

No. 21-3752

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

T.M., et al.

Plaintiffs-Appellants

v.

GOVERNOR RICHARD DeWINE, et al.

Defendants-Appellees

**On Appeal from the United States District Court
for the Southern District of Ohio**

**Case No. 1:20-cv-00944-MRB
Hon. Michael R. Barrett**

**BRIEF OF AMICI CURIAE CHILDREN'S DEFENSE FUND, ET AL.
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae hereby certify that Children’s Defense Fund, Generations United, the Annie E. Casey Foundation, FosterClub, Child Welfare League of America, National Indian Child Welfare Association, Think of Us, National Foster Youth Institute, Juvenile Law Center, and First Focus on Children are each a Section 501(c)(3) nonprofit organization that does not have a parent corporation or issue public stock; and the Children’s Advocacy Institute is an entity within the University of San Diego School of Law, which is a Section 501(c)(3) nonprofit organization that does not have a parent organization or issue public stock.

FED. R. APP. P. 29(A)(2) and 29(A)(4)(E) STATEMENTS

All parties consented to the filing of this amicus brief.

No party’s counsel authored this brief in whole or in part, and no party or party’s counsel contributed money intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel contributed money intended to fund the preparation of this brief.

Dated: December 16, 2021

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I. INTEREST OF *AMICI CURIAE*

Amici Curiae are ten non-profit child advocacy and child welfare organizations that work to better the lives of children, including those in foster care.

The **Children’s Defense Fund** (“CDF”) is a non-profit child advocacy organization that has worked relentlessly for nearly five decades to ensure a level playing field for all children, with special attention to the needs of poor children and children of color. CDF works collaboratively at the federal, state, and local levels to achieve child welfare policy and practice reforms that keep children safe and give them the opportunity to thrive, while maintaining connections to family and community. CDF advocates for children across the country, and maintains offices in Columbus, Ohio.

For more than three decades, **Generations United** has been the catalyst for policies and practices stimulating cooperation and collaboration among generations. The National Center on Grandfamilies has been a critical part of that mission. In 2021, Generations United was awarded a federal cooperative agreement to build and manage the first ever National Technical Assistance Center on Grandfamilies and Kinship Families.

The **Annie E. Casey Foundation** is a private philanthropy that creates a brighter future for the nation’s children and youth by developing solutions to strengthen families, build paths to economic opportunity and transform struggling

communities into safer and healthier places to live, work, and grow. The Foundation aims to advance racial and ethnic equity and inclusion and build paths to opportunity so that all children and youth can realize their potential.

FosterClub is the national network for young people who experience foster care. In partnership with Lived Experience Leaders, FosterClub drives change in the child welfare system and provides direct support to children and youth who experience the foster care system.

The **Child Welfare League of America** (“CWLA”) is the oldest and largest membership-based child-welfare organization in the country, and a nationally recognized standard-setter for child-welfare services. Dedicated to improving the lives of our nation’s most vulnerable youth through research, advocacy, and outreach, CWLA has long been a leading voice on family foster care and adoption policy.

National Indian Child Welfare Association (“NICWA”) is a non-profit membership organization founded in 1987 and dedicated to the well-being of American Indian and Alaska Native children and families. NICWA is committed to protecting and preserving the Indian Child Welfare Act while promoting compliance with the Act through trainings, technical assistance, research, advocacy, and information sharing.

Think of Us operates as a research-and-development lab for child welfare,

transforming the system so that people with lived experience are the center of designing, imagining, and building. Think of Us strategically engages projects across tech, participatory research, and state and federal partnerships, driving system-wide solutions that bridge the gap between policy, practice, and people.

The **National Foster Youth Institute** is a nonprofit organization dedicated to ensuring that current and former foster youth have a seat at the table alongside legislators, policymakers, decision makers, families, and advocates. We aim to transform the child welfare system by building a national grassroots movement led by foster youth and their families.

Juvenile Law Center advocates for rights, dignity, equity, and opportunity for youth in the child welfare and justice systems. Founded in 1975, Juvenile Law Center was the first U.S. nonprofit public interest law firm for children. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

The **Children's Advocacy Institute** ("CAI"), founded at the nonprofit University of San Diego School of Law in 1989, is an academic, research, and advocacy nonprofit organization working to improve outcomes for children and youth, with special emphasis on improving the child protection and foster care

systems.

First Focus on Children is a bipartisan advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. The organization leads comprehensive advocacy strategies with a commitment to seeking sustainable policy solutions that advance the interests of children of all ages.

II. SUMMARY OF ARGUMENT

The modern foster care system was designed to provide for the welfare of children removed from their parents' care—including, when possible, by keeping those children with their family members. As the Supreme Court and this Court have recognized, federal law prohibits a state from discriminating between non-relative foster families and kinship foster families.

Ohio's federally funded foster care program does, however, discriminate. In Ohio, a foster child may be placed with an unrelated foster parent only if that adult has completed Ohio's extensive foster parent licensure process. Ohio will place a foster child with an approved relative when certain safety requirements are met, but without requiring the same level of inspection, training, and other licensing requirements required of non-relative foster parents. Although any adult—kin or otherwise—may become a licensed foster parent, only a relative may become an approved-but-unlicensed foster parent.

