CASE NO. 21-5074

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

J.B.-K.-1, J.B.-K.-2, J.A., K.A.-1, B.A., C.B., N.B., C.H.-1, C.H.-2, I.T., D.T., J.S.-1, J.S.-2, C.R., A.R.-1, A.R.-2, K.E., T.B., N.C., AND T.C., ALL MINORS, IN THEIR INDIVIDUAL CAPACITIES AND AS REPRESENTATIVES OF THE CHILDREN'S CLASS; E.B., K.A.-2, T.A., E.A., C.A., H.D., R.W., L.A., S.T., C.H.-3, J.D., K.G., A.H., AND A.C., AS REPRESENTATIVES OF THE CAREGIVERS' CLASS; AND J.B.-K.-1 (A MINOR), J.B.-K.-2 (A MINOR), J.A. (A MINOR), K.A.-1 (A MINOR), B.A. (A MINOR), C.B. (A MINOR), N.B. (A MINOR), C.H.-1 (A MINOR), C.H.-2 (A MINOR), I.T. (A MINOR), D.T. (A MINOR), J.S.-1 (A MINOR), J.S.-2 (A MINOR), C.R. (A MINOR), A.R.-1 (A MINOR), A.R.-2 (A MINOR), K.E. (A MINOR), T.B. (A MINOR), N.C. (A MINOR), T.C. (A MINOR), E.B., K.A.-2, T.A., E.A., C.A., H.D., R.W., L.A., S.T., C.H.-3, J.D., K.G., A.H., AND A.C., AS REPRESENTATIVES OF THE NOTICE AND HEARING CLASS,
Plaintiffs-Appellants

V.

SECRETARY OF THE KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, COMMISSIONER OF THE KENTUCKY DEPARTMENT FOR COMMUNITY BASED SERVICES, AND ELIZABETH CAYWOOD, IN HER OFFICIAL CAPACITY AS DEPUTY COMMISSIONER OF THE KENTUCKY DEPARTMENT OF COMMUNITY BASED SERVICES
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort
Case No. 3:18-cv-00025-GFVT

BRIEF OF DEFENDANTS-APPELLEES

(Continued inside front cover)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellees make 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/ ***D. Brent Irvin*** June 23, 2021
David Brent Irvin Date
Counsel for Defendants-Appellees

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees do not oppose the scheduling of oral argument and defer to the Court's judgment on whether argument would aid its decisional process.

STATEMENT OF JURISDICTION

Defendants-Appellees agree this Court has jurisdiction to consider this appeal.

STATEMENT OF ISSUES

The Adoption Assistance and Child Welfare Act of 1980 (CWA), also known as Title IV-E of the Social Security Act, delegates to the federal Department of Health and Human Services (HHS) the authority to approve partial federal reimbursements to states that make certain foster care maintenance payments to foster parents who care for children in state custody if states meet the conditions of the Act. The appellants in this case are a class of children and family caregivers of children who were removed from their homes based on findings of dependency, neglect or abuse, but were never placed in state custody. Instead, Kentucky state courts granted temporary custody to family members or fictive-kinship caregivers.

This appeal raises four discrete questions of law interpreting the CWA, as it pertains to the parties:

1. Did the district court err construing the CWA when it held Congress did not mandate states pay foster care maintenance

payments to relatives and "fictive-kin" caregivers of children who are not in state custody, when Congress made one condition of funding in 42 U.S.C. § 672(a)(2)(B) (i) that: "[t]he child's placement and care are the responsibility of...the state agency administering the state plan"?

2. May courts ignore parts of a federal statute that limit the conditions upon which an entitlement to benefits might be claimed?
3. Did Congress intend for the CWA to confer upon anyone: foster parents, institutional childcare facilities, family members, or children any federal right to foster care maintenance payments as a statutory "right" enforceable under 42 U.S.C. § 1983?
4. If the district court erred in any respect, should the judgment be affirmed on other grounds?

COUNTERSTATEMENT OF THE CASE

Legal Framework

A. The Adoption Assistance and Child Welfare Act

The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended as Title IV-E of the Social Security Act, 42 U.S.C. §670 *et seq*.) ("CWA"), "is a grant of federal funding for expenses associated with operating a foster care system." *Conner B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 61 (1st Cir. 2014).

The state, not the federal government, creates a foster family and defines the foster parent-child relationship. See, e.g., *Smith v. Org. of Foster Families*, 431 U.S. 816, 845–46 (1977). ("[A] foster family [] has its source in state law and contractual arrangements.").

In the CWA, Congress "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). As is evident from the text of the CWA, and more particularly, its legislative history, see, *e.g.*, 125 Cong. Rec. S22685 (daily ed. Aug. 3, 1979) (remarks of Sen. Cranston), Congress gave states "considerable flexibility to develop administrative procedures

compatible with their own unique foster care circumstances." *Scrivner*, at 263, quoting *State of Vermont Dept. of Social and Rehabilitation Services v. U.S. Dept. of Health and Human Services*, 798 F.2d 57, 60 (2d Cir. 1986).[1]

Prior to the enactment of the CWA in 1980, where Congress modified what had been Title IV-A of the Social Security Act, there was no statutory definition of foster care maintenance payment. H.R. Conf. Rep. 96–900 (1980), reprinted in 1980 U.S.C.C.A.N. 1561, 1570.[2] Responding to "general confusion about what *can* be called a foster care maintenance payment," the Senate then crafted a definition, which was codified at § 675(4)(A). S. Rep. 96–336 (Finance Committee 1980), reprinted in 1980 U.S.C.C.A.N. 1448, 1464 (emphasis added).[3] The Eighth Circuit has concluded the definition of "foster care maintenance payments" crafted in 42 U.S.C. § 675(4)(A) was intended to be a funding condition that limited the expenses for which a state may seek reimbursement, not a statutory right of entitlement. *Midwest Foster*

[1] The Second Circuit cited the remarks of Sen. Cranston, in *State of Vermont*. For additional legislative history see this brief, p. 50 *infra.*
[2] Available on Westlaw: 1980 WL 13105 *49 (Leg.Hist.)
[3] Available on Westlaw: 1979 WL 10361 *14 (Leg.Hist.)

Care and Adoption Ass'n v. Kincade, 712 F.3d 1190, 1198 (8th Cir. 2013). Other circuits including this Court disagree.

"In order to obtain [Title IV-E] funding, the state must submit a plan for the operation of its foster care system and receive approval from the Secretary of the [U.S. Department of Health and Human Services (HHS)]." *Id.*, citing 42 USC § 671(a). "Congress passed the Act under its Spending Clause power, U.S. Const. art. I, § 8, and like other federal-state cooperative programs, states are given the choice of complying with the Act's conditions or forgoing federal funding." *D.O. v. Glisson*, 847 F.3d 374, 376 (6th Cir. 2017). "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Suter v. Artist M.*, 503 U.S. 347, 356 (1992). An ambiguous provision may not be enforced against a state. *Id.*

For example, in *Suter* the Supreme Court held 42 U.S.C. § 671(a)(15), the "reasonable efforts" provision of the CWA, did not confer on its beneficiaries a private right enforceable in a § 1983 action. And in *Scrivner v. Andrews*, this Court held another provision of the CWA does not confer a right to "meaningful visitation." *Id.*, at 264. Instead, HHS is directed to take corrective actions if a state substantially fails

to conform to the requirements of its plan and may require a state to implement a corrective action plan or, if necessary, withhold federal funds. *Midwest Foster Care,* at 1194. Likewise, the Medicaid Act "lacks the sort of rights-creating language needed to imply a private right of action." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 331, (2015). The CWA like the Medicaid Act is phrased as a directive to the federal agency charged with approving the state child welfare plans, not as a conferral of the right to sue upon the beneficiaries of a state's decision to participate in federal Title IV-E social security funding.

