No. 21-3752

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

T.M., ET AL., Plaintiffs-Appellants, v. RICHARD DEWINE, ET AL., Defendants-Appellees.	:	On Appeal from the United States District Court for the Southern District of Ohio Western Division
	:	District Court Case No. 1:20-cv-00944-MRB

BRIEF OF APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important issues regarding the interpretation of Title IV-E of the Social Security Act, 42 U.S.C. §670 *et seq.*, Defendant Mike DeWine, the Governor of Ohio, and Defendant Matthew Damschroder, the director of Ohio Department of Job and Family Services, request oral argument.

JURISDICTIONAL STATEMENT

The District Court had statutory jurisdiction over plaintiffs' claims for relief under 42 U.S.C. §1983 because of 28 U.S.C. §§1331 & 1343. (For the reasons developed in Section I below, two of the plaintiffs' claims are moot and all the claims are barred by sovereign immunity, meaning the federal courts lack jurisdiction on constitutional grounds.) The District Court issued a final order and judgment dismissing all claims in July. Opinion & Order, R.57, PageID#1364–92; Judgment, R.58, PageID#1393. The plaintiffs timely appealed. Notice, R.60, PageID#1397. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. The plaintiffs are unlicensed foster caregivers who bring suit on their own behalves and on behalf of their foster children to whom they are related. They sued two Ohio officials—Governor Mike DeWine and Director Matthew Damschroder—alleging violations of their statutory rights under Title IV-E of the Social Security Act, 42 U.S.C. §670 *et seq.* For relief, they seek foster-care-maintenance payments. The sovereign-immunity doctrine forbids individuals from suing States for orders requiring monetary payments. Does the sovereign-immunity doctrine bar this suit, in whole or in part?

2. The plaintiffs claim that the State wrongfully withheld benefits they are owed by Title IV-E. But two plaintiffs are indisputably *not* entitled to Title IV-E benefits anymore, even if they were when the suit was filed. Are their claims moot?

3. Title IV-E requires States to make foster-care-maintenance payments to children and their caregivers in eligible "foster family homes." Federal law defines "foster family home" as a home that is "licensed or approved by the State in which it is situated as a foster family home that meets the standards established for the licensing or approval." 42 U.S.C. §672(c)(1)(A)(i). Although the plaintiff caregiv-

ers were approved to provide foster care in the State's distinct, wholly state-funded and state-administered foster system, they were *not* approved under "the standards established for the licensing or approval" of foster care homes under Ohio's Title IV-E plan. Must the State pay Title IV-E benefits to individuals, like the plaintiffs, who are not participating in Title IV-E?

INTRODUCTION

Ohio operates two distinct foster-care systems. The first is a cooperative state–federal program funded through Title IV-E of the Social Security Act. States may participate in Title IV-E by submitting a Title IV-E plan to the Secretary of Health and Human Services ("HHS"). To be approved, the State's Title IV-E plan must adopt and ensure compliance with various "standards." *See, e.g.*, 42 U.S.C. §671(a)(10). After a State's plan is approved, the State must make foster-care-maintenance payments to children and their caregivers in eligible "foster family homes." Federal law defines "foster family home" as a home that is "licensed or approved by the State in which it is situated as a foster family home that meets the standards established for the licensing or approval." §672(c)(1)(A)(i).

The second foster-care system—the "State System"—is a wholly state-run and state-funded program. It provides benefits to relative foster caregivers who are not Title IV-E eligible.

The plaintiffs in this case care for their foster children to whom they are related. All of them are approved under the State System rather than Ohio's Title IV-E program, and are eligible to obtain benefits through the State System. But they were never approved under the "standards established for" licensing or approval

under Ohio's Title IV-E plan. The plaintiffs nonetheless contend that they are entitled to Title IV-E benefits. They say that, because the State allowed them to foster children in the *state-run* and *state-funded* program, they were "approved by the State … as a foster family home that meets the standards established for the licensing or approval." *Id.* The plaintiffs sued Ohio Governor Mike DeWine and one other state official in federal district court, seeking an injunction requiring the State to make future Title IV-E payments. The District Court dismissed their case. The plaintiffs now appeal.

The plaintiffs are not entitled to relief. For one thing, the Court lacks jurisdiction to resolve the case. The claims brought by two of the plaintiffs are now moot. And in any event, the sovereign-immunity doctrine deprives the federal courts of jurisdiction over cases, like this one, in which the plaintiffs seek a "prospective injunction that amounts to a 'direct monetary award.'" *Ernst v. Rising*, 427 F.3d 351, 370 (6th Cir. 2005) (*en banc*) (quotation omitted).

The plaintiffs' merits arguments fare no better. To prove their entitlement to relief under Title IV-E, the plaintiffs would have to show that their homes are "foster family homes" under Title IV-E—that is, homes that are "licensed or approved by the State … as a foster family home that meets the standards established for the licensing or approval." The "standards established for the

licensing or approval" are the standards established for licensing or approval *under a Title IV-E plan*. But the plaintiffs were not licensed or approved under those standards; they were instead approved under the less rigorous standards that govern Ohio's State System. Accordingly, they are not eligible for Title IV-E benefits.

STATEMENT OF THE CASE

1. In 1980, Congress enacted Title IV-E of the Social Security Act. *D.O. v. Glisson*, 847 F.3d 374, 376 (6th Cir. 2017). The law creates a cooperative state–federal program providing federal aid for state administration of foster and adoption assistance. *Id.*; *New York State Citizens' Coal. for Children v. Poole*, 922 F.3d 69, 77 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 956 (2020); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 978 (9th Cir. 2010).

Under Title IV-E, States make foster-care-maintenance payments to eligible foster children and receive partial reimbursement from the federal government. 42 U.S.C. §§671(a), 672(a). To be eligible for federal foster-care assistance, States must submit to the U.S. Secretary of Health and Human Services a plan satisfying dozens of criteria. *Id.* §671(a). Relevant here, States must establish or designate a state authority that will be responsible for establishing and maintaining licensing standards for foster family homes. *Id.* §671(a)(10). These standards must be "reasonably in accord with the recommended standards of national organizations," *id.*,

and must be applied "to *any* foster family home" that receives Title IV-E funds. §671(a)(10)(B) (emphasis added); *see also* Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4032 (January 25, 2000) ("[A]pproved foster family homes must meet the same standards as licensed foster family homes."); U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE POLICY MANUAL §8.3A.8(c), question 5, (2021) (citing 42 U.S.C. §671(a)(10); 45 C.F.R. §1355.20) ("[T]he statute and regulation require that the State use the same standards to license or approve all foster homes.").

States implementing Title IV-E must "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards." §671(a)(19). Consistent with the statute's preference for placing children with relatives, licensing standards may be waived for relative caregivers, but "only on a case-by-case basis," and only if the standards in question are "nonsafety standards." §671(a)(10)(D). For example, the State may waive the otherwise-applicable square-footage requirement before placing a child in a relative's home. 65 Fed. Reg. 4020, 4033. But States cannot use this waiver power to "exclude relative homes, as a group, from any requirements." *Id.* States must also provide notice to relative caregivers about "the options the relative[s] ha[ve] under Federal, State, and local

law to participate in the care and placement of the child," and about the licensing standards that relative caregivers must meet in order to "become a foster family home" eligible to receive "the additional services and supports that are available for children placed in such a home." §671(a)(29).

After a State's Title IV-E plan is approved, the State must make foster-care-maintenance payments to eligible children and their caregivers. §672(a)(1). These payments cover certain enumerated categories of costs, on behalf of each qualifying child. §675(4)(A). The categories include the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, the child's personal incidentals, liability insurance with respect to the 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. §675(4)(A). States may seek partial reimbursement from the federal government of the foster-care-maintenance payments paid by the State on behalf of each eligible child. §674.