Ohio violates federal law by denying approved kinship foster families the

Foster Care Maintenance Payments (“FCMP”) to which foster children are entitled under Title IV-E of the Social Security Act of 1935 (the “Act”). Ohio contends, and the district court erroneously found, that only children placed with “licensed” foster families are entitled to FCMP, and that children placed with approved kinship foster families are not.

This is incorrect and prejudices needy children and their families—the very group Congress has repeatedly encouraged states to prioritize. In doing so, Ohio disregards the plain statutory text and Congress’s specific intent to place foster children with their relatives whenever possible. The evidence—which was well known to Congress—unambiguously shows that foster children are more likely to thrive when fostered by their own relatives.

Ohio’s two-track system for relative and non-relative foster care is not on its face racially discriminatory. In practice, however, it disproportionately harms Black and brown children, who are more likely than other children to be placed in foster care and even more likely to be placed with relatives. Ohio violates federal law when it deprives kinship foster families of critical financial support and forces Black and brown children to bear the burden of the State’s separate and unequal kinship foster care system.

III. ARGUMENT

A. Ohio's Policy Undermines Congress's Intent to Keep Children with Their Families and Disregards the Significant Advantages of Kinship Care.

The plain text of 42 U.S.C. § 672 and the legislative history recognizing the numerous advantages of kinship care make it clear that Congress intended to support children placed with kinship foster parents and, specifically, to require each state to have an approved plan to provide Title IV-E FCMP to relative foster families. Congressional intent has never “depart[ed] from th[e] fundamental principle” that foster children should be placed with their relatives to the extent possible. *See Miller v. Youakim*, 440 U.S. 125, 141–42 (1979); *D.O. v. Glisson*, 847 F.3d 374, 383 (6th Cir. 2017) (“the Act requires states to give preference to adult relative caregivers”).

1. The Plain Text of § 672 Shows Congress's Intent to Provide Title IV-E FCMP to Relative Foster Care Families.

When discerning Congress's intent, we start with the text. *See, e.g., Merrick v. Diageo Ams. Supply Co.*, 805 F.3d 685, 690 (6th Cir. 2015) (“[T]he best evidence of Congress's intent is the statutory text adopted by both Houses of Congress and submitted to the President.” (quotation omitted)).

Under Section 672, if certain requirements are met, “[e]ach State with a plan approved under this part *shall* make foster care maintenance payments on behalf of each child who has been removed” from his or her home. 42 U.S.C. § 672(a)(1)

(emphasis added).¹ See *Ciccio v. SmileDirectClub, LLC*, 2 F.4th 577, 584 (6th Cir. 2021) (“[S]hall is mandatory” (alteration in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112 (2012))); see also *Miller*, 440 U.S. at 133–34 (“A participating State may not deny assistance to persons who meet eligibility standards defined in the Social Security Act unless Congress clearly has indicated that the standards are permissive.”). One of the requirements is that “the child has been placed in a foster family home.” 42 U.S.C. § 672(a)(2)(C). Section 672 defines “foster family home” as a “home of an individual or family 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) (emphases added).

The plain language of the statute requires that, to be a foster family home for the purpose of Title IV-E eligibility, the home must be *either licensed or approved*. This Court has recognized that plain reading: Section 672 “contemplates two categories of foster families,” and it provides funding for both. *Glisson*, 847 F.3d at 382. The first category “includes *licensed foster parents*, who usually care for unrelated foster children,” and the second is “*approved foster homes*, which typically

¹ The State conceded below that if the plaintiffs meet Title IV-E’s requirements, the State is required to pay the full, statutorily required amount. See Defendant’s Mtn. to Dismiss at 5–11, *H.C. v. DeWine*, No. 1:20-cv-944-MRB (S.D. Ohio Feb. 9, 2021), ECF No. 49.

care for a relative child.” *Id.* at 382–83 (emphases added).²

The State argued below that because the relative families are “approved” but not “licensed,” they are not “foster families” within the meaning of Section 672(c) and not, therefore, entitled to receive FCMP. But that is not what the statute says. Congress plainly created two categories of foster care families—licensed *and* approved—that *both* qualify for Title IV-E funds. *Id.* at 382; *cf. Miller*, 440 U.S. at 140–41 (“It is . . . likely that Congress, by including an approval procedure, meant to encompass foster homes not subject to State licensing requirements in particular, related foster homes.”). In denying support payments to approved-but-unlicensed relative foster families, Ohio ignores the plain statutory text and impermissibly reads a key term out of the statute, in violation of the canon against surplusage. That canon reflects “the idea that ‘every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.’” *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (quoting SCALIA & GARNER, *READING LAW*, *supra*, at 174); *see also United States v. Smith*, 27 F. App’x 292, 293–94 (6th Cir. 2001) (“[C]ourts are to assume that Congress intended each of its terms to have meaning and should hesitate to treat statutory terms as surplusage.”).

