Case No. 21-3752

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

T.M., et al. v. RICHARD DeWINE, in his official capacity as Governor of the State of Ohio, et al.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division, Case No. 1:20-cv-00944-MRB

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CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Plaintiffs-Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no owned corporation that is not a party to this appeal has a financial interest in the outcome. Plaintiffs-Appellants are all individual family members.

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I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants, T.M., et al. (hereinafter, the "Plaintiffs") request that oral argument be heard in this case pursuant to Sixth Circuit Local Rule 34(a). At issue in this appeal is whether the United States District Court for the Southern District of Ohio erred in concluding that Plaintiffs – relative foster caregivers approved by the Ohio Department of Job and Family Services (ODJFS) (hereinafter, "the State") and their relative foster children – lack an individually enforceable right to receive foster care maintenance payments under 42 U.S.C. § 672, and correspondingly whether it erred by dismissing Plaintiffs' Complaint for that reason. Although the text of the statute, precedent from this Court and the U.S. Supreme Court, and the legislative intent of the Child Welfare Act, all support reversal, oral argument would assist this Court by providing an opportunity to address questions regarding the scope of the 42 U.S.C. § 672 mandate.

II. STATEMENT OF JURISDICTION

Plaintiffs brought the underlying class action for declaratory and injunctive relief in the United States District Court for the Southern District of Ohio (the "District Court") pursuant to 42 U.S.C. § 1983. Plaintiffs did so for the purpose of redressing Defendants' failure to make foster care maintenance payments to approved relative foster parents, in violation of Defendants' statutory obligations under 42 U.S.C. § 672. The District Court had jurisdiction pursuant to 28 U.S.C. §§

1331 and 1343(a)(3), as well as the authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

This appeal arises from the District Court's July 29, 2021 Opinion and Order granting Governor DeWine's Motion Dismiss (RE 34), granting Defendant Damschroder's Motion to Dismiss (RE 49) and denying as moot Plaintiffs' Motions for Class Certification (RE 19) and for Preliminary Injunction (RE 21). The District Court's order resolved, and disposed of, all parties' claims below. The Clerk entered judgment in accordance with the District Court's Order the same day, thereby closing the matter and terminating it from the active docket of the United States District Court for the Southern District of Ohio.

Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291, which provides that the Courts of Appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

Plaintiffs timely filed their Notice of Appeal with the District Court on August 18, 2021. Thereafter, Plaintiffs timely filed Appearances of Counsel, the Civil Appeal Statement of Parties & Issues, Disclosure of Corporate Affiliations, and applicable applications for admission to the Sixth Circuit Bar on or before September 3, 2021. These dates establish the timeliness of this appeal.

III. STATEMENT OF ISSUES

1. Whether the District Court erred in concluding that Plaintiffs – relative foster caregivers approved by the State and their relative foster children – lack an individually enforceable right to receive foster care maintenance payments under 42 U.S.C. § 672.

2. Whether the District Court erred in dismissing Plaintiffs' Complaint for failure to state a claim upon which relief can be granted.

3. Whether the District Court erred in denying Plaintiffs' Motions for Preliminary Injunction and for Class Certification as moot.

IV. STATEMENT OF THE CASE

Plaintiffs are four Ohio foster children between the ages of one and three and their approved relative foster parents. (See Complaint ("Compl."), RE 7, Page ID # 67-71; see also Opinion and Order ("Order"), 7/29/21 Order, RE 57, Page ID # 1365-1366.) Between April 2019 and April 2020, the State through its local divisions of ODJFS in Hamilton, Franklin, and Cuyahoga Counties, removed the Plaintiff children H.C., Y.C., B.F., and T.E. from their homes due to allegations of abuse or neglect and placed them with relative foster parents T.M., D.R., K.T. and T.T., who are the children's grandparents, aunts, and/or uncles.[1] (Compl., RE 7, Page ID # 68-70, 74, at ¶¶ 16-18, 20, 34; Order at 2-4.)

[1] Plaintiffs are proceeding under pseudonyms to protect the identities of the Plaintiff

The State or its county ODJFS offices or county public children's service agencies ("PCSAs") investigated and substantiated the allegations of neglect and abuse with respect to each of the Plaintiff foster children. (Compl., RE 7, Page ID # 74, at ¶ 34.) The State determined that the children's health, welfare, and/or mental or emotional conditions were threatened with substantial harm, and thus concluded that there was no reasonable alternative but to remove the children and place them in state care. (Id.) The State identified, evaluated, and approved the homes of the Plaintiff relative foster parents as appropriate foster family homes, pursuant to 42 U.S.C. §§ 672(c)(1)(A)(i) & 671(a)(20) and Ohio Admin Code 5101:2-42-18, and placed the Plaintiff foster children in those homes. (Compl., RE 7, Page ID # 68-71, at ¶¶ 16-18, 20, 22-24; see also 7/29/21 Order, RE 57, Page ID # 1386-1387 (discussing Ohio's required standards for "approving the placement of a foster child with a relative caregiver").)