Title IV-E restricts the class of children eligible for federal foster-care-maintenance payments in several key ways. First, children are eligible to have these payments made on their behalves only if they are in the custody of a state agency that administers a State's Title IV-E plan. §672(a)(2)(B). Once a child is placed in the care of a permanent guardian, such as by adoption, the child is no longer eligible

for federal foster-care-maintenance payments. *Id.* Second, the "foster family home" in which the child is placed, §672(a)(2)(C), must be "licensed or approved by the State in which it is situated." §672(c)(1)(A). Of particular importance here, the home must be licensed or approved by the State "as a foster family home that meets the standards established for the licensing or approval." *Id.* Third, children are eligible for foster-care-maintenance payments only if certain income-eligibility requirements are satisfied. §672(a)(1)(B), (a)(3).

2. Ohio operates two foster-care systems.

First, there is Ohio's Title IV-E program, which is operated pursuant to a plan that the HHS Secretary approved. *See* Ohio Rev. Code §5101.141; Ohio Admin. Code §5101:2-47. The plan designates the Ohio Department of Job and Family Services—the "Department"—as the state agency charged with administering federal foster-care-maintenance payments made under Title IV-E. Ohio Rev. Code §5101.141(B)(1). As required by Title IV-E, any amendment to this plan must be approved by the HHS Secretary. *See* Ohio Rev. Code §5101.141(B)(2)-(4); 45 C.F.R. §1356.20(d); 42 U.S.C. §671. Although the Department supervises the foster-care-maintenance payments, Ohio's individual counties set the amounts of foster-care-maintenance payments and issue the payments to eligible foster-family

homes in compliance with Title IV-E. Ohio Rev. Code §5101.141(C); *see* Ohio Admin. Code §5101:2-47-10.

Under its broad authority to implement and supervise Ohio's Title IV-E plan, the Department regulates the licensing of foster care homes and issues "certificate[s]" to foster homes that satisfy the relevant Title IV-E requirements. Ohio Rev. Code §5103.03(B)(2). Consistent with Title IV-E's preference that children be placed with relatives, Ohio's Title IV-E plan permits waivers of certain non-safety-related licensing standards on a case-by-case basis. Ex. B to Pls.' Supplemental Br., R.50-2, PageID#1226. But because Title IV-E prohibits waiving *safety*-related licensing standards, even for relatives, the State's Title IV-E program allows for no such waivers.

Second, Ohio operates a separate, state-run foster-care system for unlicensed foster caregivers who are ineligible for Title IV-E assistance. *See* Ohio Admin. Code §5101:2-42-18(A). The Department administers this "State System," too. Before December 2020, all unlicensed caregivers were eligible for financial assistance from Ohio Works First (which is the financial assistance portion of Ohio's Temporary Assistance to Needy Families program), or from other general public-benefits programs. Ohio Admin. Code §5101:2-42-18(B)(8)(b); Compl. ¶39, R.7, PageID#76.

The Department administers the State System alongside the State's Title IV-E plan, and has broad discretion to promulgate rules for the State System's administration. Ohio Rev. Code §5101.881. As with the State's Title IV-E program, relative and non-relative foster caregivers must meet standards established by the Department to be approved as a foster caregiver in the System. Ohio Admin. Code §5101:2-42-18. These standards are similar to, but not the same as, those required of licensed foster caregivers. Executive Order 2020-43D ¶3, R.34-2, PageID#713.

Relative caregivers face especially difficult circumstances when they become foster parents, often unexpectedly. Consequently, they often step into the role with little to no preparation, and usually have not had time to obtain a foster-home license to be eligible for Title IV-E payments. To alleviate these burdens, Ohio's General Assembly enacted the Kinship Support Program to financially ease relative caregivers into their new roles as foster parents. Ohio Rev. Code §5101.881 *et seq.*; Executive Order 2020-43D, R.34-2 ¶4, PageID#713. The Program is a part of the State System. It ensures that "kinship caregivers" who "[d]o not have foster home certification" receive state-funded financial support through the Program during the period in which they seek and obtain licensure. Ohio Rev. Code §5101.884; Executive Order 2020-43D ¶4, R.34-2, PageID#713. Eligible kinship caregivers receive payments of a per diem rate for every child. Ohio Rev. Code §5101.885. To

incentivize unlicensed kinship caregivers to obtain a foster-home license, the Program payments terminate if the caregiver fails to obtain a license under Title IV-E within either a six- or nine-month period. Ohio Rev. Code §5101.886(C). The payments also stop once the kinship caregiver obtains foster-home certification under the Title IV-E plan and becomes eligible to receive Title IV-E payments instead of payments through the Kinship Support Program. Ohio Rev. Code §5101.887; Ohio Rev. Code §5101.889.

3. The plaintiffs—four relative caregivers who sue on their own behalves and on behalf of their four foster children—filed this putative class action against Ohio Governor Mike DeWine and Matthew Damschroder, who is the director and executive head of the Department. Compl. ¶¶16–18, 21–24, R.7, PageID#68–71. The plaintiffs sued both defendants, whom this brief will sometimes refer to collectively as "the State"—in their official capacities only. *See* Compl., R.7. The complaint contains a single count against the State. The plaintiffs seek relief under 42 U.S.C. §1983, alleging violations of their statutory rights under Title IV-E. They seek declaratory and prospective-injunctive relief ordering the State to make federal foster-care-maintenance payments to the plaintiffs and to others similarly situated. Compl. ¶10, R.7, PageID#66. They filed their suit before the State enacted the Kinship Support Program.

Plaintiffs H.C. and Y.C. are siblings, who were one and three years old when the complaint was filed. T.M. is their grandmother. Compl. ¶16, R.7, PageID#68. Hamilton County Job and Family Services obtained temporary legal custody of H.C. and Y.C. in April 2020 after a court found that it was not in the children's interest to remain in their mother's custody. Hamilton County Job and Family Services subsequently approved H.C. and Y.C.'s placement in T.M.'s home. Compl. ¶¶16, 22, R.7, PageID#68, 71.

Plaintiff B.F. was two years old when this suit began; D.R. is her grandmother. Compl. ¶17, R.7, PageID#68-69. The Franklin County Children's Services Division obtained temporary legal custody of B.F. in April 2019 and approved B.F.'s placement in D.R.'s home. Compl. ¶17 R.7, PageID#69. B.F. was permanently placed in D.R.'s home on December 9, 2020. As a result, B.F. is no longer in the custody of the Franklin County Children's Services Division. Ghering Decl. Ex. A ¶5, R.35-1, Page ID#742.

Plaintiff T.E. was, at the time the complaint was filed, one year old; K.T. and T.T. are his aunt and uncle. Compl. ¶18, R.7, PageID#69. The Cuyahoga County Department of Job and Family Services Children Services Division obtained temporary legal custody of T.E. in November 2019 and approved T.E.'s placement in K.T.'s and T.T.'s home in December 2019. *Id.*

Although the plaintiffs baldly allege that they "meet all of the federal eligibility requirements" to receive federal foster-care-maintenance payments, Compl. ¶36, R.7, PageID#75, they do not allege that they are licensed foster caregivers. Rather, they allege that they are "approved" foster caregivers within the meaning of Title IV-E because they have been "approved" to be foster caregivers *in the State System*. Compl. ¶39, R.7, PageID#76. They argue that the State's failure to make federal foster-care-maintenance payments to "approved" relative caregivers, on behalf of eligible relative-foster children, violates 42 U.S.C. §672. Because they are unlicensed, the plaintiffs were not, and currently are not, receiving federal foster-care-maintenance payments. Compl. ¶38, R.7, PageID#76.

4. After filing their complaint, the plaintiffs moved for class certification, R.19, and for a preliminary injunction, R.21. The State opposed the preliminary-injunction motion and moved to dismiss the complaint. R.34, R.35, R.49.