² It also is clear from the statutory text that State licensing standards must be applied to “any” foster family home that receives funding under Titles IV-E or IV-B, including relative caretakers. 42 U.S.C. § 671(a)(10).

2. The Statutory History and Context Shows Congress’s Intent to Keep Children with Their Families.

The structure and history of the Social Security Act also show that relative foster families’ entitlement to FCMP is consistent with Congress’s clear intent to promote and support kinship foster care.

a. Congress Has Repeatedly Amended the Social Security Act to Protect Children and Keep Families Together.

Congress began issuing “grants to states for aid to dependent children” through the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620. When reviewing the Act’s evolution, Congress’s “preference for care of dependent children by relatives” is evident. *Miller*, 440 U.S. at 141. Congress’s amendments to the Act show no indication that Congress “meant to depart from this fundamental principle.” *Id.* at 142.

First, in 1961, Congress passed the Aid to Families with Dependent Children-Foster Care program (“AFDC-FC”), Act of May 8, 1961, Pub. L. No. 87-31, § 2, 75 Stat. 76. The AFDC-FC offered states financial subsidies for implementing a compliant foster care program, and initially established required FCMP to “foster family homes,” which are codified at 42 U.S.C. § 672. *See* AFDC Benefits to Children of Unemployed Parents, H.R. 4884 (1961), amending Social Security Act of 1935, ch. 531, title IV, § 472. The original provision stated that a “foster family home” was one that was “*licensed* by the State in which it is situated or ha[d] been

approved.” 42 U.S.C. § 408 (1961) (emphases added). The legislative history shows that “in authorizing an approval procedure as an alternative to actual licensing of ‘foster family homes,’ Congress evinced its understanding that *children placed in related foster homes are entitled to Foster Care benefits.*” *Miller*, 440 U.S. at 140 (emphasis added). When interpreting this text, the Supreme Court saw that “Congress manifestly did not limit the term [‘foster family home’] to encompass only the homes of nonrelated caretakers.” *Id.* at 135. Moreover, nothing in the “legislative history nor the structure of the Act indicate[d] that Congress intended to differentiate among neglected children based on their relationship to their foster parents.” *Id.* at 138–39. “[S]uch a distinction would conflict in several respects with the overriding goal of providing the best available care for *all* dependent children removed from their homes because they were neglected.” *Id.* at 139 (emphasis added) (citing S. Rep. No. 165, p. 6; 107 Cong. Rec. 6388 (1961) (statement of Sen. Byrd)). Thus, a reading of “foster family home” that excluded approved relative homes would directly contradict Congress’s goal. *See Glisson*, 847 F.3d at 383.

Second, in 1980, after *Miller* was decided, Congress amended Title IV again but did not change the definition of “foster family home.” *See id.* at 383–84 (“[Congress] has not added any provision distinguishing relative and non-relative foster care providers. Nor has it modified the definition of ‘foster family home’ that the Court interpreted in [*Miller*].”).

Third, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the “1996 Act”), originally presented as a bill to “amend part E of title IV of the Social Security Act to require States to regard adult relatives who meet State child protection standards as the preferred placement option for children,” and “provide for demonstration projects to test the feasibility of establishing kinship care as an alternative to foster care for a child who has adult relatives willing to provide safe and appropriate care for the child.” S. 1683, 104th Cong. (1996); H.R. 3650 104th Cong. (1996). Through these amendments, Congress indicated that its overall intent was to keep foster children with their relatives when possible.

When introducing the bill, Senator Ron Wyden stated that the 1996 Act would “continue the process of shifting the focus of our child welfare system from turning children over to strangers, to granting them the loving arms of grandparents and other relatives.” 142 Cong. Rec. S3626-S3633 (1996). It would do so by (1) “requir[ing] States to give preference to relative providers when a child is removed from their parents’ home” and (2) “allow[ing] States to obtain waivers to set up kinship care guardianship systems where grandparents and other relative providers can receive some financial assistance without having to turn over custody of the child to the State, and without having to go through the paperwork and bureaucratic hurdles of the foster care system.” *Id.* These changes, Senator Wyden

said, were needed to “protect children and keep families together.” *Id.*

In the House, Representative Constance Morella introduced the 1996 Act as “a bill to encourage kinship care families, families in which adult relatives are the preferred placement options for children separated from their parents” and noted that “placing [a] child with a caring relative helps keep the family together and limits disruption to the child’s life.” 143 Cong. Rec. E745 (1997).

The 1996 Act amended the Social Security Act in several significant ways. It clearly covered “Kinship Care” and established that states must give preference to an eligible relative when placing a child in a foster family home. Pub. L. No. 104–193, 110 Stat. 2278.

b. The Current Provisions of Title IV-E Demonstrate Congress’s Preference for Kinship Care.

Several provisions of Title IV-E show Congress’s preference for kinship care. For example, a state 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.” 42 U.S.C. § 671(a)(19). And a state must exercise due diligence to identify adult relatives, notify them of the child’s removal from the home, and consider giving them preference over non-relatives in placement decisions. *Id.* § 671(a)(20).

