added). As the Secretary even admits, the "CWA does not permit States to waive safety standards when approving kin to care for children." (Brief of Defendant-Appellee Vickie Yates Brown Glisson, RE # 20, Page ID # 59). Certainly the "standards" that prospective foster family home must meet are the same safety standards that cannot be waived. R.O. met these standards, having passed the Cabinet's investigative process, including a criminal background check and home evaluation. Accordingly, the Cabinet approved her as a foster family home for her great-nephews, D.O. and A.O. The Cabinet is the same agency of the state with the responsibility for licensing foster family homes. Thus, R.O. met every statutory requirement and has been a foster family home since the day the Cabinet approved her and placed the children under her care.

Miller v. Youakim, 440 U.S. 125 (1979), is the decisive authority for defining an "approved" home. In a unanimous opinion, the Court held that

Congress authorized an approval procedure guaranteeing minimum standards of quality as an alternative to licensure and that relative caregivers like R.O., who passed this approval process were included within the definition of a "foster family home" and therefore eligible for foster care payments.

The Court reviewed the legislative history of the Social Security Act and the Aid to Families with Dependent Children-Foster Care program in making its determination (*Youakim* was decided just before Part E of the Act was added with the passage of the Adoption Assistance and Child Welfare Act of 1980, which carried forth the approval or licensure requirements as before):

> Congress was also concerned with assuring that States place neglected children in substitute homes determined appropriate for foster care. See S.Rep. No. 165, pp. 6-7. To deter indiscriminate foster placements, Congress required that States establish licensing standards for every foster home, § 408 (definition of "foster family home"), and supervise the placement of foster children. § 408(a)(2); see 45 CFR §§ 220.19(a), 233.110(a)(2)(i) (1977). The legislative materials at no point suggest that Congress intended to subject some foster homes, but not others, to minimum standards of quality, as could result if § 408 excluded relatives' homes from the definition of "foster family home." Indeed, in authorizing an approval procedure as an alternative to actual licensing of "foster family homes,"[19] Congress evinced its understanding that children placed in related foster homes are entitled to Foster Care benefits. At the time the AFDC-FC program was enacted in 1961, many States exempted relatives' homes from the licensing requirements imposed on all other types of settings in which [99 S.Ct. 967] foster children could be placed.[20] It is 440 U.S. 141 therefore likely that Congress, by including an approval procedure, meant to encompass foster homes not subject to State licensing requirements, in particular, related foster homes.
>
> *Miller v. Youakim*, 99 S.Ct. 957, 440 U.S. 125, 59 L.Ed.2d 194 (1979)

D. The Secretary concedes that an *approved* foster family home is on par with a licensed foster family home and entitled to the same treatment.

The Secretary conceded that the Cabinet's approval of R.O. as a relative foster home for D.O. and A.O. qualifies the children for foster care maintenance payments. She stated that "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." (Secretary's Brief, RE # 20, Page # 19-20). (Emphasis added).

The Secretary also made this concession later in her Brief. She argued that Kentucky had rational reasons to "make distinctions between licensed, trained and approved foster care families when compared to kinship care relatives that are not trained or approved." (Secretary's Brief, RE # 20, Page # 59). Despite her inclusion of "trained" (federal law has no such requirement for "approved" foster family homes as a precondition for receipt of foster care maintenance payments)

the Secretary thus recognizes two distinct categories of foster family homes entitled to foster care maintenance payments: those that are licensed *or* those like R.O.'s that are approved per 42 U.S.C. § 672(c)(1). The Cabinet approved R.O. as a placement for the brothers. Thus, R.O. is an approved foster family home who, by the Secretary's own concession, is entitled to the same treatment as licensed foster family homes, including entitlement to foster care maintenance payments.

E. The family's claim is not moot.

Contrary to the Secretary's argument, the family's claim is not moot. First, the Secretary's unlawful conduct fits into the "capable of repetition, yet evading review" exception to mootness. Second, the children are still in temporary custody, not permanent.