A Title IV-E plan must contain a number of provisions. Among many requirements, the plan is to: provide for foster care maintenance payments in accordance with 42 U.S.C. § 672 and adoption assistance payments in accordance with 42 U.S.C. § 673; be in effect in all political subdivisions; require the State agency to make reports to the Secretary; require the State agency to monitor and conduct periodic evaluations of activities carried out under Title IV-E; require the State agency to report child abuse; provide for establishment of standards for foster family homes and the application of those standards to homes receiving funds under Title IV-E; provide for periodic review of such standards

and of amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness; provide for a fair hearing to any individual whose claim for benefits under Title IV-E is denied; provide for periodic and independent audits of the State's Title IV-E program no less than every three years; provide specific goals for each fiscal year for the maximum number of children who will remain in foster care more than 24 months; provide that reasonable efforts shall be made to preserve and reunify families or to timely place a child in accordance with a permanency plan; provide for the development of a case plan for each foster child; provide for criminal records check of prospective foster or adoptive parents; provide for implementation of standards to ensure foster children are provided quality services that protect the health and safety of the children; include a certification that foster parents will be prepared adequately with the appropriate knowledge and skills to provide for the needs of a foster child placed with the foster parents; and provide assurances that each school-aged child attends school full-time student unless medically unable. 42 U.S.C. § 671(a) (Requisite features of State plan).

The federal circuits are sharply divided on whether 42 U.S.C. § 671(a)(1) and § 672 of the CWA create a federal statutory right to "foster care maintenance payments" enforceable through litigation by foster parents against states under 42 U.S.C. § 1983. This split is part of a more general disagreement about the proper application of the three-part *Blessing* test,[4] later clarified in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). As Justice Thomas noted in his dissent from the denial of writ of certiorari in *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018), "[t]he division in the lower courts stems, at least in part, from this Courts own lack of clarity on the issue. As one court observed, the disagreement 'can be explained in part by an evolution in the law,' *Does v. Gillespie*, 867 F.3d 1034, 1043 (8th Cir. 2017)—a tactful way of saying that this Court made a mess of the issue." *Id.*

In *D.O. v. Glisson*, this Court held the CWA "confers upon foster parents an individually enforceable right to foster care maintenance payments." *Id.*, at 378. Importantly, the *Glisson* Court recognized:

> Section 672(a) restricts the class of children entitled to benefits in two relevant ways. *First*, the child must be in the Cabinet's ***custody***; once the child is adopted or placed

[4] *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).

> in a permanent guardianship, the Act no longer requires maintenance payments. 42 U.S.C. § 672(a)(2)(B). *Second*, the child must be placed in a licensed or approved "foster family home." Id. § 672(a)(2)(C) (in bold and italicized for emphasis).

Glisson, at 381.

Particularly relevant to this appeal, as the *Glisson* Court found, the CWA requires a state receiving Title IV-E funds make "foster care maintenance payments"[5] to certain "foster families" or "child care institutions" to support the care of children placed into "foster care." 42 U.S.C. §§ 671(a)(1), 672(a)(1), 675(4), and this Court used the word "custody." To qualify for maintenance payments, the removal must be under a "voluntary placement agreement" or a "judicial determination," § 672(a)(2)(A), and crucial to this appeal, the child's "placement and care" must be the responsibility of the "state agency administering the State plan approved under section 671 of this title." *Id*. § 672(a)(2)(B)(i).

[5] "Foster care maintenance payments" are defined as "payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement...." 42 U.S.C. § 675(4)(A).

In other words, state custody. Because it was unclear from the record whether the children in *D.O. v. Glisson* had been discharged from Cabinet custody by a Kentucky juvenile court, the case was remanded for a determination of whether the state judge had entered a required AOC-DNA-9 Order-permanent custody form or other written order before closing the juvenile case. This Court did not examine when or if custody begins under Title IV-E, thus framing the precise issues now on appeal, and forecasting the logical outcome if this Court employs the same methodology it did in *Glisson*.

B. Kentucky Law

The Kentucky Cabinet for Health and Family Services ("CHFS" or "the Cabinet") is the Kentucky state agency responsible for operating the departments of public health, Medicaid, certificate of need and licensure, and mental health and intellectual disability programs in the Commonwealth of Kentucky. CHFS also operates the Department for Community Based Services ("DCBS"), which administers and is responsible for child and adult protection, violence prevention resources, foster care and adoption, permanency, and services to enhance family self-sufficiency, including child care, social services,

public assistance, and family support. Ky. Rev. Stat. § 194A.030(8). CHFS is Kentucky's designated Title IV-E agency whose plan has been approved by HHS.

All persons in Kentucky have a duty to report child abuse, neglect, dependency or child trafficking. Ky. Rev. Stat. 620.030. Under Kentucky's child protection laws, CHFS has a legal obligation to "investigate" and "assess a family's needs" when it receives a report alleging child abuse or neglect by a parent, guardian, fictive kin, person in a position of authority, person in a position of special trust, or person exercising custodial control or supervision . . . or a report alleging a child is a victim of human trafficking." Ky. Rev. Stat. § 620.040 (1)(a) and (b).

If a CHFS investigative social worker, having investigated such a report, believes a child may not safely live at home with his parents or legal guardians, the investigative worker "may" (like any other "interested person") initiate a Dependency, Neglect, or Abuse ("DNA action") by filing a petition in juvenile court. Ky. Rev. Stat. § 620.070.[6]

[6] The statute refers to the juvenile session of the Kentucky district court. However, a 2002 amendment to Kentucky's Constitution authorized a family court division within Kentucky's circuit courts. Kentucky's family courts and district courts have concurrent

Conversely, when the worker believes the reported child is safe living at home, the worker may "provide information to the parent or legal guardian about community service programs that provide support services for families in crisis," Ky. Rev. Stat. § 620.052. And the worker may also "provide or make referral to any community-based services necessary to reduce risk to the child and to provide family support." Ky. Rev. Stat. § 620.040(1)(b).

The Cabinet is not the only party that can file a DNA petition. Other "interested persons," such as parents, guardians, or family members (but not judges) may petition the court. See *T.C. v. M.E.*, 603 S.W.3d 663, 679 (Ky. App. 2020) (State judges may report child abuse to the Cabinet but may not order the agency file a DNA petition).

When a Kentucky juvenile court is confronted with a DNA petition by any "interested person", after weighing the evidence of neglect, abuse, or dependency, and making a finding sustaining the sufficiency of proof offered, the court has four alternative dispositional choices: *First*, the court may order a child remain with his parents under an

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jurisdiction to hear DNA actions. See Ky. Rev. Stat. §§ 23A.100, 24A.010 and 24A.130.

"informal adjustment settlement.[7] *Second*, the court may order the child remain in his home, while CHFS provides services to the family to mitigate risks of harm to the child and siblings under the terms of a protective order.[8] *Third*, the court may place a DNA child directly with a relative or "fictive-kin caregiver."[9] *Fourth*, the court may place the child directly with the Cabinet, which then has to find or recruit foster parents (which could include relatives), or find an institutional group foster home to care for the foster child.[10] Only the fourth category creates a real foster care relationship with a child and the Cabinet.

The juvenile court's dispositional findings are entered on a standard Kentucky Administrative Office of the Courts form, Form AOC-DNA-5.[11] An emergency custody order may be entered pursuant

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[7] See Ky. Rev. Stat. § 620.140(1)(a).
[8] See Ky. Rev. Stat. §§ 620.130 and 620.140(1)(b).
[9] Ky. Rev. Stat. § 620.140(1)(c). "Fictive kin" is defined as "an individual who is not related by birth, adoption, or marriage to a child, but who has an emotionally significant relationship with the child. Ky. Rev. Stat. § 600.020(28). This third placement category makes up the appellant class in this appeal.
[10] Ky. Rev. Stat. § 620.140(1)(d).
[11] See https://kycourts.gov/Legal-Forms/Legal%20Forms/DNA-5.pdf.

to Ky. Rev. Stat. § 620.060, with the same dispositional alternatives, utilizing standard form number AOC-DNA-2.[12]

CHFS cannot unilaterally remove a child from his parent or guardian and place the child in the custody of another. Only a Kentucky juvenile court may weigh the evidence and decide which dispositional alternative is most appropriate. Under Kentucky law, "custody" is a legal term.[13] If a child is removed from his home, the DNA statutes and official court forms designate custody be placed either with CHFS, or directly into the home of relatives or fictive kin, but not both at the same time.