For each of the Plaintiff children, Ohio state courts determined that reasonable efforts had been made for the children to remain in their homes of origin but that continuation in those homes would be contrary to the children's welfare and best interests, as required by 42 U.S.C. § 672(a)(2)(A)(ii) and 42 U.S.C. § 671(a)(15). (Compl., RE 7, Page ID # 75, at ¶ 35.) Those courts ordered Plaintiff foster children

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foster children and other confidential information. (See Agreed Order, RE 27, Stip. Protective Order RE 31.)

into the temporary legal custody of the State through its county ODJFS offices or PCSAs. (Compl., RE 7, Page ID # 65, 74-75, at ¶¶ 6, 34-35; 7/29/21 Order, RE 57, Page ID # 1365-1367.) Plaintiff foster children remain in the homes of their relative Plaintiff foster parents, and none has been affirmatively or permanently discharged from the State's legal responsibility. (Compl., RE 7, Page ID # 75, at ¶ 35.) The State provided ongoing supervision, family support, and permanency planning services through its county offices, and retained responsibility for the children's care and placement. (Id.) See Ohio Admin. Code 5101:2-47-13; 42 U.S.C. § 672(a)(2)(B)(i).

Title IV-E of the Social Security Act (created through the Adoption Assistance and Child Welfare Act of 1980) is federal "Spending Clause legislation" enacted, in part, "to strengthen the program of foster care assistance for needy and dependent children." (7/29/21 Order, RE 57, Page ID # 1367-1368.) States that elect to receive federal funds under Title IV-E must submit a State Plan to the Secretary of Health and Human Services ("HHS") for approval and must meet specific requirements set out by the statute. (7/29/21 Order, RE 57, Page ID # 1368.) One such requirement is that a state's plan must "provide[] for foster care maintenance payments in accordance with section 672 [of the act]." (Id.) Ohio has elected to participate in Title IV-E and has enacted a federally-approved "foster care maintenance payments" program as part of its State Plan approved by HHS. (7/29/21 Order, RE 57, Page # 1372.) ("Ohio has an approved Title IV-E state plan that it last

amended on January 11, 2018"). "Ohio has thus agreed to be bound by all of the federal requirements under Title IV-E." (Id.)

Title IV-E requires the State to pay foster care maintenance payments to foster parents, on behalf of all eligible foster children, and has outlined the specific eligibility conditions which entitle children to such payments. (7/29/21 Order, RE 57, Page # 1370.) See 42 U.S.C. § 672; see also 45 C.F.R. §§ 1355, 1356. And, the Plaintiffs meet all of the federal eligibility requirements to receive foster care maintenance payments including meeting Federal Aid to Families with Dependent Children ("AFDC") income eligibility requirements, pursuant to 42 U.S.C. § 672(a)(3). (Compl., RE 7, Page ID # 75, at ¶ 36.)

Despite their eligibility, none of the Plaintiffs have received, or are receiving, federal foster care maintenance payments per 42 U.S.C. 672 from any division of the Ohio government. (Compl., RE 7, Page ID # 68-71, 76, at ¶¶ 16-17, 21, 22-24, 38-39; 7/29/21 Order, RE 57, Page ID # 1365-1367.) Instead, Plaintiffs were directed by the relevant Ohio agencies to apply for monthly stipends available through the Ohio Works First ("OWF") program, which provides only $302 per month for one child, $412 per month for two children, and decreasing support for each additional child – small fractions of the foster care maintenance payments required by 42 U.S.C. § 672 that are provided to licensed foster families in the Ohio counties where Plaintiffs reside. (Compl., RE 7, Page ID #76-77, at ¶¶ 39-40.)

Defendant Matt Damschroder, in his official capacity as Director of ODJFS, is responsible for administering ODJFS's child welfare, foster care, and other family support service programs, including the federal-state cooperative foster care maintenance program set forth in Title IV-E.[2] (Compl., RE 7, Page ID # 73-74, at ¶¶ 31-32 (citing O.R.C. § 5101.141(B)); 7/29/21 Order, RE 57, Page ID # 1367.) Notwithstanding those responsibilities, ODJFS, under Defendant Damschroder's control, refuses to provide foster care maintenance payments to Plaintiffs. (Compl., RE 7, Page ID # 76-78, at ¶¶ 38-42.) Ohio's refusal to provide the federally-required foster care maintenance payments to Plaintiffs has caused, and is continuing to cause, the exact harms that Title IV-E is intended to mitigate. Plaintiffs are deprived of critical resources required to provide for Plaintiff foster children's basic needs, including food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance with respect to the children, reasonable travel for visitation with family, provision for other caretakers, and other needs. (Compl., RE 7, Page ID # 78-79, at ¶¶ 43-44.) These harms disproportionately affect families of color. (Compl., RE 7, Page ID # 79-80, at ¶¶ 45-46.)