Before ruling on the motions, the District Court requested supplemental briefing asking the parties to answer several questions, including whether "obtaining foster-home certification" under Ohio Rev. Code §5103.03 or §5101.889 is equivalent to being "licensed" under Title IV-E. The court also asked the parties to brief whether Program payments are the same as foster-care-maintenance payments under Title IV-E. Dkt. Entry, No. 20-cv-944, (2/10/2021). The court

granted the State's motions to dismiss and denied as moot the plaintiffs' motions for class certification and for a preliminary injunction. Opinion & Order, R.57 PageID#1364–92. The court concluded that Governor DeWine had Eleventh Amendment immunity from this suit, *id.* at PageID#1379–81, and that the plaintiffs failed to state a claim upon which relief can be granted against Director Damschroder (or Governor DeWine), *id.* at PageID#1381–92. The court declined to address whether the enactment of the Kinship Support Program mooted the case or whether certain plaintiffs lack standing. *Id.* at PageID#1392 n.15.

5. The plaintiffs timely appealed.

SUMMARY OF ARGUMENT

I. Before reaching the merits of any case, courts must ensure that they have subject matter jurisdiction. Subject matter jurisdiction is lacking in this case for two reasons. First, the claims raised by two plaintiffs (B.F. and D.R.) are moot. Second, the entire suit is barred by the sovereign-immunity doctrine. The Court therefore lacks authority to grant the plaintiffs the relief they seek.

A. Article III's cases-and-controversies requirement requires that "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016) (quotation omitted). "If an intervening circumstance deprives the plaintiff of a personal stake in

the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 160–61 (internal quotation marks omitted).

The claims raised by plaintiff B.F. and her relative caregiver D.R. are now moot. These plaintiffs, just like the other plaintiffs, sued the State because they believed they were being denied federal foster-care-maintenance payments to which they were allegedly entitled under Title IV-E. They sought an order compelling the State to make those payments in the future. But a foster family is entitled to these payments *only if* the child remains in the State's custody; "once the child is adopted or placed in a permanent guardianship, [Title IV-E] no longer requires maintenance payments." *Glisson,* 847 F.3d at 381. And, after the plaintiffs filed their complaint, D.R. was granted permanent guardianship of B.F. Ghering Decl. Ex. A ¶5, R.35-1, Page ID#742. As a result, neither D.R. nor B.F. have any interest in this case—they are not entitled to federal foster-care-maintenance payments even if they are right on the law. This means there is no longer an actual controversy. It is "impossible" for "[this C]ourt to grant any effectual relief" to B.F. and D.R. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotations omitted). Their claims are therefore moot and must be dismissed.

B. In any event, the sovereign-immunity doctrine strips the federal courts of jurisdiction over this entire case.

1. The States "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). As a result, every State retained its sovereign immunity—the right "not to be sued without its consent"—when it joined the Union. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). This doctrine thus bars suits against non-consenting States. And because suits brought against state officials in their official capacities are suits against the State itself, the sovereign-immunity doctrine generally bars these suits as well. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985).

There are, however, exceptions. The Supreme Court recognized one such exception in *Ex parte Young,* 209 U.S. 123 (1908). In that case, the Court held that parties may bring official-capacity suits against state officials *only if* they seek "prospective relief to end a continuing violation of federal law." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (quoting *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013)). There is an exception to this exception: *Ex parte Young* does "not permit a prospective injunction that amounts to a direct monetary award." *Ernst*, 427 F.3d at 370 (citing *Kelley v. Metro. Cnty. Bd. of Educ.*, 836 F.2d 986, 995 (6th Cir. 1987)). A nominal claim for injunctive relief constitutes

a request for direct monetary relief when the "primary thrust of the" claim is a demand for "money" as opposed to a "non-monetary injunction." *Barton v. Summers*, 293 F.3d 944, 949 (6th Cir. 2002). To be sure, States may have to spend money complying with an injunction. Such incidental expenditures do not defeat a claim that fits within the *Ex parte Young* exception. But the *Ex parte Young* exception applies only when the expenditure of state funds is ancillary to some other form of prospective non-monetary relief. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 443 (6th Cir. 2020); *Ernst*, 427 F.3d at 367–72; *Barton*, 293 F.3d at 948–51; *Sutton v. Evans*, 918 F.2d 654, 658 (6th Cir. 1990).

Although the plaintiffs claim to seek prospective relief to end a continuing violation of Title IV-E, their suit falls outside the *Ex parte Young* exception. The plaintiffs seek just one form of relief: they want a court order requiring the State "to make the Foster Care Maintenance Payments." Compl. ¶10; R.7, PageID# 76–77. Therefore, the "primary thrust of the suit" is a demand for "money." *Barton*, 293 F.3d at 949. Plaintiffs do not seek, or even identify, any other prospective *non-monetary* relief to which their request for money would be incidental. The suit therefore falls outside the *Ex parte Young* exception and is barred by Ohio's sovereign immunity.

2. The plaintiffs waived their claims against Governor DeWine, Appellants' Br. 10 n.5, and so there is no need to address them. But if the Court does so, it should hold that these claims are barred by the State's sovereign immunity even if the claims against Director Damschroder are not. When plaintiffs challenge the constitutionality of a state law under *Ex parte Young*, they may sue only officials who have some "special relation to the particular statute" at issue and who are "expressly directed to see to its enforcement.'" *Russell*, 784 F.3d at 1047 (quotation omitted). The plaintiffs have failed to make that showing with respect to Governor DeWine. The Governor's campaign statements, press statements, and policy goals pertaining to children's welfare in general do not constitute a special relation to Title IV-E or any other statute at issue in this case. And while the Ohio governor possesses "supreme executive power," Ohio Const. art. III, §5, this does not give him the requisite "special relationship" to the many hundreds or thousands of laws enforced by his Office. Because Governor DeWine lacks the requisite relationship to the statutes at issue in this case, he cannot be sued under *Ex parte Young*.

II. If the Court reaches the merits, it should affirm.

1. The dispute in this case hinges on the meaning of 42 U.S.C. §672(c)(1)(A), which defines "foster family home." The definition is crucial, because only "foster family homes" are eligible for foster-care-maintenance pay-

ments under Title IV-E. A "foster family home" is, in turn, defined as a home that is "licensed or approved by the State in which it is situated as a foster family home that meets the standards established for the licensing or approval." *Id.*

The plaintiff foster caregivers are, undisputedly, *not* licensed or approved as meeting the standards set forth in Ohio's Title IV-E plan. Instead, they were approved as foster caregivers in the State System—a state-run program with distinct standards. This case presents the question of whether the State, by approving the foster caregivers to participate in the State System, "licensed or approved" their homes as foster family homes that "meet[] the standards established for the licensing or approval." §672(c)(1)(A).

The answer is "no": the plaintiffs' homes are not "foster family homes" for purposes of Title IV-E, and so they are not eligible for Title IV-E benefits. Again, homes qualify as "foster family homes" *only if* they are "licensed or approved" as homes "that meet[] the standards established for the licensing or approval." §672(c)(1)(A). The only "standards" relevant to Title IV-E are those approved by the Secretary of HHS in the State's Title IV-E plan. §671(a)(10). *Those* are the "standards established"—by the Title IV-E plan—"for the licensing or approval" of foster homes. §672(c)(1)(A).

Critically for present purposes, homes must satisfy these standards to qualify as "foster family homes" *regardless* of whether they are "licensed" or "approved" by the State. Another provision in Title IV-E requires that States apply their plans' standards to "*any* foster family home." §671(a)(10)(B) (emphasis added). Not surprisingly, HHS has long interpreted Title IV-E to mean that all homes must satisfy the same standards, regardless of whether they are "licensed" or "approved" foster homes. 65 Fed. Reg. 4020, 4032. Putting that together, there is only one set of "standards" relevant to Title IV-E: the set of "standards" approved by the Secretary of HHS in the State's Title IV-E plan.

The plaintiffs' homes were neither licensed nor approved as meeting the standards established in Ohio's Title IV-E plan. Accordingly, they are not entitled to Title IV-E benefits.