C. Kentucky's Title IV-E plan.

Kentucky has a Title IV-E plan approved by the HHS.[14] The state plan is a "pre-printed" form provided by HHS that lists each federal

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[12] See https://kycourts.gov/Legal-Forms/Legal%20Forms/DNA-2.pdf.

[13] "Custody of children is traditionally described as the care, control and maintenance of the children … with natural parents having the superior right to custody above all others, if they are fit for the charge and have not given up the right." *Pennington v. Marcum*, 266 S.W.3d 759, 763 (Ky. 2008), as modified (Oct. 24, 2008) (quoting Black's Law Dictionary 725 (8th ed.2004).

[14] A Microsoft Word copy of Kentucky's Title IV-E plan is available on CHFS's website, downloadable with links to the relevant state statutes.

requirement of the plan and provides a space for the state agency to fill in the relevant law, regulation, or policy indicating it is in compliance with all the requirements. HHS has always approved Kentucky's Title IV-E plans as satisfying the requirements of federal law. When the Cabinet gains legal custody of a foster child, assuming other criterion are met, HHS may make Title IV-E payments to Kentucky to partially pay for his foster care maintenance payments. Kentucky pays relatives directly appointed temporary custody in DNA cases from other funds.

Course of proceeding and disposition below

On May 9, 2018, the plaintiff-appellants filed their initial complaint naming the then acting Secretary of the Kentucky Cabinet for Health and Family Services ("CHFS" or "the Cabinet") as the defendant. Plaintiffs sought prospective injunctive relief. (R. 1, Complaint, #1-31).[15] Plaintiffs tendered their operative Second Amended Complaint on November 1, 2018, naming the successor Cabinet Secretary, the Commissioner and Deputy Commissioner of the

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See, https://chfs.ky.gov/agencies/dcbs/dpp/cpb. Open link to "Child and Family Services Plan," which page contains the Title IV-E plan.

[15]References to the record are cited as record entry number, description # (PAGE ID). "Appellants' Brief" refers to Appellants' opening brief.

Cabinet's Department for Community Based Services ("DCBS"). (R. 35, Amend. Compl., # 255-297).[16] Plaintiffs alleged Kentucky violated their statutory "rights" under Title IV-E, as they construe the CWA (Counts I and II), violated their Fourteenth Amendment procedural due process rights to benefits they claim entitlement to under the CWA (Count III), and violated their Fourteenth Amendment equal protection rights, because Kentucky distinguishes between dependent, neglected, or abused children ("DNA children") placed in Cabinet custody by a juvenile court from those placed directly by the court with a relative or kinship caregiver. (Count IV) (*Id.*, # 287-293). The Cabinet timely answered, denying the plaintiffs' claims. (R. 38, Answer, # 305-331). The Cabinet pointed out that none of the plaintiffs had ever applied to be foster parents or requested a waiver of safety requirements for foster parents, or even shown the children were Aid to Families with Dependent Children ("AFDC") eligible.[17]

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[16] When those officials left office in early 2020, their successors were substituted. (Collectively referred to in this brief as "Kentucky", "CHFS or "the Cabinet") (R. 123, Order, # 3660).

[17] See R. 86, Cabinet response in opposition to plaintiffs' motion for summary judgment # 2344-2347.

Plaintiffs submitted a motion to certify class, which the district court granted March 13, 2020. Over the Cabinet's objection, the district court certified four classes: the children's class; the caregiver class, the Cabinet custody class, and the notice and hearing class. (R. 116, Op. & Order, # 3615-3636).[18] The parties filed cross-motions for summary judgment, after plaintiffs took extensive fact discovery, even though this dispute is a matter of statutory construction, a pure issue of law.[19]

On May 28, 2020, after extensive briefing by the parties,[20] and oral argument on September 19, 2019 (R. 157, motion hearing transcript, # 4097-4149), the district court granted Kentucky's motion for summary judgment as to Counts I, II, and III of the amended complaint for the Title IV-E statutory and constitutional claims, holding Kentucky is not required to pay Title IV-E benefits to children or caregivers unless, "[t]he child's placement and care are the responsibility of...the state

[18] See Appellants' Brief, p. 9 for the complete class descriptions.
[19]See Plaintiffs' motion for preliminary injunction requesting permanent injunctive relief pursuant to Civil Rule 56, citing the depositions of CHFS officials (R. 79, Motion, # 1797-1840) and Cabinet's response (R. 86, Response # 2322-2414).
[20] See Cabinet motion for Summary Judgment filed July 24, 2019 (R. 96, # 2575-2599) and reply filed August 30, 2019 (R. 106, # 3502-3520).

agency administering the state plan," as specified in 42 U.S.C. § 672(a)(2)(B) (i).[21] (R. 128, Mem. Op., # 3726-3747). The court held because the Cabinet does not have "placement and care responsibility" over children who are placed directly into the custody of relatives or fictive kin caregivers, members of those classes are not eligible for foster care maintenance payments under the CWA. Conversely, the district court granted summary judgment declaratory relief to the plaintiff members of the "Cabinet Custody Class," holding those class members could contest the sufficiency of their notice to federal benefits through a fair hearing as a statutory right. The court reasoned:

> [A]bsent a court order giving custody to the Cabinet, the Cabinet does not have placement and care responsibility over removed children within the meaning of § 672(a). It follows that members of the Children's Class and Caregiver's Class are not entitled to FCMP benefits, because the children were not in the custody of the Cabinet prior to being placed in their relative caregiver's home. Conversely, members of the Cabinet Custody Class are

[21]The Court denied defendants' motion to dismiss on grounds of mootness (R. 97, motion, # 2724-2744) holding the "Cabinet custody class" members had standing when they filed suit and could serve as class representatives even though the children were no longer in Cabinet custody.

> eligible for benefits, assuming all other requirements of § 672(a) are met. (R. 128, Mem. Op., # 3740).[22]

With respect to the "Cabinet Custody Class", the court held those children and caregivers were entitled to a fair hearing, pursuant to 42 U.S.C. § 671(a)(12). Those plaintiffs admitted having received foster care maintenance benefits but argued about the adequacy of their notice where they waived any right to federal benefits and were paid an agreed amount for their childcare expenses.[23] The district court also granted the Cabinet's motion for summary judgment as to Count IV of the Amended Complaint. (Mem. Op. & Order, R. 128, # 3726-3747; Judgment, R. 129, # 3748-49).

To summarize, the children and caregiver appealing representatives were held not to have a right to Title IV-E benefits. The court also held the members of the "notice and hearing class" rights

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[22] See also published opinion, *J.B-K.-1 v. Secretary of Kentucky Cabinet for Health and Family Services*, 462 F. Supp. 3d 724, 736 (E.D. Ky. 2020). Only three of the plaintiff children were placed directly with CHFS by a Kentucky court, R.C., D.C., and C.C.-1. The remainder of the plaintiff children class were placed directly with family members.

[23] The prevailing plaintiff class representatives have filed a motion for attorney's fees and costs seeking over nine hundred thousand dollars for their limited victory. (R. 154, motion, # 3873-3891).

were declared as parts of one of the other three classes.[24] The district court denied plaintiffs-appellants' motion to alter, amend, or vacate the judgment under Rule 59(e). (Order, R. 150, # 3855-3865). This appeal by caregivers of children never placed in state custody followed. (R. 151, Notice of Appeal, # 3866-3867).