1. The Secretary's unlawful conduct fits into the "capable of repetition, yet evading review" exception to mootness.

The Secretary's unlawful conduct fits into the "capable of repetition, yet evading review" exception to mootness, as the family argued in its Memorandum of Law in the District Court action (Plaintiffs' Memorandum of Law, RE #11, Page ID #156). This is especially true in child abuse and neglect cases where children often have to suffer multiple moves. Should their current placement fail they will have to be placed with a different relative foster caregiver who, like R.O., must pass the Cabinet's approval process. The timeframe of a Dependency, Neglect and

Abuse case (hereinafter DNA) is too short (usually 12-15 months) to allow for the full adjudication of the family's federal claim. As the judicial disposition of the family's claim would not be able to be completed within that timeframe, Secretary Glisson's unlawful conduct would again continue to go unchecked and the family's federal rights would remain violated.

Thus, since the duration of the challenged action is too short to be litigated fully before the cessation or expiration of the challenged conduct "The problem is therefore "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). "A dispute falls into that category, and a case based on that dispute remains live, if " (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 439-440 (2011) (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

2. D.O. and A.O. are still in temporary custody status, not permanent.

A second reason their claim is not moot is that the children are still in temporary custody, not permanent. As noted in the family's Brief, the Family Court closed the DNA case granting temporary joint custody to both R.O. and the

children's mother. It was not, as the Secretary termed it, a "guardianship appointment" to R.O. (Brief of Defendant-Appellee Vickie Yates Brown Glisson, RE # 20, Page ID # 28). Legal guardianships are more durable than temporary custody orders, which are subject to modification. Additionally, the appointment of the mother as a joint custodian was highly unusual because the mother was a drug abuser who had not worked her case plan and was therefore still unfit.

Though the DNA Court's hand-written order did not include the word "temporary" the order could only have been for temporary custody. It was not, nor under Kentucky law *could not be*, a permanent custody order. That is because the order was issued in a DNA review hearing, not in a permanent custody hearing as required by KRS 610.125(1). Since this was not a formal permanent custody hearing there was no attempt to fulfill the notice and personal service provisions of KRS 610.025(3) and CR 4 of the Kentucky Rules of Civil Procedure. Also, the order was simply written on the docket sheet. It was not entered on the AOC-DNA-9 Order-Permanent Custody form as required by Rule 22 of the Family Court Rules of Procedure and Practice. (FCRPP 22, found at http://courts.ky.gov/courts/supreme/Documents/WestFCRPP.pdf).

Thus, D.O. and A.O. were still in temporary custody status when they filed their claim and remain so now. They thereby have standing to pursue their claim for foster care maintenance payments, to which they remain entitled.

The Secretary also suggests that the family did not make their claim for foster care maintenance payments until after the underlying DNA action was closed. But that is not so. Undersigned counsel made the claim on the children's behalf in the DNA action. As the family's Brief details, he did this in order to unite the brothers, who were in separate placements because R.O. could not afford to take them both.

In any case the relevant factor for eligibility to these payments is not the DNA case status but rather the permanency status of the children. Contrary to the Secretary's claim, the Court only granted R.O. *temporary joint custody*, not permanent custody. The children remain in temporary custody, a result that is at odds with federal policy, but that is abetted by the Secretary's position, as argued below.

II. THE FAMILY'S POSITION SUPPORTS THE POLICY OF THE CHILD WELFARE ACT WHILE THE SECRETARY'S OPPOSES IT.

The primary focus and overarching policy goal of the Child Welfare Act is the best interest of the child. "The over-riding concern is that decisions must be driven by the goals of safety, permanency, and well-being for children." (US

Department of Health and Human Services Report to Congress on Kinship Foster Care, 6/1/2000, found at https://aspe.hhs.gov/report/report-congress-kinship-foster-care).