Plaintiffs filed a complaint in the Southern District of Ohio on November 19, 2020, seeking to enforce their entitlement to foster care maintenance payments

[2] Matt Damschroder succeeded Kimberly Hall as interim director of the ODJFS since the commencement of this litigation. See Fed. R. Civ. P. 25(d).

pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 672. (See generally Compl., RE 1-1.) Plaintiff foster children brought suit through their next friends – their relative foster parents. Plaintiff relative foster parents also brought suit on their own behalf. (See Compl., RE 7, Page ID # 68-71, at ¶¶ 16-17, 21-24; 7/21/2021 Order, Page ID # 1365.) In addition, Plaintiffs brought claims on behalf of putative classes of thousands of similarly situated foster children and approved relative foster parents across Ohio, who are also being deprived of foster care maintenance payments under 42 U.S.C. § 672. (Compl., RE 7, Page ID # 80-84, at ¶¶ 47-63; 7/29/21 Order, Page ID # 1375.) Plaintiffs seek a judicial declaration that Defendants' failure and refusal to provide foster care maintenance payments constitutes a violation of Plaintiffs' rights, as well as the rights of the classes they represent, under 42 U.S.C. § 672(a)(1).[3]

On December 3, 2020, Plaintiffs moved for a preliminary injunction and for certification of the respective relative foster child and relative foster parent classes.[4] (RE 19, RE 21, RE 21-1, RE 21-2.) On January 6, 2021, Defendant Governor

[3] Plaintiffs also sought to enjoin Defendants' longstanding policy, pattern, custom and/or practice of depriving approved relative foster families of the foster care maintenance payments to which they are entitled, among other relief. (Compl., RE 7, Page ID # 86-88, at ¶¶ 70-75; id., Prayer for Relief ¶ d-e.)

[4] Plaintiffs' Motion for Class Certification was held in abeyance pending the District Court's consideration of Plaintiffs' Motion for Preliminary Injunction. Briefing is incomplete and the District Court has not considered the merits of the Class Certification Motion.

Richard DeWine opposed Plaintiffs' motion for a preliminary injunction and simultaneously moved to dismiss Plaintiffs' Complaint. (RE 34.) On the same day, Defendant Kimberly Hall, then Director of ODJFS, opposed Plaintiffs' motion for a preliminary injunction. (RE 35.) Plaintiffs opposed Governor DeWine's motion to dismiss and replied in support of their Motion for Preliminary Injunction on January 20, 2021. (RE 43, RE 44, RE 45.) Governor DeWine replied on January 27, 2021. (RE 46.) The District Court heard oral arguments on Plaintiffs' Motion for Preliminary Injunction and Defendant DeWine's Motion to Dismiss on January 28, 2021. (Minute Entry, RE 47.)

On February 9, 2021, Defendant Henderson separately moved to dismiss Plaintiffs' Complaint. (RE 49.) Plaintiffs opposed Defendant Henderson's motion to dismiss on February 19, 2021 (RE 53), and Defendant Henderson replied on March 5, 2021 (RE 54). The parties also filed supplemental briefing pursuant to the District Court's request between February 10-17, 2021. (RE 50, RE 51, RE 52.)

As relevant here, Defendant Henderson argued that Plaintiffs' claims should be dismissed because Plaintiffs are not licensed or approved caregivers within the meaning of 42 U.S.C. § 672 (Mot. to Dismiss, RE 49, Page ID # 1056-1062.) On July 29, 2021, the District Court agreed and issued an Opinion and Order granting Defendant DeWine's and Defendant Henderson's motions to dismiss and holding "Plaintiffs who are relative caregivers are not 'licensed or approved' 'foster family

homes' under Title IV-E and thus are not eligible for payments under Title IV-E."[5] 7/29/21 Order, RE 57, Page ID # 1389. That Opinion and Order is the subject of this appeal.[6]

V. SUMMARY OF THE ARGUMENT

As previously recognized by this Court in D.O. v. Glisson, 847 F.3d 374 (6th Cir. 2017), the federal foster care maintenance payments program mandates that each state with an approved state plan shall make foster care maintenance payments for the care of children placed in two categories of foster families (provided that other prerequisites, not at issue here, have been fulfilled): (i) licensed non-relative foster families, and (ii) *approved* relative foster families. **(pages 16-34)**. Since Ohio has opted into this federal program, and has an approved state plan, there is no doubt that it is obligated to provide full foster care maintenance payments to *all* foster families that fulfill the federal prerequisites promulgated by 42 U.S.C. § 672; partial or unequal payments simply do not suffice to fulfill Ohio's obligation in this respect. **(pages 16-23)**. Nevertheless, as the District Court expressly recognized, Ohio does

[5] Plaintiffs' claims against Governor DeWine were dismissed on the basis of Eleventh Amendment immunity. (7/29/21 Order, RE 57, Page ID # 1379-1381.) Dismissal on Eleventh Amendment immunity grounds is not the subject of this appeal.

[6] Because the District Court dismissed all of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6), it also denied Plaintiffs' Motions for Preliminary Injunction and Class Certification as moot. (7/29/21 Order, RE 57, Page ID # 1392.)

not currently pay foster care maintenance payments to relative foster family homes it has approved. **(pages 20-23)**. The minimal support it provides to these foster families through other programs is unequal and woefully inadequate, as it is far less than Ohio provides to other foster family homes – despite the fact that approved relative foster parents do the same work and need the same support (often under more urgent circumstances as they step in as a caregiver for a relative foster child). **(pages 13-14, 21-23**).