SUMMARY OF ARGUMENT

The district court correctly construed Congressional intent based on the plain text of the statute, canons of statutory construction, the legislative history of the CWA, and in accord with this Court's *D.O. v. Glisson* opinion. The judgment should be affirmed, with respect to the appellants.

Contrary to what plaintiffs-appellants argue, Congress did not intend to force states to pay childcare costs unless the children are in the legal custody of the Title IV-E agency with "placement and care responsibility." Therefore, plaintiffs-appellants have no federal right to foster care maintenance payments. Foster care in the United States is, and always has been, a "traditional area of state concern." *Moore v.*

[24] *Id.*, p. 738, n. 3.

Sims, 442 U.S. 415, 435 (1979). Decisions regarding child welfare involve sensitive policy judgments, and states have made diverse choices about the administration, funding, and coverage of their foster care systems. When it enacted the CWA, Congress respected the states' historic role by offering states partial reimbursement for their foster care expenditures - limited to certain children and certain expenditures that meet federal criteria - but otherwise left states with broad leeway to structure and administer their foster care systems as they see fit.

Consequently, as this Court recognized in *D.O. v. Glisson*, custody determines eligibility for funding. "The answer turns on Kentucky law." *Id.*, at 381. Kentucky was therefore free to enact its placement laws so Kentucky courts may place neglected or abused children directly into the custody of caring family members without Kentucky paying any federally mandated minimum child care payment, which HHS does not reimburse Kentucky. This allows Kentucky to expend scarce tax dollars for innovative programs to preserve troubled families or reunite children to their parents, without having those funds drained away defending costly § 1983 litigation, of which this case is a prime example. Both the text and structure of the CWA, and its legislative history as

well as the logical implications of *Glisson* support the district court's sound analysis.

As this Court noted in *Glisson*, through its spending clause powers, Congress may "encourage a State to regulate in a particular way, [and] influenc[e] a State's policy choices." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 576 (2012), quoting *New York v. United States*, 505 U.S. 144, 166 (1992). The Supreme Court has "repeatedly characterized ... Spending Clause legislation as 'much in the nature of a contract.'" *Seblius*, at 577-578, quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). "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, it must do so unambiguously." *Pennhurst*, at 17. "The rule that has emerged is that if Congress wishes to condition funding upon a State's promise to [do something] or refrain from doing something it would otherwise have the legal right to do, Congress must speak with a clear voice." *City of Cleveland v. Ohio*, 508 F.3d 827, 850 (6th Cir. 2007).

Every federal court, state court, and HHS administrative law decision that has examined this issue has held states are not eligible for Title IV-E child care money when the state agency administering funding does not have custody of a child because 42 U.S.C. § 672(a)(2)(B)(i) limits state eligibility for federal funding to only those instances where the designated state agency has "placement and care responsibility." It therefore defies logic and common sense to argue those same words that make Kentucky ineligible for federal reimbursement may either be ignored, or twisted by the appellants to hold Kentucky must pay family members foster care maintenance payments even though not reimbursed by the federal government, just because Kentucky voluntarily provides services to those families. Clearly, this argument by plaintiffs-appellants does not survive the exacting scrutiny required under the *Pennhurst* "clear statement rule."

Indeed, contrary to what this Court held in *D.O. v. Glisson*, the CWA does not confer upon actual foster parents or child care institutions any individually enforceable right to foster care maintenance payments. "[U]nless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights,

federal funding provisions provide no basis for private enforcement by § 1983." *Gonzaga*, 536 U.S. at 280 (internal quotations omitted). The *Glisson* decision is at odds with better reasoned judicial opinions from other courts and federal judges that have applied the *Blessing-Gonzaga* test and found the CWA does not create an individual cause of action.

If this panel finds itself constrained and bound by *Glisson*, it should at least affirm the district court judgment because the court did not err when it held plaintiffs-appellants do not have a federal right to Title IV-E foster care maintenance benefits.

STANDARD OF REVIEW

This Court reviews issues of statutory construction *de novo*. *United States v. Morgan*, 216 F.3d 557, 561 (6th Cir. 2000).

ARGUMENT

I. There is no private right of action under § 1983 for claims of foster care maintenance payments.

Congress enacted the CWA not to displace the states' role as primary decision maker with respect to foster care services, but to provide funds to help States carry out that responsibility. *Midwest Foster Care & Adoption Association v. Kincade, supra*. As the Eighth

Circuit explained, "[f]inding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent." *Id.* Instead, the list of items in § 675(4)(A) must be read as imposing a "ceiling" on "the categories of foster care costs eligible for partial federal reimbursement." *Id.* at 1197-98. In the words of the dissenting judges in the Second Circuit when that closely divided court denied *en banc* review of the Second Circuit opinion finding such a federal right in accord with this Court and the Ninth Circuit:

> In implying this right of action, the majority tasks federal district judges across the three States of our Circuit with setting the rates at which this subset of foster care parents and providers should be compensated for items such as a child's "food, clothing, shelter, daily supervision, [and] school supplies," *id.* § 675(4)(A), pursuant to a statute that contains not a word of guidance for making such judgments and represents a "costly condition ... that Congress did not impose and to which the ... States did not agree when entering into [this] relationship with the federal government."

New York State Citizens' Coalition for Children v. Poole, 935 F.3d 56, 57 (2d Cir. 2019) (Debra Ann Livingston, Circuit Judge, joined by José A. Cabranes, Richard J. Sullivan, Joseph F. Bianco, and Michael H. Park, Circuit Judges, dissenting from the denial of rehearing *en banc*). The dissent continued:

> The panel majority's decision imposes these pernicious costs on our Circuit despite the fact that the right it identifies is not even fairly discernible, much less unambiguously manifest, in the text of the CWA. Congress simply did not create an individual right to foster care maintenance payments enforceable pursuant to § 1983 in the "Definitions" section of this Spending Clause legislation.

Id., at 58. The Second circuit dissenting judges were correct. This Court should reconsider and vacate *D.O. v. Glisson* and adopt the better reasoned Eight Circuit analysis in *Midwest Foster Care* because the Eighth Circuit more faithfully followed the guidance of the Supreme Court in *Blessing v. Freestone* and *Gonzaga Univ. v. Doe*.

More broadly, nothing in the CWA satisfies the test to create a federal statutory right, not only to the plaintiffs-appellants but also to the prevailing "Cabinet Custody Class." "Anything short of an unambiguously conferred right" will not support a cause of action under § 1983. *Gonzaga v. Doe*, at 283. "[I]t is rights, not the broader or vaguer 'benefits' or 'interests' that may be enforced under [Section 1983]." *Gonzaga*, 536 U.S. at 283. This Court should overrule *D.O. v. Glisson* because this Court did not correctly apply *Gonzaga*, when it found Congress unambiguously conferred a right to plaintiff family members in that case to foster care maintenance benefits.

Federal reimbursement for foster care maintenance payments under the CWA is limited in at least four different respects. *First*, federal reimbursement is available only for payments made on behalf of certain eligible foster children, specifically children that would have qualified for assistance under the rules in effect for the now-defunct AFDC program as of July 16, 1996. See 42 U.S.C. § 672(a)(2),(3). *Second*, even for eligible foster children, only certain specified expenses are eligible for reimbursement. The CWA defines reimbursable "foster care maintenance payments" to "mean [ ] 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." *Id.* § 675(4)(A). *Third*, even for eligible expenses made on behalf of eligible foster children, each state is reimbursed for only a portion of its foster care costs - namely, an amount equal to the state's federal medical assistance percentage (FMAP), which is the percentage of the federal government's contribution to the state's Medicaid program. See 42 U.S.C. § 674(a). *Finally*, Congress

chose not to pay states Title IV-E funds to partially reimburse foster care maintenance payments FMAP unless the child's placement and care are the responsibility of—"(i) the State agency administering the State plan approved under section 671 of this title." 42 U.S.C. § 672(a)(2)(B).