Thus, the Act requires that states transfer a foster child to a relative when feasible, which “comports with Congress’ preference for care of dependent children

by relatives.” *Miller*, 440 U.S. at 141–42; *accord Glisson*, 847 F.3d at 383 (“the Act requires states to give preference to adult relative caregivers”). “Congress evidently believed that encouraging relatives to care for these ‘most underprivileged children,’ . . . whatever the cost, was worth the price.” *Miller*, 440 U.S. at 142 n.21 (citation omitted).

If Congress intended to depart from its overarching goal by excluding relative foster families, “it presumably would have done so explicitly.” *Id.* at 137. But Congress has not limited the definition of “foster family home.” To the contrary, it has maintained the broad definition referring to “licensed” or “approved” foster family homes for decades. This Court should likewise continue to interpret the term broadly and consistently with the statutory text and scheme, as the courts did in *Miller* and *Glisson*. Such an interpretation not only accords with the text and statutory history; it also leads to the result Congress intended.

3. Congress’s Intent to Prioritize Kinship Care Was Driven by the Well-Documented and Significant Benefits of Kinship Care.

Congress was well aware of the myriad benefits associated with kinship care. Senator Dan Coats referred to kinship care as a “time-honored tradition” that is “strongly tied to family preservation” and can “help soften the trauma that occurs when children are separated from their parents . . . and provide a hopeful alternative to traditional foster care.” 142 Cong. Rec. S8105–S8150 (1996). And as Senator

Wyden stated, “Grandparents caring for grandchildren represent one of the most underappreciated natural resources in our Nation. They hold tremendous potential for curing one of our society’s most pressing maladies: The care of children who have no parents, or whose parents simply aren’t up to the task of providing children a stable, secure and nurturing living environment.” 142 Cong. Rec. S3626-S3633 (1996). Senator Wyden encouraged Congress to “start developing policies that make it easier, instead of more difficult, for families to come together to raise their children.” *Id.*

As Congress has acknowledged, kinship care has repeatedly been shown to lead to better outcomes for the children. First, children placed with kinship caregivers experienced “fewer behavioral problems,” “fewer mental health disorders,” “better well-being,” and “less placement disruption.”³ These improved outcomes may be because “[c]hildren may have an easier transition into kinship care, not prompting as many adjustment difficulties, which may manifest as behavior

³ Marc Winokur, et al., *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment (Review)*, COCHRANE DATABASE OF SYSTEMATIC REV. 10 (2014); accord Jennifer Osborne, et al., *Placement Stability Among Children in Kinship and Non-Kinship Foster Placements Across Multiple Placements*, 126 CHILDREN & YOUTH SERVS. REV. 2 (2021) (“[R]esearch shows that youth in kinship care exhibit fewer developmental delays, behavioral problems, and mental health challenges, along with improved well-being.”).

problems.”⁴

Congress has noted these advantages: “When a child is separated from their parents, it is usually a painful and traumatic experience. Living with people that a child knows and trusts gives children a better chance in the world and gives families a better chance to rebuild themselves.” 142 Cong. Rec. S3626–S3633 (1996) (statement of Sen. Wyden).

Second, kinship care increases the probability that children will remain with their siblings.⁵ Placement with siblings “can provide social and emotional support and ease the transition to a new caregiving environment for the children.”⁶

Third, kinship care helps ease the transition to foster care and facilitates ties, particularly if a caregiver has a “role in the child’s life and a pre-established bond.”⁷ This is because “[k]inship care provides continuity of social, personal and family history.”⁸ In prioritizing kinship care, Congress recognized that kinship care is a preferable transition for foster children: “Living with relatives that they know and trust will give these children more immediate stability during this painful transition.”

⁴ Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD. LEGAL RTS. J. 101, 106 (2019).

⁵ *Id.* at 105.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 104.

142 Cong. Rec. S8105–S8150 (1996) (statement of Sen. Coats); *see also* 143 Cong. Rec. E745 (1997) (statement of Rep. Morella) (“[P]lacing the child with a caring relative helps keep the family together and limits disruption to the child’s life.”).

Children in kinship foster care “remain in familiar environments, maintain important relationships, and experience a higher likelihood of continuity of care.”⁹ “Kinship care can allow children to live with people they know and trust, easing the transition to out-of-home care and minimizing the potential traumatic impact of being removed from one’s home.”¹⁰

Fourth, “kinship placements are more stable than non-kin placements,”¹¹ which is critical to the children’s well-being and success. Children placed with kinship caregivers are significantly less susceptible to placement disruption.¹²

⁹ Osborne, *supra* note 3, at 2; *see also Kinship Care Versus Foster Care*, Ohio Foster, Adoption and Kinship Care, *Kinship Care Versus Foster Care*, <https://fosterandadopt.jfs.ohio.gov/wps/portal/gov/ofc/kinship-care/resources-for-kinship-caregivers/kinship-vs-foster-care> (noting that most children in kinship care—over 61%—are cared for by a grandmother, and another 22% are cared for by an aunt).

¹⁰ Riehl & Shuman, *supra* note 4, at 105.