The District Court's failure to recognize a cause of action arising from this unlawful practice, despite binding precedent, is directly premised upon its erroneous interpretation of 42 U.S.C. § 672(c)(1)(A)'s definition of "foster family home." **(pages 23-24)**. More specifically, the District Court erroneously concluded that the "two categories" of licensed *or approved* foster family homes that were expressly recognized for foster care maintenance payment entitlement by this Court in D.O. v. Glisson, 847 F.3d 374 (6th Cir. 2017), and which are expressly and independently delineated within the statute, must have identical standards applied to them. **(pages 24-34)**. This interpretation necessarily violates the plain language of 42 U.S.C. § 672(c)(1)(A) (requiring such foster homes to meet "the standards established for the licensing *or approval*") (emphasis added); it is inconsistent with binding precedent in this Circuit **(pages 34-38**); it is inconsistent with Congress's clear intent that states preferably place children with relatives to the extent possible **(pages 24-**

34); and, it does not comport with other relevant statutory provisions **(pages 31-34**). The District Court's interpretation, moreover, is grounded in guidance that (i) is not binding, (ii) has been misinterpreted, and (iii) is inconsistent with federal approval of Ohio's State Plan. **(pages 38-43)**.

Given the District Court's erroneous interpretation of 42 U.S.C. § 672 and the fact that Plaintiffs have sufficiently pled their 42 U.S.C. § 672 claims, the District Court's Order should be reversed and the other decisions stemming therefrom should be vacated. **(page 43)**.

VI. ARGUMENT

"This Court reviews a district court's grant of a motion to dismiss *de novo.*" Osborne v. Metro. Gov't of Nashville & Davidson Cty., 935 F.3d 521, 523 (6th Cir. 2019). In reviewing a motion to dismiss, this Court must construe the complaint in the light most favorable to the plaintiffs, accept all well-pleaded factual allegations as true, and determine whether the plaintiffs have plausibly alleged any allegations that would entitle them to relief. See Lindenberg v. Jackson Nat'l Life Ins. Co., 912 F.3d 348, 357 (6th Cir. 2018). Issues of statutory interpretation also necessarily warrant a *de novo* review by this Court. See Hardenberg v. Va., DMV (In re Hardenberg), 42 F.3d 986, 988 (6th Cir. 1994) ("a question of law or statutory interpretation . . . is reviewed *de novo*"); United States v. Brown, 915 F.2d 219, 223 (6th Cir. 1990) ("A district court engages in statutory construction as a matter of law,

and we review its conclusions de novo.").

This Court in D.O. v. Glisson, 847 F.3d 374 (6th Cir. 2017), held that the federal Child Welfare Act at Title IV-E (42 U.S.C. § 672) confers upon foster parents, who are approved by the state, an individually enforceable right to receive foster care maintenance payments, and therefore that it is plainly unlawful for a state to deny these payments due to a distinction between "approved" foster parents who typically care for a relative child and "licensed" foster parents who typically care for unrelated foster children. See also Miller v. Youakim, 440 U.S. 125, 133–34 (1979) (states must provide full and complete "Foster Care benefits to any child who satisfies the federal eligibility criteria") (quotes and citation omitted).

That "foster children" are "one of Ohio's most helpless and vulnerable populations," and further that "a foster child's need for food, clothing, shelter, daily supervision, school supplies, personal incidentals, and travel does not vary by the licensure status of the home in which the children lay their heads down at night," are facts which are not in dispute. 7/29/21 Order, RE 57, Page ID # 1391-1392. Also undisputed, as the District Court recognized, is the fact that approved non-licensed relative "foster caregivers in Ohio are called to do much of the same work as their licensed foster caregiver counterparts[,]" but that they nevertheless "must do that work on a fraction" of the reimbursement provided to their licensed non-relative counterparts. Id. at Page ID # 1392. This is in direct contravention of 42 U.S.C.

§ 672, which mandates foster care maintenance payments for *all* children placed in foster care homes, whether those homes are licensed "or approved." 42 U.S.C. § 672; see Miller v. Youakim, 440 U.S. 125, 140 (1979) (whether foster children receive federal foster care payments to which they are entitled should not – and, as a matter of law, cannot – "depend on the happenstance of where they are placed"); D.O. v. Glisson, 847 F.3d 374, 383 (6th Cir. 2017) (a "failure to make maintenance payments [that] turns on the distinction between relative and non-relative foster care providers . . . plainly violates federal law"). This Court's holding in Glisson is thus directly controlling here and *stare decisis* applies. See generally, Salmi v. Sec'y of Health & Hum. Servs., 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.") (citation omitted).