The Secretary's position opposes the fundamental policy goals of CWA in two ways. First by denying essential resources for the child's welfare at the most critical time of the child's life, and second, by inhibiting the attainment of permanency.

A. The Secretary's position thwarts the federal policy of providing resources to such vulnerable children as D.O. and A.O.

The Act recognizes the precarious condition of innocent children who have suffered the trauma of neglect and removal. Its grant of foster care maintenance payments provides a basic level of sustenance in order to put them on a solid foundation. D.O. and A.O. are in the same situation as other vulnerable children in neglect and/or abuse cases. They suffered the same trauma of removal from their home just like children placed in non-relative foster homes. They have the same needs as the other children, needs that the foster care maintenance payments were meant to cover.

They meet all the qualifications for these payments, yet the Secretary refuses to make these payments to them based on her flawed and narrow reading of the law. Her position dishonors the noble policy purposes behind the federal law. The

family's position gives full effect to the federal policy that will only lead to more child welfare, more child safety, more child permanence and more child success in life.

Federal policymakers were prescient. They knew that placement with a relative was in the best interest of a child as long as that relative was approved as a safe haven. They also knew that relatives have the unforeseen responsibility of child care thrust upon them. R.O. had no advanced planning or inclination to become a substitute parent. Unlike non-relative foster homes who "sign up" for such duty, and often do it as a vocation, relative caregivers like R.O. do so out of love and devotion on a one-time emergency basis. Thus, federal law tailored its foster care maintenance payments to include both licensed and approved homes. This insures that children like D.O. and A.O. would be placed in safe relative homes through the approval process, and that they were entitled to the payments the same as other children placed in non-relative foster care.

B. The Secretary's position hinders the federal policy of achieving permanency for children like D.O. and A.O.

The Secretary's position also opposes the federal policy of achieving permanency. Currently, without the leverage of a duty to pay foster care maintenance payments to children like D.O. and A.O., the Cabinet is content to close cases with only temporary custody to the relative foster parent. But if the

Secretary was forced to follow the law and make these payments to D.O. and A.O. she would also be forced to seek permanent custody for them. That is because these payments end once a child has achieved permanency, whether through adoption or permanent custody (or return to home when parents successfully complete their case plan). So in order to terminate her responsibility for making these payments she would have to ensure the relative caregiver gets permanent custody. This is a higher status that is surely in the children's best interest.

On the other hand, the family's position wholly supports the permanency goals of the Child Welfare Act. For if the state were making foster care maintenance payments to the children in relative foster care they would be forced to seek permanency in order to stop having to make these payments.

III. THE FOSTER CARE MAINTENANCE PAYMENTS CONSTITUTE A PROPERTY INTEREST ENTITLING THE FAMILY TO DUE PROCESS PROTECTION.

Contrary to the Secretary's assertions, the family has a property interest in the foster care maintenance payments. D.O. and A.O. meet every statutory condition for eligibility. The Cabinet approved R.O. approved as a foster family home for her great-nephews. The children are still in temporary custody. Alternatively, this is a case that fits in the "capable of repetition, yet evading review" exception to mootness. The Secretary continues to violate the family's

due process guarantees under the Fourteenth Amendment to the United States Constitution and Section Fourteen of the Constitution of Kentucky.

IV. THE SECRETARY HAS VIOLATED THE FAMILY'S EQUAL PROTECTION RIGHTS.

The Secretary's wrongful denial of foster care maintenance payments to the family is a violation of the letter of the law, as argued above. It is also a violation of their equal protection rights. As the family argued in their Brief, she had no rational basis on which to discriminate against them.

The Secretary again misstates the facts and issues while conceding that "approved family caregivers" like R.O. are eligible for the benefits:

> 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. (Brief of Defendant-Appellee Vickie Yates Brown Glisson, RE # 20, Page ID # 58).