In *D.O. v. Glisson*, this Court held foster parents may maintain a suit under 42 U.S.C. § 1983 for foster care maintenance payments from Kentucky to cover the cost of the expenses enumerated in 42 U.S.C. § 675(4) if the foster children were removed from the home of a parent and were still in the custody of CHFS at the time they filed suit. The answer turned on Kentucky law. *Glisson*, at 381.

This Court was correct in turning to Kentucky law to decide the question of custody. However, a proper analysis of relevant Supreme Court precedent leads to the conclusion no federal right exists, even as to children in Cabinet custody. There is no private right of action under § 1983 to assert a claim for violation of 42 U.S.C. §§ 672 and 675(4)(A) because Congress did not speak with the clarity required to create a federal statutory cause of action as a "right" not just as a potential benefit. This Court may affirm a judgment for any reason. "A decision

below must be affirmed if correct for any reason, including a reason not considered by the lower court." *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985).

Section 1983 is a mechanism to vindicate only the violation of a federal right, not merely an alleged violation of federal law. Supreme Court precedent establishes that a private right of action under federal law is not created by mere implication, but must be instead "unambiguously conferred." *Armstrong v. Exceptional Child Center, Inc.*, at 332 (2015), quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). The *Glisson* Court got it wrong. This Court should correct that error and hold no right to benefits was "unambiguously conferred."[25]

[25]In fairness to the *Glisson* judges, Justice Thomas observed the guidance from the Supreme Court has been less than clear, by "equivocating on whether the standards for implying private rights of action have any bearing on the standards for discerning whether a statute creates rights enforceable by § 1983." *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S.Ct. at 409–10 (dissenting from denial of writ of certiorari).

II. The district court did not err in holding the plaintiff-appellant class members are not eligible for foster care maintenance payments.

The plaintiff-appellants frame their argument on the absence of the word "custody" in 42 U.S.C. § 672(a)(2)(B). This clever argument is a red herring. Why did Congress put the "placement and care responsibility" language in the text if it has no meaning? The use of this language is the exact opposite of the type of "clear and unambiguous language" the Supreme Court has said is required to create a statutory right enforceable against state agencies in *Gonzaga Univ. v. Doe*, and *Armstrong v. Exceptional Child Ctr.*.

While the appellants insist the plain text of the requirement that, "the child's placement and care responsibility" can be ignored, the district court was correct in rejecting this argument. The appellants' argument that Congress secretly intended to grant them a right to foster care benefits is akin to the same argument rejected by the Supreme Court. In *Gonzaga*, the Supreme Court held FERPA's nondisclosure provision, would be a "very awkward individualized right" and a "far cry from the sort of individualized, concrete monetary entitlement found enforceable" in prior cases. *Id.*, 536 U.S. at 288, n. 6.

Even if this Court feels constrained by precedent from overruling *Glisson*, this Court should affirm the district court judgment because the court correctly held Congress did not intend to confer a statutory right to foster care maintenance benefits on the plaintiff-appellant class members. As the district court observed:

> Each of the foregoing [statutory and constitutional] claims hinges on whether a child's "placement and care are the responsibility of the State agency administering the State plan" for foster care maintenance payments when the DNA court places the child directly into the custody of a relative or fictive kin caregiver, as opposed to placing the child in the custody of the Cabinet. 42 U.S.C. § 672(B)(i). If not, then Defendants have not violated §§ 672, 671 or 45 C.F.R. 1355.30, nor can they be said to have violated the Due Process or Equal Protection clauses. Thus, deciding the question of placement and care responsibility is determinative.

(R. 128, Mem. Op. # 3728-29).

Moreover, the district court correctly answered the determinative question by examining state law. This is exactly the same methodology this Court employed in *Glisson* when it looked to Kentucky law to determine when a foster child achieves permanency and is therefore no longer eligible for foster care maintenance benefits. This Court said, "Section 672(a)(2)(B) requires the Cabinet to make maintenance payments *only when* "the child's placement and care are the

responsibility of ... the State agency administering the State plan." *Glisson*, at 381, quoting 42 U.S.C. § 672(a)(2)(B) (emphasis added). In *Glisson*, the issue was whether placement and responsibility ended when the state family court had discharged the children from the Cabinet's care. The answer, it said, "turns on Kentucky law."

Likewise, the issue of whether foster care maintenance payments must be paid when the state DNA court places a child directly into the custody of a relative or fictive kin caregiver, as opposed to placing the child in the custody of the Cabinet, also turns on Kentucky law.

Disagreeing with this premise, the appellants make several unpersuasive arguments. First, they argue "the district court misinterpreted the meaning of responsibility and care for placement and care under 42 U.S.C. § 672(a)(2)." Appellants' Brief, p. 18. Then they argue "the Cabinet believes Kentucky state and administrative law permits it to impose heightened eligibility standards for FCMP benefits." That is simply incorrect. Congress imposed the conditions for benefits at issue in this appeal, not Kentucky lawmakers. The district court turned to Kentucky law to determine initial eligibility in exactly the same manner the *Glisson* Court turned to Kentucky law to

determine the end of eligibility in *Glisson*. Therefore, the appellants' criticism of the district court's methodology is unjustified.

The district court correctly interpreted both the CWA and the Kentucky law that permits state judges to place children directly with family members or kinship caregivers, when the court found the Cabinet does not have placement and care responsibility for those children placed directly with family or kinship care providers. It is immaterial that Kentucky voluntarily provides some services to other families and children. Kentucky also provides services to parents and families whose children are never removed from the custody of their parents as part of its mandate to strengthen and preserve families. The legislative history of the CWA demonstrates Kentucky doing this was one of the primary goals of Congress. Yet, nobody would argue DNA children living at home are entitled to foster care maintenance payments. Appellants also ignore the fact that when a family court places a child directly with a family member or kinship caregiver, those persons have never been licensed or trained by CHFS, although CHFS may have recommended the placement option and done a criminal background check. Congress made a rational distinction in having

federal funding only pay for licensed or approved foster care families and institutions that meet certain standards. See 42 U.S.C. § 671(1)(a).

The appellants' own expert admitted that the Cabinet does not have placement responsibility when a judge directly places a child with a family member or fictive kin,[26] nor do state judges require family members granted custody of children adhere to national safety standards that apply to foster care homes.

As this Court has recognized in another context, ultimately it is a Kentucky court judge who decides whether a child should be removed from his home, where he should be placed, and what restrictions should be imposed on parents during an investigation to keep a child safe. See *Clark v. Stone*, 998 F.3d 287, 299 (6th Cir. 2021), referencing *Pittman v. Cuyahoga County Department of Children & Family Services*, 640 F.3d 716, 728–29 (6th Cir. 2011). In *Pittman*, this Court held where a juvenile court has ultimate authority to do something, social workers cannot be sued for substantive due process harms because the court, not

[26] See R. 86-1, # 2357-2362, excerpts from transcript of the deposition testimony of Hon. Douglas Bruce Petrie, an experienced state judge.

a social workers, causes the harm.[27] Appellants' arguments for reversal are not persuasive. We shall address them in sequential order.

A. The plain text of the statute and canons of statutory construction support the district court's interpretation of the CWA.

Appellants argue the district court erred by conflating the Cabinet's responsibility for a child's placement, in order to get federal funding, with (lack of) authority to make unilateral placement decisions, when the state judge places a child with a relative. Appellants' Brief, p. 32. This undeveloped skeletal argument is insufficient to reverse the district court. *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997). No court has adopted it because it is merely an unsupported legal argument uncorroborated by the text or legislative history of the Child Welfare Act.