Plaintiffs' single claim is that, as relative foster parents who the state of Ohio approved as meeting the standards the State established for foster family homes, and as relative foster children who Ohio placed in these approved Plaintiff relatives' foster family homes, Plaintiffs have an established entitlement to the same federally-required foster care maintenance payments as Ohio provides on behalf of foster children placed in licensed foster family homes. See Compl., RE 7, Page ID #

86. It is uncontroverted, here, that Plaintiffs are approved as unlicensed caregivers precisely because they are relatives and pursuant to Ohio regulations that are *expressly* designed for approving relative caregiver foster family homes. See 7/29/21 Order, RE 57, Page ID # 1386-1388 ("Plaintiffs allege that Plaintiffs who are relative foster caregivers are 'approved relative foster parents' by ODJFS and are entitled to foster care maintenance payments under Title IV-E in light of this approval") (citing Ohio Admin Code 5101:2-42-18(B); RE 1-1 (RE 7)). More specifically, Plaintiffs allege that they are, or that they are placed in, "foster family home[s]" that are "licensed *or approved*" as meeting "the standards established [by the state] for the licensing *or approval*[,]" 42 U.S.C. § 672(c)(1)(A), and meet all other 42 U.S.C. § 672 eligibility requirements for foster care maintenance payments, consistent with Congress's expressed preference that foster children be placed with relative caregivers. See Compl., RE 7, Page ID # 65, 67-71, 74-75, at ¶¶ 6, 7, 16-24, 34-36; 42 U.S.C. § 672(a)(1) (the state "shall make foster care maintenance payments on behalf of each child who has been removed . . . into foster care"); see also 42 U.S.C. § 671(a)(19) (requiring states to consider giving "preference to an adult relative over a non-related caregiver"). Plaintiffs have thus adequately pled facts establishing their entitlement to foster care maintenance payments – payments that they are unequivocally being denied. See D.O. v. Glisson, 847 F.3d 374, 378 (6th Cir. 2017) (42 U.S.C. §672 confers "an individually enforceable right to foster care

maintenance payments" for relative foster care "approved" by the state); Miller v. Youakim, 440 U.S. 125, 133–34 (1979) (states must provide full and complete "Foster Care benefits to any child who satisfies the federal eligibility criteria") (quotes and citation omitted); 7/29/21 Order, RE 57, Page ID # 1372 ("Ohio has an approved Title IV-E state plan that it last amended on January 11, 2018," and "has thus agreed to be bound by all of the federal requirements under Title IV-E"). This Court should therefore reverse the District Court's Decision and reinstate Plaintiffs' claims.

A. Plaintiffs Adequately Alleged their Entitlement to Foster Care Maintenance Payments Under 42 U.S.C. § 672

The federal Foster Care Maintenance Payments Program at Title IV-E of the Social Security Act[7] mandates in relevant part that:

> (1) Each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative . . . into foster care if --
>
> (B) the child, while in the home, would have met the AFDC eligibility requirement . . .

[7] "Foster care maintenance payments" for "foster family homes" were initially established as part of the Federal Aid to Families with Dependent Children-Foster Care program ("AFDC-FC") at Title IV of the Social Security Act. See ADC Benefits to Children of Unemployed Parents, H.R. 4884 (1961) (amending Social Security Act of 1935, ch. 531, title IV, § 472). "In 1980, Congress passed the Child Welfare Act, also known as Title IV-E of the Social Security Act. This federal-state grant program facilitates state-run foster care and adoption assistance for children removed from low-income homes." D.O. v. Glisson, 847 F.3d 374, 376 (6th Cir. 2017) (citing 42 U.S.C. § 670).

> (2)(A) the removal and foster care placement are in accordance with -- . . . (ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts [by the State agency to prevent removal] have been made;
>
> (2)(B) the child's placement and care are the responsibility of-- (i) the State agency . . . [and]
>
> (2)(C) the child has been placed in a foster family home . . .

42 U.S.C. § 672(a) (emphasis added). "[F]oster family home" is further defined as:

> 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*[.]

42 U.S.C. § 672(c)(1)(A) (emphasis added). State "standards for foster family homes" must be "reasonably in accord with recommended standards of national organizations concerned with standards for . . . homes, including standards related to admission policies, safety, sanitation, and protection of civil rights." 42 U.S.C. § 671(10)(A). "[F]oster care maintenance payments" are defined as:

> payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.

42 USC § 675(4)(A).

As this Court held in Glisson, once a state opts into the Title IV-E program and "the Secretary approves the state's plan, the state '*shall* make foster care maintenance payments.'" D.O. v. Glisson, 847 F.3d 374, 378, 379 (6th Cir. 2017)

(citing 42 U.S.C. § 672(a)(1)) (emphasis in original). "It isn't optional." Id. (42 U.S.C. § 672(a)(1)'s "'shall make' language 'unambiguously impose[s] a binding obligation on the States'") (citation omitted).[8] Once this obligation is triggered, "strict[ ] compl[iance]" with the obligation to pay for all of the enumerated items is absolutely mandatory. California All. of Child & Family Servs. v. Allenby, 589 F.3d 1017, 1022 (9th Cir. 2009). "[S]ubstantial compliance," i.e., anything less than full and complete compliance, simply "will not be good enough." See id. at 1021–22 (a state providing only "partial[ ] cover[age] [of] the cost" of the statutorily enumerated items necessarily "runs afoul of the CWA's mandate").