¹¹ David J. Herring, et al., *Evolutionary Theory and Kinship Foster Care: An Initial Test of Two Hypotheses*, 38 CAP. U.L. REV. 291, 296 (2009). Riehl & Shuman, *supra* note 4, at 105–06 (“research has repeatedly documented increased stability for children in kinship foster care over children placed in non-relative foster care, which also corresponds with better mental health functioning of the child . . . instability negatively impacts children’s immediate and long-term well-being”).

¹² *See* Carolien Konijn, *Foster Care Placement Instability: A Meta-Analytic Review*, 96 CHILDREN & YOUTH SERVS. REV. 483, 489 (2019) (“Non-kinship foster care was

Congress explicitly recognized this:

Children in kinship care are less likely to experience multiple placements than their counterparts in family foster care. Of the children who entered California’s foster care system in 1988, for example, only about 23 percent of those placed initially with kin experienced another placement, while 58 percent of children living with unrelated foster families experienced at least one subsequent placement during the following 3.5 years.

142 Cong. Rec. S8105–S8150 (1996) (statement of Sen. Coats).

When children are removed from their homes, “they often experience a disruption of attachment with their primary caregiver and a loss of their typical routine.”¹³ That loss makes placement disruption—which is about three times more likely for children placed with non-relative caregivers—particularly problematic.¹⁴

Fifth, kinship care fosters a child’s ties to his or her community and culture. Even where a non-relative foster parent is well-meaning, “[c]ultural dissimilarity between foster children and their caregivers has been linked to negative psychosocial outcomes, particularly among minority children.”¹⁵ By contrast, “shared family history, culture and traditions can promote bonding and lead to positive

associated with higher rates of breakdown and disruption, which was most pronounced in younger children.”).

¹³ Riehl & Shuman, *supra* note 4, at 104.

¹⁴ Herring, *supra* note 11, at 296.

¹⁵ Riehl & Shuman, *supra* note 4, at 107.

adjustment.”¹⁶

Although now driven by a variety of modern pressures, many commentators have noted that the commitment to caring for extended family has a long history in the Black community:¹⁷

Kinship care is an age-old and traditional practice in African American families. . . . African American grandparents have had a historical caregiving role from slavery to the current day. Indeed, they have consistently provided the emotional and financial support needed to ensure the well-being of their grandchildren when parents are working or absent. . . . [U]nderstanding African American elders caring for grandchildren is complex and reflects unique cultural, environmental, and institutional factors.¹⁸

Ohio’s system of unfunded or underfunded kinship foster care placements takes

¹⁶ *Id.*

¹⁷ Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303 (2006) (“Kinship care and the concept of extended family child rearing originated in Africa and have been relied on by black families throughout history. The child welfare system began to embrace this concept because it found there was less trauma and disruption in the lives of children placed with kin as opposed to children placed with non-kin. There was also evidence that the ‘sense of family identity, self-esteem, social status, community ties, and continuity of family relationships’ in kinship arrangements was important to a child.”); Maria Scannapieco & Sondra Jackson, *Kinship Care: The African American Response to Family Preservation*, 41 SOC. WORK 190, 190–92 (1996).

¹⁸ Generations United, *Toolkit: African American Grandfamilies: Helping Children Thrive Through Connection to Family and Culture* 4 (2002), <https://www.gu.org/app/uploads/2020/07/AA-Toolkit-WEB-2.pdf> (citation omitted).

advantage of these families.

Finally, kinship care offers long-term benefits to children who have experienced foster care. The evidence is clear that “[t]he placement of children with kinship caregivers can promote long-term positive outcomes for foster youth through stable and consistent family relationships that provide many of the building blocks necessary for youth to develop into loving, stable, trusting, and competent adults.”¹⁹ Whereas “instability negatively impacts children’s immediate and long-term well-being,” the increased stability stemming from kinship care “promotes greater emotional security.”²⁰ This security can “assist with establishment and maintenance of lifetime relationships for the child, which can provide an ongoing support network into adulthood.”²¹ And teenagers and adults who were once in kinship care have “higher educational achievements and lower rates of criminal behavior.”²²

In sum, “[c]hildren are more likely to feel that they belong with kinship caregivers than in foster care with strangers, can more easily remain with their siblings, have fewer behavioral problems and better mental health, and are significantly less likely to have their initial placement disrupted or to experience

¹⁹ Riehl & Shuman, *supra* note 4, at 105.

²⁰ *Id.*

²¹ *Id.* at 106.

²² *Id.* at 104.

multiple moves from one foster placement to another.”²³ Congress was well aware of the near- and long-term benefits of kinship foster care, and nothing in the statutory text, the statutory scheme, or the legislative history shows that Congress intended to hinder children in kinship foster care by denying them FCMP.

B. Ohio’s Policy Disproportionately Harms Black and Brown Children and Makes Already-Poor Families Poorer

Systematically excluding approved-but-unlicensed kinship caregivers from FCMP is not, on its face, racially discriminatory. In practice, however, Ohio’s policy is not race neutral. Because Black and multi-racial children are more likely to be placed with approved-but-unlicensed kinship foster families, excluding these families from FCMP disproportionately harms these children and their families.