First, what the family said was "unfair" was the advantage the Secretary was taking of R.O. and other devoted relative caregivers of children suffering from neglect and/or abuse and subsequent removal from their parent(s). R.O. had no time prepare, plan or budget for the responsibility of foster parenthood. Her simple answer to the call of a child in need was, "Yes, I will." She did not ask about financial help to do it, and probably never even heard of foster care maintenance

payments, much less the children's right to them. The Secretary can leverage a relative caregiver's heart to favor her budget. When the children are entitled to payments, the relative foster parent should get them on their behalf whether she knew about them or not.

Second, while undersigned counsel is unable to discern the Secretary's exact meaning, the family's equal protection claim is not about any distinctions of federal law but about the Secretary's disparate treatment—without any rational basis—of this family who is identically situated to others receiving their federal benefits.

The Secretary then misclassified R.O.'s status as unapproved. That is incorrect. R.O. was an *approved* foster care provider. Thus, according to the Secretary's own admission R.O. is eligible to receive the foster care maintenance payments on behalf of the children. She again raises non-issues as the family never asked for "guardianship assistance payments." Nor was their claim over any disparity between the rates of pay between relative and non-relative caregivers. They should be so lucky. Their claim is about not getting a dime of payments due them in the first place, not about any rate differences.

Finally, the Secretary's reliance on *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) is puzzling. As the family's brief details *Lipscomb* supports the family, not the Secretary. That is because *Lipscomb* plaintiffs were relative foster

care parents of ***children who did not qualify*** for 42 U.S.C. § 672(a)(1) foster care maintenance payments. Oregon had a separate state-funded foster care payment program for children who did not qualify for the federal program and were placed in non-relative care. Oregon did not include those who went to relatives. Plaintiffs were relative caregivers challenging Oregon's distinction under Oregon state law.

Lipscomb did not involve relative caregivers of children like D.O. and A.O. who ***are*** qualified for foster care maintenance payments under 42 U.S.C. § 672(a)(1). In fact, Oregon did what Kentucky is not doing—recognized and paid such children their rightful benefits:

"Oregon participates in the federal Foster Care Maintenance Payments program, Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-676. Federally funded foster care is administered under **federal regulations which require equal payments to relatives and non-relatives in foster care placements that qualify for Title IV-E payments.**" *Id.*, at 1376, referring to 42 U.S.C. § 672(a)(1), the provision on which the family base their claim (emphasis ours).

The family is similarly situated to others who are getting foster care maintenance payments. As the family's Brief argues, the Secretary lacks any

rational basis on which to treat them differently. Therefore, her failure to follow the letter of the law is also a violation of their equal protection rights.

CONCLUSION

For the reasons stated above and in their Opening Brief the family respectfully asks this Court to reverse the District Court's grant of summary judgment, to declare that the family has a private right of action to pursue their claim, to rule that the family is eligible for foster care maintenance payments and to require the Secretary to make these payments to the family and to otherwise follow the law.

Dated: August 29, 2016

Respectfully submitted,

/s/ *Richard F. Dawahare*
Richard F. Dawahare
McClelland & Associates, PLLC
1795 Alysheba Way,
Suite 2102
Lexington, Kentucky 40509
(859) 608-0200
rfdr@msn.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P.

32(a)(7)(B) because this brief contains 4,256 words, excluding certain parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Richard F. Dawahare
Richard F. Dawahare

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT RECORDS

The following are relevant under Sixth Circuit Rule 30(g).

Record No.	Description of Relevant Document	Page ID # Range
11	Plaintiffs' Memorandum of Law in Response to the Secretary's Memorandum of Law	# 139-161
13	Memorandum Opinion and Order	# 177-195
14	Judgment	# 196-197
15	Notice of Appeal	# 198

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Reply Brief of D.O., A.O. and R.O. was filed via the Court's electronic filing system on August 29, 2016, which will serve electronic notice to all parties of record.

/s/ Richard F. Dawahare
Richard F. Dawahare