As the District Court acknowledged here, "Ohio has an approved Title IV-E state plan that it last amended on January 11, 2018," and "has thus agreed to be bound by *all* of the federal requirements under Title IV-E." 7/29/21 Order, RE 57, Page ID # 1372 (emphasis added).[9] As such, in Ohio, "Title IV-E confers an

[8] See also New York State Citizens' Coal. for Child. v. Poole, 922 F.3d 69, 79 (2d Cir. 2019) (observing that the law "uses clearly mandatory language—'shall'—binding states to make these payments") (citation omitted); California State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 982 (9th Cir. 2010) ("§ 672(a)'s language is clearly mandatory"); see, e.g., Native Vill. of Stevens v. Smith, 770 F.2d 1486, 1488 (9th Cir. 1985) ("Alaska participates in Title IV-E, and it is therefore obligated under 42 U.S.C. § 672 to make foster care maintenance payments for dependent children eligible for AFDC."); California State Foster Parent Ass'n, 624 F.3d at 978 (citing 42 U.S.C. §§ 671(a)-(b), 672, 675(4)(A)) ("[F]oster [C]are [M]aintenance [P]ayments" must "'cover the cost of' listed items such as food, clothing and shelter" and *must* be used "to reimburse foster parents for . . . [the] out-of-pocket costs" identified and specifically enumerated within the statute).

[9] Ohio's State Plan, as approved by the federal government, through its Department

individually enforceable right to foster care maintenance payments and foster families can enforce that right under 42 U.S.C. § 1983." Id. at Page ID # 1390 (citing Glisson, 847 F.3d at 378, 381).

Further, it is fully alleged here, and also wholly undisputed, that: (i) the Plaintiff foster children met AFDC eligibility (see 42 U.S.C. §672(a)(1)); (ii) Defendant removed Plaintiff foster children from their homes of origin subject to required judicial determinations (see 42 U.S.C. §672(a)(2)(A)); (iii) Defendant thereby assumed "responsibility" for the "placement and care" of Plaintiff children (see 42 U.S.C. § 672(a)(2)(B)); and (iv) Defendant subsequently placed Plaintiff children with Plaintiff relative foster parents in "foster family home[s]" approved by Defendant under their standards established for such approval (see 42 U.S.C. §672(c)(1)(A)).[10] See Compl., RE 7, Page ID # 65, 68-71, 74-75, at ¶¶ 6, 7, 16-24,

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of Health and Human Services, states: "Foster family home means, for the purpose of title IV-E eligibility, the home of an individual or family licensed *or approved* as meeting the standards established by the State/Tribal licensing *or approval authority(ies)*. . ." (emphasis added). See State Plan, RE 50-1, Page ID # 1172 (Ex. A to Pls.' Suppl. Mem.) (citing 45 C.F.R. § 1355.20(a)).

[10] Plaintiffs allege, e.g., that H.C. and Y.C. are siblings who were removed from their home by ODJFS due to substantiation of parental child dependency, neglect, or abuse, and placed in the out-of-home relative foster home of their paternal grandmother, named Plaintiff Relative Foster Parent T.M. The children are in temporary legal custody of ODJFS in Hamilton County, through the Hamilton County Job and Family Services ("Hamilton Family Services"). In April 2020, the Hamilton County Juvenile Court found that reasonable efforts had been made to prevent the children's removal and that return to the home would be contrary to the children's best interest, and thus granted interim temporary legal custody of H.C. and Y.C. to Hamilton Family Services. Hamilton Family Services *approved* Named

34-36; Ohio Admin. Code § 5101:2-47-01(C); State Plan, RE 50-1, Page ID # 1101-1103, 1109 (Ex. A to Pls.' Suppl. Mem.). See also 7/29/21 Order, RE 57, Page ID # 1365-1367. Ultimately, there is no dispute that Plaintiffs fulfilled every condition of eligibility for foster care maintenance payments under § 672 – particularly that they are approved relative foster parents, and relative foster children placed in such homes approved by the state.

Nevertheless, as the District Court also expressly recognized, Ohio *does not* provide federal foster care maintenance payments to such approved relative caregivers. See 7/29/21 Order, RE 57, Page ID # 1391 (acknowledging the "unequal payment amount [provided to approved relative foster family homes in Ohio] when compared to Plaintiffs' licensed foster caregiver counterparts"). More specifically, it is undisputed that under current Ohio practice, *licensed* foster parents "receive a daily per diem rate for each foster child placed in the home." See Compl., RE 7, Page ID # 76, at ¶ 39 (citing ODJFS, *Kinship Care Versus Foster Care* (June 6, 2010), *available at* https://fosterandadopt.jfs.ohio/gov/wps/portal/gov/ofc/kinship-care/resources-for-kinship-caregivers/kinship-vs-foster-care). Such foster care maintenance payments for licensed foster parents in Ohio range from several hundred to several thousand dollars per child, per month, based on the county they