1. Ohio’s Policy Disproportionately Harms Black and Multi-Racial Children.

Black and multi-racial children are far more likely than white children to be placed in foster care. As of September 30, 2019, approximately 424,000 children across the country were in foster care.²⁴ Although Black children constituted 14% of the 2019 U.S. population, 23% of children in foster care were Black.²⁵ In that same

²³ *Id.* at 103–04.

²⁴ U.S. Dep’t Health & Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children’s Bureau, THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 – NO. 27, <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf>.

²⁵ *Compare id.* at 2, with U.S. Census Bureau, ANNUAL STATE RESIDENT POPULATION ESTIMATES FOR 6 RACE GROUPS (5 RACE ALONE GROUPS AND TWO OR

year, 2.8% of the U.S. population identified as two or more races, but 8% of foster care children so identified.²⁶ Amicus Children’s Defense Fund explained in a 2021 report:

Children of color, particularly Black and American Indian/Alaska Native children, are dramatically overrepresented in the child welfare system. Of every 1,000 white children in the United States, 5.2 are in foster care, compared with 9.9 of every 1,000 Black children and 16.9 of every 1,000 American Indian/Alaska Native children.²⁷

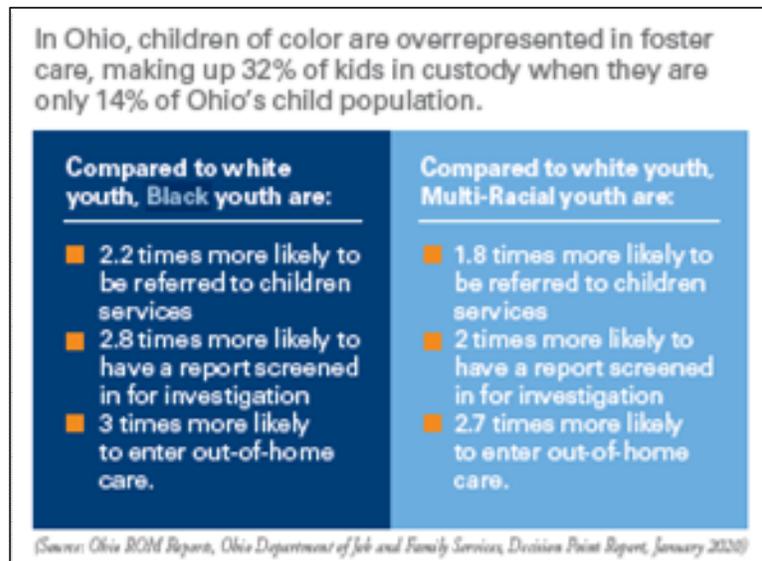
The demographics of Ohio’s foster care population are even more racially skewed. Governor DeWine’s Children Services Transformation Advisory Council acknowledged that “[i]n Ohio, children of color are overrepresented in foster care, making up 32% of kids in custody when they are only 14% of Ohio’s child population.”²⁸

MORE RACES) BY AGE, SEX, AND HISPANIC ORIGIN: APRIL 1, 2010 TO JULY 1, 2019, <https://www2.census.gov/programs-surveys/popest/technical-documentation/file-layouts/2010-2019/sc-est2019-alldata6.pdf>.

²⁶ *Id.*

²⁷ Children’s Defense Fund, *The State of America’s Children 2021* 28 (2021), <https://www.childrensdefense.org/wp-content/uploads/2021/04/The-State-of-Americas-Children-2021.pdf> (citations omitted).

²⁸ Office of Children Services Transformation, *Final Recommendations of the Children Services Transformation Advisory Council* 11 (Nov. 2020), https://content.govdelivery.com/attachments/OHOOD/2020/11/19/file_attachments/1606570/Transformation%20Final%20Report%20FINAL.pdf.



The most recent U.S. Children’s Bureau data confirms this. As shown below, 15.2% of Ohio’s child population is Black, but as of September 2019, 31.3% of Ohio children in foster care were Black.²⁹ Although just 5.1% of Ohio children are multi-racial, multi-racial children make up 11.9% of Ohio’s foster care population.³⁰

Race/Ethnicity	Total Child Population		In Foster Care		In Relative Foster Care	
	Number	Percent	Number	Percent	Number	Percent
Hispanic	172728	6.7%	879	5.4%	170	4.7%
American Indian/Alaska Native (NH)	3731	0.1%	4	0.0%	0	0.0%
Asian (NH)	70040	2.7%	30	0.2%	3	0.1%
Black (NH)	389951	15.2%	5135	31.3%	1334	37.1%
Hawaiian/Pacific Islander (NH)	1450	0.1%	4	0.0%	0	0.0%
More than One Race (NH)	131331	5.1%	1943	11.9%	340	9.5%
White (NH)	1799410	70.1%	8282	50.5%	1712	47.6%
Race/Ethnicity Unknown		0.0%	110	0.7%	34	0.9%
Total	2568641	100.0%	16387	100.0%	3593	100.0%

²⁹ Compare U.S. Census Bureau, *supra* note 25, with Children’s Bureau, Administration on Children, Youth and Families (Dep’t of Health and Human Services) (2020), *Adoption and Foster Care Analysis and Reporting System (AFCARS), Foster Care File 2019 [Dataset]*, <https://www.ndacan.acf.hhs.gov/datasets/dataset-details.cfm?ID=239>.