Kentucky agrees with appellants that this Court must read the entire text of the CWA to determine Congressional intent. This Court

[27] Moreover, custody determines if the state has a legal duty to protect a child. See *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). Therefore, custody has important legal implications far beyond whether Kentucky must pay for the care of children not in its legal custody which Congress would have been aware of when drafting the CWA.

begins with the understanding that Congress "says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000). "That is why statutory interpretation begins with the text." *United States v. Jackson*, 995 F.3d 522, 523 (6th Cir. 2021), citing *FNU Tanzin v. Tanvir*, __ U.S. __, 141 S. Ct. 486, 489, 208 L.Ed.2d 295 (2020). "Thus, [this Court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). "Plain meaning is examined by looking at the language and design of the statute as a whole." *United States v. Mateen*, 764 F.3d 627, 631 (6th Cir. 2014). This Court endeavors to "read statutes ... with an eye to their straightforward and commonsense meanings." *Black v. Pension Benefit Guaranty Corporation*, 983 F.3d 858, 863 (6th Cir. 2020). And it gives "terms the ordinary meaning that they carried when the statute was enacted." *Id*. The Supreme Court has called on "judicial interpreter[s] to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Hueso v. Barnhart*, 948 F.3d 324, 333 (6th Cir. 2020) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal

Texts § 24, at p. 167 (2012) and citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, —— U.S. ——, 137 S. Ct. 1002, 1010, 197 L.Ed.2d 354 (2017)). When viewed in this fashion, statutory provisions are read, as the Supreme Court instructs federal courts must do, as "a symmetrical and coherent regulatory scheme," where "all parts [fit] into an harmonious whole," *Detroit Receiving Hosp. and University Health Center v. Sebelius*, 575 F.3d 609, 615 (6th Cir. 2009). But appellants' argument strains credulity in positing the Cabinet has a "trust, duty, or obligation" to children a state court has placed directly into the home of a relative that can substitute for "care and placement responsibility." That is why the district court observed at oral argument "custody matters." (R. 157, Transcript of oral argument # 4177).

Indeed, not only the district court below, but also every other court and administrative decision that have examined the "placement and care" phrase have found it has legislative significance. For example, interpreting this same phrase carried over from the previous version of the federal law, the Michigan Court of Appeals held in *Oakland County Prob. Court v. Department of Social Services*, 208 Mich. App. 664, 665, 528 N.W.2d 215, 216 (1995), Michigan's Department of Social Services

must have ability to control placement of children in specific foster care facilities or it would jeopardize the children's AFDC benefits.

In addition to *Glisson*, where this Court used the word "custody" the District Court in the Northern District of New York held when the state judge placed a child in the custody of the relative, the relative could not claim any entitlement to Title IV-E benefits. *Johnson v. New York State Office of Child and Family Services*, 116-CV-1331 LEKDEP, 2017 WL 6459516, at *7 (N.D.N.Y. Dec. 18, 2017). See also *Maher v. White*, 1992 WL 122912, *3, (E.D. Pa. June 4, 1992). In *Maher*, the court said, "Natural parents have no claim for child care benefits as the benefits, by definition, are only available to maintain the child while in foster care."

B. Appellants' construction of the CWA renders Section 672(a)(2)(B) superfluous.

Another basic rule of construction, relied on by the district court, is the canon against surplusage. "It conveys the familiar rule that courts should "give effect, if possible, to every word Congress used." *In re Davis*, 960 F.3d 346, 355 (6th Cir. 2020), quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, —— U.S. ——, 138 S. Ct. 617, 632, 199 L.Ed.2d 501 (2018)

(which quoted *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979)). "This means that "[i]f a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision ... and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred." *In re Davis*, quoting Antonin Scalia & Bryan A. Garner, at 176.

Applying those principles to this appeal, the district court correctly understood the Cabinet cannot be said to have "placement responsibility for the child" when the state family court retains that placement responsibility unless it has placed the child in the legal custody of the Cabinet. (See Memorandum Op. & Order, R. 128, ## 3738-40). Appellants unpersuasively argue that the Cabinet has other statutory duties, such as the duty to investigate child abuse, provide services to families in crisis, and recommend placement to the court, and this somehow substitutes for the specific mandate found in 42 U.S.C. § 672(a)(2). (Appellants' Brief, p. 22). For example, relying on Ky. Rev. Stat. § 620.130 appellants argue the Cabinet may change the child's placement or treatment plan as the cabinet may require, but Ky. Rev. Stat. § 620.140(1) (c) mandates a Cabinet supervisory obligation

only to children committed to its care and placed by it in a foster family home. The Cabinet has no such obligation to children not in its custody. *Id*. Moreover, "foster family home" is defined under Kentucky law as a private home in which children are placed for foster family care under supervision of the cabinet or of a licensed child-placing agency. Ky. Rev. Stat. § 199.011(10). "Foster care," is defined as: 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.

Ky. Rev. Stat. § 620.020(5).

The district court correctly interpreted Kentucky law. Congress did not define "placement and care responsibility" leaving states with the latitude to "tailor their assistance programs as they deem best." *Arizona State Dept. of Public Welfare v. Department of Health, Ed. and Welfare*, 449 F.2d 456, 470 (9th Cir. 1971). The real issue is not, as appellants have argued, whether Kentucky has added extra conditions

to the CWA, but this Court construing Congressional intent. As the district court observed, "if it were true that removed children were in the placement and care of the Cabinet regardless of who was given custody by the DNA court, then for Congress to include this subpart makes little sense." (Memorandum Op. & Order, R. 128, # 3740). In short, it would violate the canon against surplusage.

Because it would make little sense, it also does not satisfy the heightened standard to create a federal right for the appellants in this case. While appellants make much of the fact that Congress did not use the word "custody", neither did it omit the "placement and care" responsibility language when if it wanted to provide benefits for all children removed from their parent's homes regardless of where they were placed Congress would not have included the critical language that appellants asks this Court to simply ignore.

C. The district court's decision is supported by guidance from the United States Department of Health and Human Services.

Because appellants cannot find statutory support for their arguments in the plain text of the federal statute or rebut the canon against surplusage, they argue the district court's holding also stands

in stark contrast to federal interpretive guidance to states in carrying out their approved Title IV-E plans. Appellants ask this Court to defer to HHS's administrative guidance. (Appellants' Brief, pp. 45-46).

The first problem with this argument is HHS has never offered any guidance of any type supporting the appellants' argument on the precise statutory construction issue before this Court. The opposite is true. First, 45 C.F.R. § 1356.21(g)(3) expressly states "[federal financial participation] is *not available* when a court orders a placement with a specific foster care provider" (emphasis added).

Moreover, HHS has specifically stated:

> It is not permissible for courts to extend their responsibilities to include ordering a child's placement with a specific foster care provider. To be eligible for title IV-E foster care maintenance payments the child's placement and care responsibility must either lie with the State agency, or another public agency with whom the State has an agreement according to section 472(a)(2) of the Act. Once a court has ordered a placement with a specific provider, it has assumed the State agency's placement responsibility. Consequently, the State cannot claim FFP for that placement.

Appendix 12-2. Regulations Implementing Pub. L. No. 103-43, Pub. L. No. 104-188, and Pub. L. No. 105-89, 2 Handling Child Custody, Abuse and Adoption Cases Appendix 12-2. Clearly, where a court has ordered

placement of a child with an individual, then that child is not eligible for foster care maintenance payments.