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Plaintiff Relative Foster Parent T.M. as a relative foster parent and placed H.C. and Y.C. in out of home foster care in T.M.'s home. See Compl., RE 7, Page ID # 68, at ¶ 16.

are in and the age and special needs of the child. See, e.g., id. at Page ID # 76-77, at ¶ 40 (e.g., Cuyahoga County foster care maintenance payments rates range from $615 to $2,731 per month per child; Hamilton County foster care maintenance payments rates range from $1,500 to $9,667 per month, for two children); 7/29/21 Order, RE 57, Page ID # 1366-1367. By contrast, relative foster homes *approved* by the state have been directed to apply for Ohio Works First benefits or other general public benefits programs. Compl., RE 7, Page ID # 76, at ¶ 39. The OWF child-only payment provides only $302 per month for one child and $412 per month for two children, with no allowance for special needs and decreasing support for each additional child. See, e.g., Compl., RE 7, Page ID # 76, at ¶ 40 (K.T. receives $302 per month in OWF payments to care for T.E.; T.M. receives $406 per month in OWF payments to care for H.C. and Y.C.).

Thus, as the District Court acknowledged, under Ohio law, approved relative foster caregivers must operate "on a fraction" of the payment that is provided to "their licensed foster caregiver counterparts." See 7/29/21 Order, RE 57, Page # 1392. Ohio's new "Kinship Support Program" ("KSP")[11] for kinship caregivers is no different. It likewise continues to offer grossly unequal payments; such payments

[11] As explained by the District Court, "while the parties were briefing responses to Plaintiffs' Motion for Preliminary Injunction in this matter, Defendant DeWine signed Amended Substitute Senate Bill 310 ('S.B. 310') into law, and the law went into effect the same day. 7/29/21 Order, RE 57, Page ID # 1373 (citing Ohio Rev. Code § 5101.881).

are time-limited, with no allowance for special needs, and are made only if funds are available.[12] See generally Id. at Page ID # 1374 (citing Ohio Rev. Code § 5101.886) (describing specifics of the KSP). Ultimately, the KSP necessarily perpetuates the unlawful inequity in Ohio's treatment of approved foster families through its failure to pay federally-mandated foster care maintenance payments at equal rates among licensed and approved foster family homes. See D.O. v. Glisson, 847 F.3d 374, 383 (6th Cir. 2017) (finding that a "kinship care program" with payments contingent "[t]o the extent funds are available" does not meet Title IV-E requirements); accord California All. of Child & Family Servs. v. Allenby, 589 F.3d 1017, 1023 (9th Cir. 2009) ("Because the State is not covering [all of] the costs required by the CWA, we reverse the district court's order granting summary judgment to the State and denying summary judgment to the Alliance."); Ah Chong v. McManaman, 154 F. Supp. 3d 1043, 1054 (D. Haw. 2015) (as a matter of law, "the provision of additional payments, reimbursements, and benefits" does not "excuse a state from meeting its obligations under the CWA to pay for *all* of the costs enumerated in § 675(4)(A)") (emphasis added).

[12] Specifically, S.B. 310 sets the amount of financial payments at only "ten dollars and twenty cents per child, per day, to the extent funds are available[,]" for a maximum of $320 per month, per child. 7/29/21 Order, RE 57, Page ID # 1374 (citing Ohio Rev. Code § 5101.885). Moreover, payments shall now be made to kinship caregivers for not more than six months after the date of placement of a child with the kinship caregiver. Id. (citing Ohio Rev. Code § 5101.886).

As fully alleged in Plaintiffs' Complaint, Ohio's inequitable treatment of relative foster children, who are placed in approved relative foster homes pursuant to the state of Ohio's approval process, necessarily violates federal law because it denies the full and equal foster care maintenance payments to which such relative foster children and foster parents are entitled.[13] See Glisson, 847 F.3d at 383.

B. The District Court's Decision Contravenes the Unambiguous Terms of 42 U.S.C. § 672, Binding Precedent, and Clear Evidence of Legislative Intent

The District Court's dismissal hinges entirely on its erroneous conclusion that "Title IV-E *requires a caregiver to be fully licensed* by the state [under uniform licensing standards] before a caregiver is eligible for foster care maintenance payments." 7/29/21 Order, RE 57, Page ID # 1391 (emphasis added). Thus, according to the District Court, "[c]aregivers who may be approved as relative foster

[13] Ohio's denial of foster care maintenance payments to relative foster homes also exacerbates existing economic hardships and falls particularly heavily on Black and minority families. See, e.g., Compl., RE 7, Page ID # 78-79, at ¶¶ 43-46 (one in three Ohio households struggled to pay household expenses, and one in ten Ohioans were without enough food, with Black children disproportionately placed into foster care as well as disproportionately placed with kin); see also Christina McClurg Riehl & Tara Shurman, Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families, 39 Child. Legal Rts. J. 101, 109 (citing, inter alia, Jennifer Ehrle & Rob Geen, Children cared for by relatives: What services do they need?, The Ur. Inst. 1, 2 (June 2002)); see also Jill Duerr Berrick, When Children Cannot Remain Home: Foster Family Care and Kinship Care 8 Future of Child. 77, 78 (1998)) ("African American kinship caregivers have the lowest levels of annual income and are also the least likely to own their own home.").