2. The plaintiffs' argument to the contrary rests largely on language in *D.O. v. Glisson*, which observed that §672(c)(1)(A) creates "two categories" of foster family homes—homes "licensed" by the State and homes "approved" by the State. 847 F.3d at 382–83. According to the plaintiffs, this dicta must be correct because of the presumption against surplusage. If "licensed" and "approved" homes must meet the same standards, the plaintiffs say, then the word "approved" becomes superfluous—every "approved" home would be a "licensed" home, and

there would have been no need for Congress to include both categories. To avoid the surplusage, the plaintiffs suggest interpreting §672(c)(1)(A) to include two categories of homes: *licensed* homes, which satisfy the standards set forth in a state Title IV-E plan, and *approved* homes, which a State allows to serve as a foster home under some other set of standards. Appellants' Br. 31.

The Court should reject this argument. "[S]ometimes the better overall reading of a statute contains some redundancy." *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020) (quoting *Rimini Street, Inc. v. Oracle USA, Inc.,* 139 S. Ct. 873, 881 (2019)). This is one such instance. Even if the "licensed" and "approved" categories are coextensive, Congress had good reason to take a belt-and-suspenders approach to the definition of "foster family home." When Congress passed Title IV-E, it "did not displace preexisting foster care systems but merely created a mechanism for partial reimbursement of a specified set of expenses associated with some children." *Poole*, 922 F.3d at 88 (Livingston, J., dissenting). To the contrary, it empowered the States to implement the Title IV-E program through their preexisting systems. And not all of those systems use the same terminology. Ohio and some other States, for example, "certify" foster homes instead of "licensing" them. Ohio Rev. Code §§5103.03(B)(2), 5103.031; *see also* Cal. Health & Safety Code §1536.2. Given this terminological diversity, the word "approved" serves an

important role: it establishes that the definition captures all homes licensed *or otherwise permitted* by a State to serve as foster homes under a Title IV-E plan. Because any redundancy is easily explained by Congress's desire to "remove doubt" about the statute's scope, any surplusage is unconcerning here. *Marx v. General Revenue Corp.*, 568 U. S. 371, 385 (2013).

STANDARD OF REVIEW

This court reviews *de novo* a district court's dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Beiersdorfer v. LaRose*, No. 20-3557, 2021 WL 3702211, at *5 (6th Cir. Aug. 20, 2021).

"Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks." *Id.* (quoting *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). For facial attacks that challenge "the sufficiency of the pleading itself," this Court "take[s] the material allegations of the petition as true" and construes them "in the light most favorable to the nonmoving party." *Id.* (quoting *Ritchie*, 15 F.3d at 598). On the other hand, a "factual attack" on subject matter jurisdiction challenges "the factual existence of subject matter jurisdiction." *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). For factual attacks, this Court can review evidence outside of the pleadings and "has the power to weigh the evidence and determine the effect of that evidence on the court's au-

thority to hear the case." *Id.* at 759–60. The District Court's factual findings are reviewed for clear error, and the District Court's application of the law to the facts is reviewed *de novo*. *Id.* at 760.

This Court reviews *de novo* a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Boxill v. O'Grady*, 935 F.3d 510, 517 (6th Cir. 2019). In reviewing a motion to dismiss this Court accepts all factual allegations in the complaint as true and construes the complaint in the light most favorable to the plaintiffs, drawing all reasonable inferences in their favor. *Golf Vill. North, LLC v. City of Powell*, 14 F.4th 611, 617 (6th Cir. 2021). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Issues of statutory interpretation are reviewed *de novo* on appeal. *United States v. Lawrence*, 735 F.3d 385, 411 (6th Cir. 2013).

ARGUMENT

I. The mootness and sovereign-immunity doctrines strip this Court of jurisdiction to hear the claims at issue.

The Court, before reaching the merits, must determine whether it has jurisdiction to do so. *Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 360 (6th Cir. 2021). Here, the Court lacks jurisdiction. The claims filed by two plaintiffs—

B.F. and D.R.—are moot. And regardless, the sovereign-immunity doctrine, which is jurisdictional, *see Ladd v. Marchbanks*, 971 F.3d 574, 576 (6th Cir. 2020), bars all of the plaintiffs' claims. This section addresses these issues in turn.

A. The claims raised by B.F. and D.R. are moot.

1. Article III of the United States Constitution permits courts to decide only "cases" and "controversies." U.S. Const. art. III, §2. "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). "That party must also have 'standing,' which requires, among other things, that it have suffered a concrete and particularized injury." *Id.* When no party has standing to sue, the federal courts lack jurisdiction to resolve the suit. *See WCI, Inc. v. Ohio Dep't of Pub. Safety*, 18 F.4th 509, 516 (6th Cir. 2021).

Article III's cases-and-controversies requirement requires that "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald Co.*, 577 U.S. at 161 (quotation omitted). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* (internal quotation marks omitted). A case thus becomes

moot if, and only if, it becomes "impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* (quotation omitted).

2. The claims brought by B.F. and D.R. (B.F.'s relative caregiver) are moot because both "parties lack a legally cognizable interest in the outcome" of this case. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 558 (6th Cir. 2021) (quotation omitted). B.F. and D.R., like the other plaintiffs, seek future Title IV-E payments. To be eligible for such payments, "the child must be in the [state's] custody; once the child is adopted or placed in a permanent guardianship, [Title IV-E] no longer requires maintenance payments." *Glisson,* 847 F.3d at 381. This eligibility requirement means that, when a child achieves permanent placement during the suit, the case becomes moot. *See Sam M. v. Carcieri*, 608 F.3d 77, 81 n.1 (1st Cir. 2010); *J.B-K.-1 v. Sec'y of Kentucky Cabinet for Health & Fam. Servs.*, 462 F. Supp. 3d 724, 730 (E.D. Ky. 2020); *Laurie Q. v. Contra Costa Cnty.*, 304 F. Supp. 2d 1185, 1208 (N.D. Cal. 2004); *Ah Chong v. McManaman*, 154 F. Supp. 3d 1043, 1050–51 (D. Haw. 2015).

After this suit began, D.R. was granted permanent guardianship of B.F. As a result, B.F. is no longer in the custody of Franklin County Children's Services. Ghering Decl. Ex. A ¶5, R.35-1, Page ID#742. This has not been disputed. Assuming that D.R. would have been eligible for federal foster-care-maintenance pay-

ments, the Department's obligation to pay them ceased when D.R. obtained permanent guardianship of B.F. B.F.'s and D.R.'s claims are therefore moot because "it is impossible for [this C]ourt to grant any effectual relief" to B.F. and D.R. *Chafin*, 568 U.S. at 172 (quotation omitted). The issues presented in B.F.'s and D.R.'s claims are "no longer 'live.'" *Id.* (quotation omitted).

There is a narrow exception to the mootness doctrine for cases "that are capable of repetition while evading review." *Turner v. Rogers*, 564 U.S. 431, 439 (2011) (internal quotation marks omitted). But B.F.'s and D.R.'s claims do not fall within this narrow exception. Indeed, the presence of other plaintiffs whose claims *are not* moot proves that such claims need not evade review. D.R. would have a stronger argument against mootness if she could claim a "reasonable expectation" of having the same dispute with the State—if, for example, she planned on fostering another relative child (or any other child, really). *See Ah Chong*, 154 F. Supp. 3d at 1051 (quotation omitted). But there is no evidence of any such expectation, especially because she has not sought or received foster care licensure. B.F., too, does not have a "reasonable expectation" of having the same dispute with the State: once a child is placed in a permanent home, she is "unlikely to find [herself] back within the [State's] foster care system and thus cannot demonstrate with substantial probability that [she] will suffer future harm[] at the hands of the [State]." *Laurie Q.*,

304 F. Supp. 2d at 1208. In sum, B.F.'s permanent placement with D.R. has extinguished their claims.

B. The entire case is barred by sovereign-immunity principles.

Regardless, the entire suit is barred by the sovereign-immunity doctrine.