The HHS Child Welfare Manual, relied upon by Appellants, when not selectively quoted supports Kentucky's arguments to affirm the judgment.[28] Chapter 8.3A.12, Q&A.1 states that "[a]lthough responsibility for placement and care generally is associated with child custody, custody of the child is not a requirement of Federal law or policy under title IV-E and the State agency need not be given custody,

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[28]Judge Livingston, dissenting in *New York State Citizens' Coalition for Children v. Poole*, 922 F.3d 69 (2d Cir. 2019), pointed out that most of the guidance in the Child Welfare Manual supports the view that the CWA mandates states receiving partial reimbursement pursuant to the CWA must make foster care maintenance payments, but that the definitional section was added to limit what was *reimbursable*, not to mandate a set amount that must be spent for itemized expenses (emphasis added). For example, a state may be reimbursed for a child's personal "incidentals" 42 U.S.C. § 675(4)(A). HHS's Child Welfare Manual explains incidentals could include "the reasonable and occasional cost of such items as tickets or other admission fees for sporting, entertainment or cultural events," as well as the cost of "horseback riding" and "Boy/Girl Scout" dues. Yet, it defies reason to think Congress intended to mandate a state pay for these incidentals, especially when doing so might require cutting payments to other foster care families and families in crisis who are not eligible for Title IV-E foster care maintenance payments. *See Poole* (Judge Livingston dissenting), at 92 n. 7 (citing Child Welfare Policy Manual §§ 8.3B.1(2), (9) (2018) (emphasis added).

but must be given responsibility for placement and care of the child." (emphasis added.) Child Welfare Manual, p.84, Chapter 8.3A.12, Q&A.1. As to whether "custody" is necessary to satisfy the "placement and care" standard, the Manual further explains:

> The term placement and care means that the State agency is legally accountable for the day-to-day care and protection of the child who has come into foster care through either a court order or a voluntary placement agreement. Sometimes this responsibility translates to "custody" or "care and control" of the child via a court order, but custody is not a title IV-E requirement. *Placement and care responsibility allows the State agency to make placement decisions about the child, such as where the child is placed and the type of placement most appropriate for the child*.

Id., Chapter 8.3A.12, Q&A 4, p. 109 (emphasis added.) The Manual explicitly notes:

> [I]t is not permissible for courts to extend their responsibilities to include choosing a child's placement with a specific foster care provider. . . . *Once a court has chosen a placement with a specific provider, it has assumed the State agency's placement responsibility. Consequently, the State cannot claim Federal financial participation (FFP) for that placement.*

Id., Chapter 8.3C.1, Q&A.3, p. 132 (emphasis added).

This HHS interpretive guidance is also supported by HHS Department Appeals Board decisions. In Missouri, juvenile officers

employed by the courts made removal and placement decisions. The Missouri Department of Social Services (DSS) appealed HHS denying reimbursement for foster care maintenance payments and administrative costs. In *Missouri Department of Social Services*, DAB No. 1899, 2003 WL 22873099 (Nov. 25, 2003), which was subsequently affirmed by the Eighth Circuit Court of Appeals, the DAB disallowed the claims for reimbursement because juvenile officers removed the children from their homes, and the responsibility of Missouri law delegated that function solely to juvenile officers employed in Missouri's court system. The DAB rejected arguments that juvenile officers worked with DSS, and family support teams because the Missouri law gave placement and care responsibility to the judicial branch, not DSS.

The Department of Appeals Board in disallowing Missouri's claimed reimbursement cited previous similar DAB decisions in support of its interpretation of the statutes including *Maryland Dep't of Human Res.*, DAB No. 1225, 1991 WL 634982, *4 (Feb. 7, 1991), where the DAB rejected Maryland's claims based on the state's inability to exercise independent control over the placement of the child, finding:

> [T]he argument that the State agency could have sought a court order to remove the child from the placement is simply not persuasive, since the state could take the same action for a child living with his parents, in which case title IV-E payments would of course not be available.

Id. The DAB rejected Maryland's argument "that the State agency's responsibility to provide services in support of the child's placement satisfied the statute since there was no specific requirement that the child be committed to the State agency." *Id.* The DAB held: "[E]ven if the State agency was responsible for providing services to support the child's placement, this did not constitute responsibility for the child's care." *Id.* at *5. Moreover, the DAB noted that expanding the placement and care requirement to situations where the State agency's involvement is "limited to financial support" "would render this restriction so broad as to be meaningless. If Congress had intended to make title IV-E funds available for any case in which the State agency took an interest, it would not have required specifically that the State agency have responsibility for the child's placement and care." *Id.*

The DAB noted that in *Washington Dep't of Soc. & Health Servs.*, DAB No. 280, 1982 WL 189550 (Apr. 22, 1982), the DAB affirmed a disallowance because "the responsibility for placement and care of a

state agency must be derived from the court order and enable the state to directly affect the placement and care of the individual child," and such control is frustrated "where the court order grants direct control to a private agency." *Id*. at *3. The DAB had concluded, when interpreting the similarly worded predecessor to this section of the CWA, that "The [Washington agency's] responsibility must extend to more than the power to withhold payment; it must also provide the Grantee with the ability to control where a child is placed, and to alter the plan of care without further petitioning of the court to do so." *Id*. at *5. Thus where court orders granted custody of dependent children directly to nonprofit foster-care organizations, Washington was not eligible for federal financial participation for foster care maintenance payments.

Appellants argue as a general matter, courts defer to a federal agency's interpretation of its own enabling act. This is true. A federal agency's interpretation of statutes "[is] given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

But in this case HHS guidance supports Kentucky's position more than it does the appellants. Of course under *Chevron*, a court will defer

to an agency's reasonable interpretation when "Congress has explicitly left a gap for the agency to fill" or if the statute is ambiguous after application of "traditional tools of statutory construction." See *Chevron*, 467 U.S. at 843 n.9, 843–44, 865. Whatever deference is required of the judiciary to a federal agency interpreting its own ambiguous regulations has been "cabined in its scope" by *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). See *In re Davis*, 960 F.3d at 354–55. An agency's interpretation may merit some deference whatever its form, but the law is murky on this subject. See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) and *Stein v. HHGREGG, Incorporated*, 873 F.3d 523, 532 (6th Cir. 2017) (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[29]

In any event, using this Court's two-step process it is not necessary to apply *Chevron* because courts must do their best to determine the statute's meaning before giving up, finding ambiguity, and deferring to the agency. *Arangure v. Whitaker*, 911 F.3d 333, 338

[29] When this Court has exhausted all the "textual and structural clues" bearing on the statutory construction this Court's "sole function" is to apply the law as we find it. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). "[W]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020).

(6th Cir. 2018). HHS has not interpreted the law as favorably to appellants' position as they claim. On the contrary, HHS's Child Welfare Manual and other extra-statutory textual sources support Kentucky as much or more than the appellants. The "traditional tools" of statutory interpretation take precedence over *Chevron* deference, according to this Court in *Angure*, and those tools especially include the canon against surplusage.

D. Legislative history supports the district court's decision.

When a statute is ambiguous or would lead to an absurd result a Court may also rely on legislative history. *Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 253 (6th Cir. 2020). Tracing the history of Title IV-E also supports the district court's sound construction of the statute.

Congress began providing limited financial assistance to state foster care systems in the 1930s, but it has continued to leave questions of policy and implementation largely to the States. Beginning with the Social Security Act (SSA) of 1935, Congress made regular appropriations ($1.5 million for the first year, with modest increases thereafter) to be allocated among all of the States to help them "in

establishing, extending, and strengthening, especially in predominantly rural areas," public services for "homeless, dependent, and neglected children, and children in danger of becoming delinquent" - a broad category that included, but was not limited to, children in foster care. Ch. 531, § 521, 49 Stat. 620, 633.4

In 1958, among other changes, Congress eliminated the previously established requirement that funds be restricted to "predominantly rural" or "special need" areas, and established a variable rate for reimbursing the States based, in part, on per capita income levels in each State. See Social Security Act Amendments of 1958, Pub. L. No. 85-840, sec. 601, § 521, 72 Stat. 1013, 1053. In 1961, Congress created the first financial assistance program earmarked specifically to support state foster care programs - an uncapped grant to fund partial reimbursement to States for the costs of providing foster care to children under the Aid to Families with Dependent Children (AFDC) program. See Pub. L. No. 87-31, 75 Stat. 75, 76-78 (1961); see also Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 131, 76 Stat. 172, 193 (making this grant permanent).