³⁰ *Id.*

Black children are not only overrepresented in the foster care system,³¹ they are even more overrepresented in the kinship foster care system, through which they and their families receive far fewer resources. As amicus Generations United has observed, “[b]oth inside and outside the child welfare system, the probability that African American children will live in grandfamilies is more than double that of the overall population, with one in five African American children living in grandfamilies at some point during their childhood.”³² In Ohio, 37.1% of kinship foster care placements involve Black children.³³

2. Kinship Caregivers Are Typically Poorer Than Licensed Non-Relative Foster Parents.

The circumstances under which a caregiver takes in a relative’s child are unlike those when a child is placed with a non-relative foster family. Non-relative foster parents plan and prepare to foster a child. Before any placement, non-relative foster parents have been through a lengthy vetting process and prepared for their new responsibilities through education and training.

By contrast, kinship care providers step up in family crises where the need to

³¹ The AFCARS data indicates that, including children who are also Hispanic or multi-racial, there were 7,159 Black Ohio children in foster care as of September 2019, or 44% of all foster care children. *See* AFCARS dataset, *supra* note 29.

³² GENERATIONS UNITED, *supra* note 18, at 4; *see also id.* at 5 (“grandfamilies” are “families in which grandparents . . . are raising children with no parents in the home”).

³³ *See* AFCARS dataset, *supra* note 29.

care for a neglected or abused child (or children) is unplanned for and immediate. Family emergencies occur without regard to the kinship caregiver's job schedule or bank balance. As Ohio recognizes: "Many kinship caregivers are asked to take on the full-time care of youth with little notice and minimal information. They often receive no training, little or no financial support, and insufficient information regarding the youth they are being asked to care for."³⁴

Adding a foster child to the home is often an unplanned logistical and financial challenge, and kinship caregivers "often need to purchase supplies, such as bedding or furniture, or provide short-term salary matches for lost work time while tending to the adjustment needs of a child recently placed in their homes."³⁵ The strain of suddenly and unexpectedly bringing one child or more into the home is significant—and these families are not receiving the financial support that could lessen the strain.³⁶

Kinship caregivers are far more likely to be single parents. The National Survey of Child and Adolescent Well-Being found that more than half of kinship

³⁴ OFFICE OF CHILDREN SERVICES TRANSFORMATION, *supra* note 28, at 15; *see also* Riehl & Shuman, *supra* note 4, at 108 (citing Lenore M. McWey, et al., *The impact of Continued Contact with Biological Parent upon the Mental Health of Children in Foster Care*, 32 CHILD & YOUTH SERVS. REV. 1343, 1140–42 (2010)).

³⁵ Riehl & Shuman, *supra* note 4, at 120.

³⁶ Ramona W. Denby, et al., *Culture and Coping: Kinship Caregivers' Experiences with Stress*, 32 CHILD. & ADOLESCENT SOC. WORK J. 465 (2015).

caregivers were unmarried (including 11.6% who were widowed), whereas only 26% of non-relative foster caregivers were unmarried.³⁷ This places all of “the demands and responsibilities of caregiving on one adult.”³⁸ Single kinship caregivers may be especially reliant on extended family to provide social and practical support, and may be especially challenged if those supports are unavailable.

Research shows that kinship foster parents are typically much poorer than non-relative caregivers, with kinship foster parents almost twice as likely to have an income of less than \$25,000,³⁹ and 64% of children in kinship care living in “low-income” families (31% of which are “poor” families).⁴⁰ Black kinship caregivers are

³⁷ Administration for Children and Families: Office of Planning, Research & Evaluation, *National Survey of Child and Adolescent Well-Being: 15 Kinship Caregivers in The Child Welfare Sys.* 1, 3 (2007), https://www.acf.hhs.gov/sites/default/files/documents/opre/rb_15_2col.pdf; see also Jill Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 THE FUTURE OF CHILDREN 77 (1998) (noting California study showing that more than half of kinship care situations involve a single adult in the home).

³⁸ Riehl & Shuman, *supra* note 4, at 109.

³⁹ Hannah Roman, *Foster Parenting as Work*, 27 YALE J.L. & FEMINISM 179, 190 (2016) (citing U.S. Dep’t Health & Hum. Servs., NATIONAL SURVEY OF CHILD & ADOLESCENT WELL-BEING: ONE YEAR IN FOSTER CARE, 78 (Nov. 2003), http://www.acf.hhs.gov/sites/default/files/opre/oyfc_report.pdf).

⁴⁰ Jennifer Ehrle & Rob Geen, *Children Cared for by Relatives: What Services Do They Need?*, URBAN INST. 1–2 (June 2002), <https://marylandcasa.org/wp-content/uploads/2013/11/Children-Cared-for-by-Relatives-services-needed.pdf>.