1. "Sovereign immunity is the privilege of the sovereign not to be sued without its consent." *Stewart*, 563 U.S. at 253. The States did not give up this privilege when they ratified the Constitution; they "entered the federal system with their sovereignty intact." *Blatchford*, 501 U.S. at 779; *see also Franchise Tax Bd. v. Hyatt,* 139 S. Ct. 1485, 1493–97 (2019). Federal courts therefore have jurisdiction over claims against a State only if the State has consented to suit or otherwise surrendered its immunity when the Constitution was ratified. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (citing *Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934)). And claims against state officials in their official capacities qualify as suits against the State itself. *Kentucky v. Graham*, 473 U.S. at 165–66; *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

Some history helps illustrate how deeply engrained in our Constitution these background principles are. In the early case of *Chisholm v. Georgia*, 2 U.S. 419 (1793), the Supreme Court interpreted Article III, §2—which permits suits between States and citizens of other States—to mean that the States *had* surrendered

their immunity with respect to complaints brought against them by citizens of other States. It thus held that federal courts could hear a suit brought by a South Carolinian against the State of Georgia.

But "after Georgia lost *Chisholm* before the Supreme Court … the Supreme Court proceeded to lose *Chisholm* before the People." *Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d 1091, 1111 (6th Cir. 2015) (Sutton, J., dissenting), *rev'd by Sheriff v. Gillie*, 136 S. Ct. 1594 (2016). The decision generated an enormous backlash. Indeed, it revived not-so-old fears that the Constitution surreptitiously stripped the States of their sovereignty. *See* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1862–70 (2010). And so, perhaps not surprisingly, it "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco*, 292 U.S. at 325; *accord Ladd*, 971 F.3d at 578. That amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

If one were to consider the text of the Eleventh Amendment in isolation, it might appear rather limited, barring *only* suits brought against a State by citizens of *other* States, but allowing suits (like this one) between a State and its own citizens.

But the just-discussed background principles make sense of the Eleventh Amendment's seemingly limited reach. Because the States "entered the federal system with their sovereignty intact," *Blatchford*, 501 U.S. at 779, they could be subject to suit in federal court without their consent *only if* the Constitution expressly subjected them to suit, *Monaco*, 292 U.S. at 322–23. And the only constitutional provision that could reasonably have been interpreted to abrogate their immunity was Article III, §2's state–citizen diversity provision. That provision, after all, is the only one that allows suits between the States and citizens. *See generally* U.S. Const art. III, §2. The corresponding federal-question provision, by comparison, makes no mention of the States. *Id.* Because it was designed to correct *Chisholm*'s mistaken interpretation of Article III, §2's diversity provision, the Eleventh Amendment did not need to say anything more than it does.

Consistent with this, courts today recognize that the States retain their sovereign immunity from suit even in suits brought by their own citizens—suits that fall outside the Eleventh Amendment's text. *Ladd*, 971 F.3d at 578–79.

2. The Supreme Court has recognized three narrow exceptions to the States' sovereign immunity. First, States may waive their sovereign immunity. *Id.* at 576. Second, Congress can, in limited contexts, abrogate State sovereign immunity. *Id.* at 578. Finally, under *Ex parte Young,* 209 U.S. 123, plaintiffs may bring official-

capacity suits against state officials seeking to enjoin the officers from taking unconstitutional actions. *Id.* at 155–56; *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). The *Ex parte Young* exception "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Stewart*, 563 U.S. at 255 (citation omitted). And, based on this fiction, plaintiffs are able to secure injunctive relief that binds the States.

Here, it is undisputed that the State has not consented to this suit. And §1983 does not abrogate the States' sovereign immunity. *Harrison v. Michigan*, 722 F.3d 768, 771 (6th Cir. 2013). So the plaintiffs' suit against Governor DeWine and Director Damschroder is barred by sovereign immunity unless it falls within the *Ex parte Young* exception.

It does not fall within that exception. "In order to fall within the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law." *Russell*, 784 F.3d at 1047 (quoting *Diaz*, 703 F.3d at 964). There is, however, an exception to this exception: "requests for monetary relief" phrased "as requests for future payments" are barred by sovereign immunity. *Barton*, 293 F.3d at 948. When the suit "is in essence one for the recovery of money from the state"—when "private parties seek[] to impose a liability which must be paid from

public funds"—the suit is barred. *Id.* at 948–49 (quoting *Ford Motor Co. v. Dep't of Treasury of the State of Indiana*, 323 U.S. 459, 464 (1945) and *Edelman*, 415 U.S. at 663); *Ernst*, 427 F.3d at 370. Sovereign-immunity principles do "not permit a prospective injunction that amounts to a direct monetary award." *Ernst*, 427 F.3d at 370 (internal quotation marks omitted).

Critically, however, "sovereign immunity will not bar" suit under *Ex parte Young* "simply because the state may be required to make *incidental* expenditures in complying with the injunction." *Barton*, 293 F.3d at 949; *Ernst*, 427 F.3d at 368. This "ancillary-effect exception," however, is very "narrow." *Ernst*, 427 F.3d at 368 (quotation omitted). To determine whether this exception applies, this Court asks whether the "primary thrust of the suit" is "the money" or the "non-monetary injunction." *Id.* (quotation omitted). If the money is the focus, the *Ex parte Young* exception does not apply.

Kelley v. Metropolitan County Board of Education, 836 F.2d 986, is particularly instructive on this point. In *Kelley*, this Court held that sovereign-immunity principles barred a suit in which plaintiffs sought an injunction ordering the State to assume a percentage of the costs of desegregating a school. *Id.* at 998, 1001. Distinguishing the facts before it from *Milliken v. Bradley*, 433 U.S. 267 (1977), the Court noted that ordering a State to assume the costs of the program was "not

'ancillary' to anything at all." *Id.* at 992. When "[t]he order to pay is ancillary only to itself," *Ex parte Young* is inapplicable and the suit is barred by sovereign immunity. *Id.*

In the years since this Court's decision in *Kelley*, the Court has repeatedly held that an order having a substantial effect on the State's treasury must be ancillary to some other form of prospective non-monetary relief to fall within the *Ex parte Young* exception. *See, e.g.*, *Waskul*, 979 F.3d 426, 443 (suit seeking healthcare services under the Medicaid Act does not violate sovereign immunity because any monetary impact on the state treasury would be incidental to the non-monetary request for relief); *Ernst*, 427 F.3d at 367–72 (suit seeking retirement benefits is "monetary by [its] very terms or [is] ancillary to nothing but monetary relief" and violates sovereign immunity); *Barton*, 293 F.3d at 948–51 (suit seeking portions of future installments due under the States' settlement agreement with several tobacco manufacturers barred by sovereign immunity); *Sutton*, 918 F.2d at 658 (suit for supplemental compensation barred by sovereign immunity). Requests for monetary relief, even if couched in prospective language, are ancillary only to themselves and barred under sovereign-immunity principles.

It is true that the Supreme Court has never embraced this Court's ancillary-only-to-itself test. But it has not rejected that test either. And so the test continues

to bind this Court, unless and until another *en banc* Court rejects the test or the Supreme Court issues an opinion foreclosing its use. *See Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019).

It is also of no moment that this Court did not address sovereign-immunity concerns in *D.O. v. Glisson*, which was similarly a suit against state officials seeking foster-care-maintenance payments under Title IV-E. 847 F.3d 374. *Glisson* simply failed to engage with the issue at all. And when "a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45 (2011). While the claims in that case should have been barred by sovereign immunity as well, the Court's failure to consider the issue has no precedential effect on this case.

3. In light of *Kelley* and its progeny, the *Ex parte Young* exception does not apply to this case. The only relief the plaintiffs seek is an order requiring the State to make foster-care-maintenance payments in the future. Compl. ¶3, R.7, PageID#64. This sole request—that "Defendants … make the Foster Care Maintenance Payments," Compl.¶10; R.7, PageID#76–77—can only be fulfilled if the State makes direct payments from its treasury under its Title IV-E plan. Although couched in prospective-injunction language, this is a request for direct

monetary relief of the sort that sovereign-immunity principles foreclose. Indeed, the plaintiffs have not identified *any* non-monetary relief to which their request for foster care payments would be "incidental" or "ancillary." Thus plaintiffs' request for direct monetary payments from the state treasury is foreclosed by the sovereign-immunity doctrine.