In 1980, Congress enacted the CWA thereby creating a permanent, open-ended program to provide *partial* reimbursement to States for some of the costs they incur in caring for some children in foster care. Like its predecessors, the CWA was intended to support states' efforts "to provide, in appropriate cases, foster care" services, 42 U.S.C. § 670, while leaving states substantial discretion to administer their foster care programs according to local needs. Congress added the definition of reimbursable "foster care maintenance payments" because, before the CWA, federal law had no general definition and limited federal reimbursement to "only those items which are included in the case of foster care provided in a foster family home." H.R. Rep. No. 96-900, at 49 (1979) (Conf. Rep.). Nothing in the legislative history suggests Congress intended by this definition to compel states to pay a minimum amount to actual foster care families, much less mandate payment to caregivers of children who are not placed in state custody by state judges, as the appellants have argued.

E. The district court's statutory interpretation does not undermine the application of Title IV-E.

Lacking a compelling argument for this Court to reverse the judgment of the district court, appellants argue that the district court's ruling "undermines" application of Title IV-E. This fear is overblown.

Appellants express fear the Cabinet will abandon its team approach working with families and courts to work together to make sure a safe, permanent and stable home is secured for each abused and neglected child. There is no factual basis for this professed fear.

Under our federalist system, states are laboratories in democracy. The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 576 U.S. 787, 817 (2015), quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Because Congress did not mandate states pay foster care maintenance payments to caregivers if the state Title IV-E agency does not have placement and care responsibility, nor grant states federal funding in those instances, Kentucky is free to spend its scarce tax dollars to preserve and reunite

families rather than litigate with families caring for children over how much reimbursement they claim as a "federal right."

For example, Kentucky has launched an innovative program so that mothers who are addicted to drugs may recover from their addictions and be safely reunited with their babies. The Sobriety Treatment and Recovery Team (START) program is designed so specially trained social workers can work intensively with families that confront addiction issues, engage them in individualized wrap-around services and identify natural supports with goals of child safety, permanency and parental sobriety and capacity.[30]

Moreover, Kentucky is aggressively implementing the federal Family First Prevention Services Act enacted as part of the Bipartisan Budget Act of 2018, §§ 50701 - 50782, 132 Stat. 232, 232-268 (Feb. 8, 2019). (Pub. L. No. 115-123), which expanded the use of federal Title IV-E child welfare dollars for states to expend to prevent entry into foster care.[31] This flexibility afforded states is consistent with Congressional

[30] See https://chfs.ky.gov/agencies/dcbs/dpp for the link to information about Kentucky's START program.

[31] See Fabiola Villalpando, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 Child. Legal Rts. J. 283

intent as well as what our nation's founders envisioned when they allowed states to choose for themselves how to resolve complex child welfare issues.[32] These types of innovative programs are all in jeopardy if Kentucky has to divert scarce tax dollars to pay for expensive federal civil rights litigation, as this case serves as a prime example. If plaintiffs are awarded their attorney's fees demand and costs for their nominal victory, nearly a million dollars will have to be diverted to pay big firm lawyers demanding corporate billing rates; money that could be far better used to preserve and reunite broken Kentucky families.

Judge Livingston's dissent in *Poole* correctly predicted the beneficiaries of the scheme the Second Circuit's majority opinion judicially imposed (which this Court also adopted in *Glisson*) may not be foster care parents or other caregivers, but the attorneys who bring claims on their behalf. *Poole,* at 97 & n. 13 (Livingston, dissenting)

(2019) for overview of why the law was enacted to shift more funding to preventative services to families in crisis.

[32]See https://chfs.ky.gov/Documents/CWTPPTTransformationSummitPresentation.pdf for summary of Kentucky's plan to transform child welfare based on the greater flexibility Congress gave states in spending Title IV-funding as part of the Family First Prevention Services Act.

(predicting "scarce foster care resources, instead of going to foster children, will be squandered in litigation destined to produce arbitrary and inconsistent results.").

In any event, the appellants' policy concerns are with Congress, which did not mandate Kentucky pay kinship care payments to family caregivers of DNA children unless the conditions the CWA were satisfied. It is not the role of the courts to rewrite a statute to alleviate a policy concern. The separation of powers doctrine requires this Court interpret the statute "as written," therefore this Court "may not rewrite the statute simply to accommodate [a] policy concern." *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 468 (6th Cir. 2021), quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, —— U.S. ——, 139 S. Ct. 524, 529, 531, 202 L.Ed.2d 480 (2019). "[T]he proper role of the judiciary ... [is] to apply, not amend, the work of the People's representatives."). *Gun Owners*, at 473, quoting *Henson v. Santander Consumer USA Inc.*, —— U.S. ——, 137 S. Ct. 1718, 1726, 198 L.Ed.2d 177 (2017).

II. Appellants have abandoned their constitutional claims.

The district court also granted summary judgment in favor of Kentucky against plaintiffs on their procedural due process and equal protection constitutional claims which they alleged in Counts III and IV of their amended complaint, with the only exception consisting of the "Cabinet Custody class" which the district court held have a statutory right to a fair hearing to give them an opportunity to prove eligibility for benefits. (R. 128, Mem. Op. # 3740-3746). Plaintiff-Appellants have failed to brief these issues thereby abandoning those claims on appeal. See *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.").

CONCLUSION

For the foregoing reasons, at a minimum, the partial judgment in favor of Kentucky should be affirmed. The partial judgment in favor of plaintiffs-appellants should be reversed. This Court should reconsider and vacate *D.O. v. Glisson* because Congress did not manifest any intention to create a right to foster care maintenance payments that is enforceable under § 1983.

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 11,449 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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CERTIFICATE OF SERVICE

I certify that on June 23, 2021, I filed this Appellees' Brief through the federal CM/ECF system which will serve a copy on Appellants' counsel of record in this appeal.

/s/ *D. Brent Irvin*
David Brent Irvin

ADDENDUM-DESIGNATION OF DISTRICT COURT RECORD

Pursuant to 6th Cir. R. 30(b), Defendants-Appellees designate the filings from the district courts electronic record as shown below in this table.

Record No.	Date Filed	Description	Page ID Nos.
1	May 9, 2018	Complaint	1-21
35	Nov. 1, 2018	Second Amended Complaint	254-297
38	Nov. 20, 2018	Answer to Second Amended Complaint	305-331
79	June 5, 2019	Plaintiffs' motion for preliminary injunction, declaratory relief and permanent injunctive relief	1797-1840
86	June 26, 2019	Defendants' response in opposition	2322-2414
94	July 24, 2019	Plaintiffs' reply	2499-2546
96	July 24, 2019	Defendants' Motion for Summary Judgment and exhibits	2575-2722
97	May 28, 2019	Motion to Dismiss and exhibits	2724-2744
104	Aug. 16, 2019	Plaintiffs' response in opposition to Defendants' cross-motion for summary judgment	3411-3476
106	Aug. 30, 2019	Defendants' Reply in Support of Motion for	3502-3520

		Summary Judgment and exhibit	
107	Aug. 30, 2019	Defendants' Reply in Support of Motion to Dismiss and exhibit	3521-3516
116	March 13, 2020	Memorandum Opinion and Order certifying class	3615-3636
120	April 3, 2020	Notice of Filing identifying class members	3650-3653
128	May 28, 2020	Memorandum Opinion and Order	3726-3747
129	May 28, 2020	Judgment	3748-3749
149	Dec. 29, 2020	Response in Opposition to Plaintiff's Motion for Clarification and to Enforce Judgment	3843-3854
150	Jan. 5, 2021	Order denying Motion to Clarify	3855-3865
151	Jan. 22, 2021	Notice of Appeal	3866-3867
154	Feb. 3, 2021	Plaintiffs' Motion for Attorney fees and costs	3873-3891

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