“Low-income” is defined as income below 200% of the federal poverty level, while “poor” is defined as an income below the federal poverty level. *Id.* In 2021, the federal poverty level is an income of \$26,500 for a family of four. See Dep’t of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., 2021 FEDERAL

particularly poor, with even lower average annual incomes than other kinship caregivers.⁴¹ “The financial instability of kinship caregivers creates added stress in the home as the kinship caregivers struggle to have the financial resources to adequately care for the children placed in their home and to ensure the children’s well-being.”⁴² Adding children to a family with limited income, without increasing the financial support due, creates additional stress on the household.

3. Ohio’s Policy Makes Already-Poor Families Poorer.

A primary recommendation of the Governor’s Children Services Transformation Advisory Council was to increase the role of kinship placements in Ohio’s foster care system:

Research in Ohio and nationwide shows that children placed with kinship caregivers have greater stability, achieve permanency in fewer days, and are less likely to experience subsequent abuse or neglect. Children placed with kinship caregivers also experience less trauma and maintain meaningful connections with family members and kin. However, only about 27% of Ohio youth in care are placed with kinship caregivers.⁴³

The Council also recognized the challenges facing kinship foster parents,

POVERTY LEVEL STANDARDS (Mar. 18, 2021), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib031821.pdf>.

⁴¹ Riehl & Shuman, *supra* note 4, at 109 (citing Ehrle & Geen, *supra* note 40, at 1–2).

⁴² *Id.* at 109 (citing Meredith Kiraly & Cathy Humphreys, *A Tangled Web: Parental Contact with Children in Kinship Care*, 20 CHILD & FAM. SOC. WORK 106 (2013)).

⁴³ OFFICE OF CHILDREN SERVICES TRANSFORMATION, *supra* note 28, at 15.

including lack of support:

Kinship caregivers are a vital resource that historically have not received the same supports as other caregivers. Many kinship caregivers are asked to take on the full-time care of youth with little notice and minimal information. They often receive no training, little or no financial support, and insufficient information regarding the youth they are being asked to care for.⁴⁴

The needs of children otherwise eligible for FCMP does not vary based on whether they are placed with relative or non-relative foster parents. *See Miller*, 440 U.S. at 143 (“The legislative history of the amendment reveals no basis for distinguishing between related and unrelated foster homes. Rather, it discloses a generalized concern for the plight of *all* dependent children.” (emphasis added)); *Glisson*, 847 F.3d 378 (emphasizing that “the Act mandates payments ‘on behalf of each child’” (quoting 42 U.S.C. § 672(a)(1))). Ohio nevertheless adopted a two-track system that deprives these children of much-needed support.

Licensed foster parents in Ohio receive “a daily per diem rate for each foster child placed in the home,”⁴⁵ which varies by county. In Cuyahoga County, for example, a licensed foster caregiver may receive from \$615 to \$2,371 per month per child; in Hamilton County, a licensed foster caregiver may receive from \$1,500 to

⁴⁴ *Id.*

⁴⁵ Ohio Foster, Adoption and Kinship Care, *supra* note 9.

\$9,667 per month for two children.⁴⁶ Additional amounts are available for children with special needs.⁴⁷

By contrast, when Plaintiffs filed suit in November 2020, kinship caregivers were merely “directed to apply for Ohio Works First benefits or other general public benefits programs” that provide \$302 per month for one child, \$412 per month for two children, and decreasing support for each additional child.⁴⁸ The following month, Ohio established a “kinship support program” that provided for a daily payment to kinship foster parents of \$10.20 per child per day for not more than nine months, and only to the extent funds are appropriated by the state. *H.C. v. Governor of Ohio*, No. 1:20-cv-994, 2001 WL 3207904, at *5 (S.D. Ohio July 29, 2021) (citing Ohio Rev. Code § 5101.884). Thus, the amount available under the kinship support program is far less than the FCMP the same child would be entitled to if placed with a non-relative family.

A child’s needs for food, shelter, clothing, and basic necessities are not, of course, reduced merely because he or she lives with a relative. Instead of providing for needy children who have been placed in foster care due to abuse and neglect,

⁴⁶ See Compl. ¶ 40, *H.C. v. DeWine*, No. 1:20-cv-944-MRB (S.D. Ohio Nov. 30, 2021), ECF No. 7.

⁴⁷ *Id.*

⁴⁸ *Id.*

Ohio passes the cost of their care onto relatives who are often poor.⁴⁹

IV. CONCLUSION

For all of these reasons, Amici Curiae respectfully suggest that the district court's order be reversed.

Dated: December 16, 2021

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⁴⁹ Riehl & Shuman, *supra* note 4, at 111 (“Kinship caregivers need the same adequate monthly stipends as received by all foster care providers and may also benefit from food vouchers, childcare, housing assistance, and other emergency assistance programs or bridge funding to assist with their unexpected added expenses upon placement of a child in their home.”).

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,457 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in Times New Roman 14-point font.

Dated: December 16, 2021

/s/ Susan Baker Manning
Susan Baker Manning
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on December 16, 2021. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: December 16, 2021

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