In reaching a contrary conclusion, the District Court relied on *Milliken*, 433 U.S. 267. It erred. In *Milliken*, the Supreme Court enjoined Michigan to provide education programs in order to remedy racial discrimination. *Id.* at 289–90. The Court concluded that the State's expenditure of funds to support the education programs was merely ancillary to the non-compensatory goal of ending the continuing conditions of inequality. *Id.* at 290. However, here, plaintiffs do not seek, or even identify, any non-compensatory goals: the primary thrust of their suit is monetary relief. *Milliken*, therefore, is not analogous.

Because the plaintiffs' request for foster care payments is "ancillary only to itself," *Kelley*, 836 F.2d at 992, the *Ex parte Young* exception does not apply and this suit is barred by sovereign-immunity principles.

C. Even if the claims against Director Damschroder are not barred by sovereign immunity, those against Governor DeWine are.

The plaintiffs' claims against Governor DeWine are barred by sovereign-immunity principles *even if* the Court rejects the prior argument.

First, the plaintiffs have waived any arguments in support of their claims against Governor DeWine. They say, in their brief, that the claims against the Governor are "not the subject of this appeal." Appellants' Br. 10 n.5. In light of this waiver, the Court should affirm the District Court's judgment *at least* with respect to the claim against Governor DeWine. *See PolyOne Corp. v. Westlake Vinyls, Inc.*, 937 F.3d 692, 700 (6th Cir. 2019).

In any event, the District Court correctly held that the suit against Governor DeWine is barred by Ohio's sovereign immunity. *See* Opinion & Order, R.57, PageID#1379–81. Plaintiffs may invoke the *Ex parte Young* theory *only* against state officers who, "by virtue of the office" they hold, have "some connection with the alleged unconstitutional act or conduct of which the plaintiff complains." *Top Flight Entm't, Ltd. v. Schuette*, 729 F.3d 623, 634, (6th Cir. 2013) (quotation omitted). Put differently, plaintiffs "must allege facts showing how [the] state official is connected to, or has responsibility for," the alleged violations of plaintiffs' federal rights. *Id.*

The plaintiffs failed to make that showing with respect to Governor DeWine. They allege that Governor DeWine is vested with the "supreme executive power" and that the Department is "under his control." Compl. ¶25, R.7, PageID#71. They further allege that Governor DeWine, through campaign statements, press

statements, and announced policy goals, promised to make children's welfare "the core of his policy agenda." Compl. ¶¶25–28, R.7, PageID#71–73 (quotation omitted). Allegedly, his failure to ensure the Department's payment of federal foster-care-maintenance payments to unlicensed kinship caregivers contravenes his promises. Compl. ¶29, R.7, PageID#73.

None of those allegations suffice to establish the relevant connection. *Ex parte Young* "does not reach state officials who lack a 'special relation to the particular statute'" and who are "'not expressly directed to see to its enforcement.'" *Russell*, 784 F.3d at 1047 (quotation omitted). That forecloses the plaintiffs' arguments. Governor DeWine is not "expressly directed" to enforce the State's Title IV-E plan (or its state-sponsored plan, for that matter). True, the Ohio Constitution vests him with "supreme executive power," and the exercise of that power entails overseeing the direction of agencies (like the Department) that operate under his direction. But the vesting of that authority does not establish that the Governor has a special relationship to the particular statute at issue or that he is expressly directed to enforce it. To the contrary, Governor DeWine's connection to the statutes here at issue is no more special or direct than is his connection to any of the other hundreds (perhaps thousands) of statutes administered by agencies under his supervision. If his position as chief executive were enough, the Governor would

become subject to suit in any lawsuit involving the enforcement of state law. "The exception would become the rule." *Ball v. Kasich*, 244 F. Supp. 3d 662, 674 (S.D. Ohio 2017).

Similarly, the Governor's campaign statements, press statements, and policy goals pertaining to child welfare in general do not constitute a special relation to Title IV-E or any other statute at issue in this case. The plaintiffs cannot use the federal courts to make an official turn policy goals into law. The sovereign-immunity doctrine exists because the States are sovereigns all their own, free to govern themselves. Allowing federal courts to issue orders compelling state officials to achieve policy goals would be antithetical to the concept of States as sovereigns. (Anyway, Governor DeWine *did* improve the foster-care system, as he promised, by signing the Kinship Support Program into law.)

II. The plaintiffs' claims fail on the merits.

If the Court reaches the merits, it should affirm. Under Title IV-E, federal foster-care-maintenance payments are available to children placed in qualifying foster family homes. Only foster caregivers who care for foster children in a "foster family home" are eligible for Title IV-E benefits. Title IV-E defines a qualifying "foster family home" as follows:

> The term "foster family home" means the home of an individual or family—
>
> > (i) that is licensed or approved by the State in which it is situated as a foster family home that meets the standards established for the licensing or approval; and
> >
> > …

42 U.S.C. §672(c)(1)(A). The plaintiffs undisputedly are not "licensed … by the State." But they have been permitted to serve as foster caregivers in the State System—the separate foster-care program that the State funds and administers itself. On this basis, they say they are "approved by the State … as a foster family home that meets the standards established for … licensing or approval." That is wrong. The "standards established for … licensing or approval" are the standards established in a State's approved Title IV-E plan. Because the plaintiffs were not approved under those standards—because they were allowed to participate in the State System *without regard* to the Title IV-E plan or its standards—their homes are not "foster family home[s]" for purposes of §672(c)(1)(A). As such, they are not eligible for Title IV-E benefits.

A. The plaintiffs do not qualify for Title IV-E benefits because they are not licensed foster caregivers.

1. Foster caregivers are eligible for Title IV-E benefits only if their home is a "foster family home" as defined by Title IV-E. And a "foster family home" is a home "that is licensed or approved by the State in which it is situated as a foster

family home that meets the standards established for the licensing or approval." §672(c)(1)(A). Breaking this down, a "foster family home" qualifies for Title IV-E funds *only if* it "meets the standards established for the licensing or approval."

By "standards," this section refers only to the "standards" relevant to Title IV-E plans. Every State that wishes to participate in Title IV-E must submit a plan to the Secretary of HHS for the Secretary's approval. 42 U.S.C. §671(a). Each such plan must establish "standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights." §671(a)(10)(A).

The same standards apply regardless of whether the home is "licensed" or "approved" by the State. Title IV-E requires that States apply licensing standards, which must first be approved by the HHS Secretary, to "*any* foster family home." 42 U.S.C. §671(a)(10)(A)–(B) (emphasis added). Although "any" is not defined by the statute, courts "assume that Congress adopts the customary meaning of the terms it uses." *United States v. Price*, 901 F.3d 746, 750 (6th Cir. 2018) (quotation omitted). Where, as here, "any" is "used as a function word to indicate the maximum or whole of a number or quantity," the word "any" means "all." *United*

States v. Maxwell, 285 F.3d 336, 341 (6th Cir. 2002) (quoting *Webster's Third New International Dictionary* at 97 (2d ed. 1981)); *accord Price*, 901 F.3d at 750. Thus, Title IV-E requires that all foster family homes satisfy the same licensing standards. Necessarily, then, those same standards apply to homes *licensed* by the State and to homes *approved* by the State.

This was confirmed by HHS in its response to a comment the Department received about the 2000 amendments to Title IV-E. One comment asked whether eligibility standards were different for "licensed" as opposed to "approved" homes. 65 Fed. Reg. 4020, 4032. In response, HHS clarified that "approved foster family homes must meet the same standards as licensed foster family homes." *Id.* "Licensed" homes and "approved" homes cannot be subject to two different eligibility standards.

2. The plaintiffs' claims fail as a matter of law. While each caregiver-plaintiff was approved to participate in the State System, that system has different approval standards than those in Ohio's Title IV-E plan. *Compare* Ohio Admin. Code §5101:2-7-02 (eligibility standards for licensed foster care homes) *with* Ohio Admin. Code §5101:2-42-18 (eligibility standards for unlicensed foster care homes). Thus, none of the plaintiffs were "licensed or approved by the State … as

a foster family home that meets the standards established for the licensing or approval" in the State's Title IV-E Plan. §672(c)(1)(A).

Ohio's regulations frankly acknowledge that the "requirements for foster caregiver certification"—that is, the requirements that govern approval for participation in the State's Title IV-E plan—"differ from the requirements for approval as a relative or nonrelative substitute caregiver." Ohio Admin. Code §5101:2-42-18(B)(8)(e). For instance, the Kinship Support Program's eligibility standards for unlicensed caregivers and those for caregivers licensed under Title IV-E vary as to a number of *safety* requirements. There are fewer disqualifying criminal offenses for unlicensed caregivers than for licensed caregivers. *Compare* Ohio Admin. Code §5101:2-7-02(J), appendix A, *with* Ohio Admin. Code §5101:2-42-18(B)(11)–(12). Licensed caregivers are also subject to more rigorous background checks than unlicensed caregivers. *Compare* Ohio Admin. Code §5101:2-7-02(K), (M)–(O), *with* Ohio Admin. Code §5101:2-42-18(B)(10)–(12). Unlicensed caregivers are not required to complete training before placement, whereas licensed foster caregivers must obtain thirty-six hours of preplacement training and complete additional training after receiving their license. *Compare* Ohio Admin. Code §5101:2-7-02(Y), *with* Ohio Admin. Code §5101:2-42-18(B). Because all foster-family homes must meet the standards relevant for a State's Title IV-E plan, plaintiffs, who have been

approved as meeting only the State System's less-rigorous standards, are ineligible for Title IV-E payments.

In sum, the plaintiffs are not "licensed or approved by the State" to operate foster-family homes that meet "the standards for licensing or approval" established in Ohio's Title IV-E plan. Accordingly, their homes are not "family foster homes" for purposes of Title IV-E. And it follows that they are not entitled to Title IV-E benefits.

B. The plaintiffs' argument rests on a misreading of Title IV-E's plain text and governing precedent.

1. The plaintiffs counter the State's interpretation by claiming it introduces superfluity into the statute. More precisely, they say that if those *licensed* to serve as foster caregivers and those *approved* to serve as foster caregivers *both* must operate foster homes that satisfy the standards in the State's Title IV-E plan, then the categories of "licensed" and "approved" families are coextensive, making the "approved" category superfluous. Appellants' Br. 31; *see also* Br. of Amicus Curiae Children's Defense Fund 7–8. To avoid surplusage, they suggest reading §672(c)(1)(A) so that *only* those "licensed" to serve as foster caregivers must satisfy a State's Title IV-E standards. In contrast, they say that the category of "approved" foster caregivers can be understood to encompass *all* homes allowed to foster children, regardless of whether they are approved to foster children under the

standards adopted in a Title IV-E plan or whether they meet other, less rigorous, standards under a state-specific program.

The Court should reject this argument. "Redundancy is not a silver bullet." *Rimini*, 139 S. Ct. at 881. The Supreme Court has "often recognized" that "[s]ometimes the better overall reading of a statute contains some redundancy." *Barton* , 140 S. Ct. at 1453 (quotation omitted). This is one such instance. Even if the phrases "licensed … by the State" and "approved by the State" end up being coextensive, there is a natural explanation for Congress's choice to include both co-extensive categories: doing so gave the States greater flexibility to carry Title IV-E into effect without disturbing foster-care systems that predated Title IV-E's passage.

Congress passed Title IV-E under its Spending Clause authority, offering the States money in exchange for their agreement to help implement a federally sponsored program. But it is important to recognize that state and local foster-care systems predate Title IV-E's passage. *Poole*, 922 F.3d at 88 (Livingston, J., dissenting). Congress, when it passed Title IV-E "did not displace preexisting foster care systems"—instead, it "created a mechanism for partial reimbursement of a specified set of expenses associated with some children." *Id.* (citing Kerry DeVooght, *et al.*, *Family Foster Care Reimbursement Rates in the U.S.*, tbl. 1 at 9–18

(2013)). And the Title IV-E program leveraged the States' expertise by leaving them with substantial flexibility. For example, Title IV-E gives each participating State the discretion to "establish[] and maintain[] standards" for the "licensing or approval" of foster family homes. 42 U.S.C. §§671(a)(10)(A), 672(c)(1)(A)(i).

Because of this flexibility, licensing and approval schemes vary from State to State. Critically here, some States approve a foster home to participate in Title IV-E by issuing something other than a "license." Ohio, for example, uses "certify" rather than "license" to refer to foster-family-home approval. Ohio Rev. Code §§5103.03(B)(2), 5103.031; *see also* Cal. Health & Safety Code §1536.2 (referring to licensed foster-family homes as "certified"). The word "approved" thus serves as a clarifier; a home is a "foster family home" if the State says the home meets the standards of the State's Title IV-E plan, regardless of whether the State "licenses" the home. Put differently, Congress's inclusion of "or approved" accommodates the varying terms that States use for licensure. Congress quite often includes surplusage so as to "remove doubt" about a statute's scope. *Marx*, 568 U. S. at 385. That is what it did here.

The plaintiffs, anticipating this analysis, note that, "in the absence of a plain indication to the contrary," the operation of Spending Clause legislation should not be "dependent upon state law." Appellants' Br. 36 n.22 (quoting *Mississippi Band of*

Choctaw Indians v. Holyfield, 490 U.S. 30, 44 (1989)). But that principle has no application here. On the State's reading, the phrase "licensed or approved by the State" means the same thing in every State: the phrase picks out *every* form of approval that a State might embrace. So Title IV-E's meaning and operation does not depend on state law. To the contrary, Title IV-E operates the same way in every State *regardless* of what word state law uses to describe its approval process.

The plaintiffs' interpretation would result in a sweeping expansion of Title IV-E's reach, contrary to Congressional intent. Because nothing in Title IV-E prevents States from implementing a separate system for funding the foster care of children who are not eligible under Title IV-E, some States, including Ohio, operate separate state-funded systems in addition to their federally funded Title IV-E plan. For example, Tennessee, Kentucky, Oregon, California, and Illinois also have separate, state-funded foster-care systems for children who do not meet federal criteria for Title IV-E eligibility. TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES, ADMINISTRATIVE POLICIES AND PROCEDURES §§16.20(F)(3), 16.29 (paying per diem rate from state funds to unlicensed relative foster homes), https://perma.cc/XDN8-AM4B, https://perma.cc/66E6-WH3C; KENTUCKY DEPARTMENT FOR COMMUNITY BASED SERVICES, STANDARDS OF PRACTICE ONLINE MANUAL §§ 4.10.4, 12.24 (paying per diem rate from state funds to unlicensed rela-

tive foster homes), https://perma.cc/7XQ7-VUT3, https://perma.cc/GA2J-N7M4; *Lipscomb v. Simmons*, 962 F.2d 1374, 1376, 1380 (9th Cir. 1992). The State System, which now includes the Kinship Support Program, is another such state-funded foster-care system for children who do not meet federal criteria. If in fact every placement of a child with a caregiver who does not meet federal criteria is an "approval" within the meaning of Title IV-E, as the plaintiffs argue, then Title IV-E would subsume every state-funded system for children who do not meet federal criteria. That would upend the "large and complex state and local foster care systems, which themselves involve a complicated interplay between local demands and state funding." *Poole*, 922 F.3d at 88 (Livingston, J., dissenting). Title IV-E, which does not displace state foster-care systems that predated Title IV-E's passage, surely does not contemplate such a remarkable disruption to traditionally state-regulated foster-care systems.

2. The plaintiffs contend that the State's interpretation conflicts with this Court's decision in *D.O. v. Glisson,* 847 F.3d 374. They are wrong. *Glisson* had two holdings. First, it held that Title IV-E creates a private right to foster-care-maintenance payments that private plaintiffs may enforce by filing suit under §1983. *See id.* at 380. Second, it held that, under Title IV-E, States may not withhold federal foster-care-maintenance payments *from an otherwise eligible caregiver* based

simply on the fact that the caregiver is related to the child. *Id.* at 382–84. The State's interpretation of Title IV-E does not contravene either of these holdings. *Contra* Appellants' Br. 34–37. The substitute-caregiver plaintiffs are not, under Ohio's Title IV-E Plan, ineligible for Title IV-E benefits because they are related to the children they are fostering. Instead, they are ineligible for Title IV-E because their homes have not been "licensed or approved by the State … as a foster family home that meets the standards established for the licensing or approval" under Ohio's Title IV-E plan. 42 U.S.C. §672(c)(1)(A). This is in direct contrast to the plaintiffs in *Glisson*, who undisputedly met all relevant standards established in Kentucky's Title IV-E plan but who were nonetheless denied benefits simply because they were relative caregivers. *Glisson*, 847 F.3d at 383.

The plaintiffs also note that *Glisson* interpreted §672(a)(1)(C)'s definition of "foster family home" as creating "two categories" of foster family homes: homes "licensed" by the State and homes "approved" by the State. According to the plaintiffs, that contradicts the State's interpretation of the definition, under which both licensed and approved homes must satisfy the standards of a State's Title IV-E plan. Appellants' Br. 11, 24, 29. This argument fails. Although *Glisson* does say that Title IV-E "contemplates two categories of foster families," it does not say that homes can be "approved" without satisfying the standards of the State's Title IV-E

plan. And as the foregoing shows, to qualify as a "foster family home" under §672(c)(1)(A), *every* foster home must either be licensed by the State or approved by the State as meeting the standards set forth in the State's HHS-approved Title IV-E plan. True enough, as *Glisson* noted, while the State may waive non-safety standards in a Title IV-E plan on a case-by-case basis for relative caregivers, it cannot waive the same standards for *non-relative* caregivers. 847 F.3d at 383. But that has nothing to do with any distinction between "licensed" and "approved" homes. Instead, this distinction flows directly from a different provision in Title IV-E, *see* 42 U.S.C. §671(a)(10)(D), which creates this distinction expressly. Thus, it does not change the fact that, to be eligible for Title IV-E benefits, both licensed and approved homes must satisfy the standards of the State's Title IV-E plan. Since none of the plaintiffs were approved to foster children under the standards set forth in Ohio's Title IV-E plan, they are not eligible for Title IV-E benefits.

The plaintiffs' reliance on *Glisson* actually harms, rather than helps, their position. Assume, as the plaintiffs argue, that there exists a second category of "approved" foster homes that meet only the State System's safety standards and still qualify for Title IV-E funds. These foster homes would obtain "approval" by meeting Ohio's less rigorous safety standards, whereas the licensed foster homes would have to meet the more rigorous safety standards in Ohio's Title IV-E plan.

In effect, "approved" homes would receive a blanket waiver as to many safety standards in Ohio's Title IV-E plan. But that presents a problem. Remember, Title IV-E expressly forbids waivers of *any* safety standards, and it expressly forbids all *group* waivers of even non-safety standards. In other words, licensing and approval standards may be waived for relative foster family homes, but "only on a case-by-case basis," and only those standards that are "*nonsafety* standards." §671(a)(10)(D) (emphasis added). Accordingly, States "may not exclude relative homes, as a group, from any requirements." 65 Fed. Reg. 4020, 4033. By seeking inclusion in Title IV-E eligibility, the plaintiffs effectively seek a blanket waiver for all unlicensed relative caregivers, including themselves, of the heightened safety standards required for licensing under Ohio's Title IV-E plan. If the Court accepts the plaintiffs' interpretation of Title IV-E, the plaintiffs would be allowed to circumvent Title IV-E's express eligibility restrictions. Neither Title IV-E nor *Glisson* permits this outcome.

3. The plaintiffs also argue that the State's (and the District Court's) interpretation of §672 is inconsistent with Congress's preference for placing children with their relatives. Appellants' Br. 25–29. There are two problems with that argument. First, "it is ultimately the provisions" of Title IV-E, "rather than the principal concerns of our legislators," that constitute the law. *Oncale v. Sundowner*

Offshore Servs., 523 U.S. 75, 79 (1998). Second, Ohio's foster-care system *does* advance Congress's intent to encourage relatives to foster their relative children. As plaintiffs recognize, kinship caregivers often "find themselves unexpectedly placed in the position of having to parent a child." Appellants' Br. 27. They usually have not had the time to obtain a foster care license and thus do not qualify for Title IV-E funds. The Kinship Support Program softens that blow by providing the necessary financial support for kinship caregivers who are thrown into a role they did not anticipate. Under this Program, kinship caregivers who "do not have foster home certification," Ohio Rev. Code §5101.884, and who thus cannot receive federal foster-care-maintenance payments, still receive financial support "while working toward their foster caregiver certificate," Executive Order 2020-43D ¶¶3–4, R.34-2, PageID#713. To incentivize the kinship caregiver to timely seek and obtain licensing, the Program payments ultimately expire. These payments end when the caregiver obtains a license and becomes eligible for Title IV-E payments, the child's placement terminates, or a statutorily set period of time has passed and the caregiver still has not obtained a license. Ohio thus furthers Congress's "preference for care of dependent children by relatives," by easing the financial burden on relatives who take up an important role with little notice or time to prepare. *Miller v. Youakim*, 440 U.S. 125, 141–42 (1979).

* * *

For the foregoing reasons, the plaintiffs are not entitled to relief. But before ending this brief, the State pauses to add a coda: it is doubtful whether people in the plaintiffs' position should *ever* be allowed to sue to enforce Title IV-E. *See Poole*, 922 F.3d at 92–93 (Livingston, J., dissenting). This Court, like the Ninth and Second Circuits, has held that Title IV-E "confers foster families with an individual right to foster care maintenance payments enforceable under §1983." *Glisson,* 847 F.3d at 381; *see Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974 (9th Cir. 2010); *Poole*, 922 F.3d 69; *contra Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013). The plaintiffs' suit invokes this caselaw. Recently, however, the Supreme Court has been asked to "reexamine its holding that Spending Clause legislation"—Title IV-E, for example—can *ever* give rise "to privately enforceable rights under Section 1983." *See* Pet. for Writ of Certiorari, *Health and Hospital Corp. of Marion County v. Talevski*, No. 21-806, at i (U.S. November 23, 2021). The Court may well take up the issue, as it is doubtful whether Spending Clause conditions ought to be privately enforceable. *See Poole*, 922 F.3d at 93 (Livingston, J., dissenting) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002)).

In sum, circuit precedent resolves (in the affirmative) the question of whether private actors (like the plaintiffs) can sue under §1983 to enforce Title IV-E under §1983. But that is likely wrong. Because the Supreme Court may take up the issue, the State preserves the argument that Title IV-E cannot be privately enforced via §1983.

CONCLUSION

The Court should either vacate the District Court's judgment on the ground that it lacked subject-matter jurisdiction, or else affirm on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for a principal brief and contains 11,493 words. *See* Fed. R. App. P. 32(a)(7)(B)(i).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

DESIGNATION OF DISTRICT COURT RECORD

Defendants-Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the District Court's electronic records:

***H.C., et al. v. DeWine, et al.*, 1:20-cv-00944-MRB**

Date Filed	R. No.; PageID#	Document Description
11/30/2020	R.7; 64–77	Complaint
1/6/2021	R.34-2; 713	Executive Order 2020-43D
2/10/2021	R.50-2; 1226	Ex. B to Plaintiffs' Supplemental Brief
7/29/2021	R.57; 1364–92	Opinion & Order
7/28/2021	R.58; 1393	Judgement in a Civil Case
8/18/2021	R.60; 1397	Notice of Appeal