caregivers as the term 'approved' is used under Ohio Administrative Code § 5101:2-42-18 . . . are not 'approved' under 42 U.S.C. § 672 if they are subject to lesser standards than their licensed foster counterparts." Id. at Page ID # 1389. The District Court explicitly and erroneously interpreted 42 U.S.C. § 672 as requiring that the standards for approval and licensure – prerequisites to a caregiver's eligibility for foster care maintenance payments – must be "the same," meaning that they must be identical. Id. Such an interpretation is incompatible with the plain meaning of the statute, as well as the Congressional intent underlying the foster care maintenance payments statute, as has already been recognized by this Court and the Supreme Court. See D.O. v. Glisson, 847 F.3d 374, 378, 383 (6th Cir. 2017); Miller v. Youakim, 440 U.S. 125, 140–41 (1979).

1. Requiring Identical Licensing Standards, for both Approved Relative Foster Families and their Licensed Non-Relative Counterparts, Contravenes the Plain Meaning of 42 U.S.C. § 672

First and foremost, this Court has *already* established that the plain meaning of 42 U.S.C. § 672(c)'s use of "licensed . . . *or* . . . *approved*" to define a "foster family home" "contemplates two categories of foster families" that are entitled to foster care maintenance payments – (i) "licensed foster parents" *and* (ii) "approved foster homes, which typically care for a relative child." Glisson, 847 F.3d at 382-383 (emphasis in original and emphasis added). By utilizing the word "or" prior to the word "approval," Congress clearly manifested its intent to differentiate the two

alternate types of "foster family home" and thus the two respective standards that apply to each respective category of eligible § 672(c)(1)(A) foster family homes. See United States v. Chriswell, 401 F.3d 459, 470 (6th Cir. 2005) (determining that the plain meaning of the word "or" is meant in the disjunctive); Marquette Gen. Hosp. v. Goodman Forest Indus., 315 F.3d 629, 633 (6th Cir. 2003) ("[T]he word **or** does not also mean **and**. Any other reading constrains the clear meaning of the language.") (emphasis in original).[14]

This interpretation of 42 U.S.C. § 672(c)(1)(A) is also the only one that is consistent with Congress's well-recognized preference for placing children with their relatives. See e.g., 42 U.S.C. § 671(a)(19) ("the State shall consider giving preference to an adult relative over a non-related caregiver"); Miller v. Youakim, 440 U.S. 125, 141–42 (1979) (noting the federal government's long-held "preference for care of dependent [foster] children by relatives.").[15] Although the

[14] See generally, United States v. Palacios-Suarez, 418 F.3d 692, 697 (6th Cir. 2005) ("[W]hen interpreting statutes, [t]he language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear.") (citation omitted); United States v. Miller, 734 F.3d 530, 540 (6th Cir. 2013) (same); see also Smith v. United States, 508 U.S. 223, 228 (1993); Miller, 734 F.3d at 540 (When a word is not defined in the statute it should be "construe[d]" "in accord with its ordinary or natural meaning.") (citation omitted).

[15] Significantly, relative foster family homes account for thirty-four percent of children in foster care, nationwide. See Children's Bureau, The AFCARS Report: Preliminary FY 2020 Estimates as of October 4, 2021, U.S. Dep't Health & Hum. Servs. 1 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf.

federal foster care entitlement program has evolved throughout the last several decades, Congressional intent has never "depart[ed] from th[e] fundamental principle" that foster children should be placed with their relatives to the extent possible. Youakim, 440 U.S. at 141–42; see also 42 U.S.C. § 675(5)(A) (requiring that case plans for children in foster care be "designed to achieve placement in a safe setting that is the least restrictive (*most family like*) and most appropriate setting available and in close proximity to the parents' home") (emphasis added).[16]

Moreover, Congress does not "intend[ ] to discriminate between potential beneficiaries . . . on the basis of their relationship to their foster parents." See Youakim, 440 U.S. at 141–42. This is, of course, because *all* "beneficiaries [are] equally in need of the program," *regardless* of where they are placed. See id. As such, the fact that a foster child should happen to land with an approved relative, or alternatively a non-relative, *should not* cause any detriment whatsoever to that child's ability to receive federal benefits. See id. at140 (the rights of foster children cannot "depend on the happenstance of where they are placed"); Glisson, 847 F.3d at 383 ("the [state's] failure to make maintenance payments [that] turns on the

[16] Indeed, the District Court noted this Congressional preference within its Decision. 7/29/21 Order, RE 57, Page ID # 1369 (in order to "qualify for federal payments under Section 671 and Title IV-E" a state's plan must give "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") (citing §§ 671(a)(19), (29)).

distinction between relative and non-relative foster care providers . . . plainly violates federal law").

Unlike their licensed non-relative counterparts, approved *relative* foster parents find themselves unexpectedly placed in the position of having to parent a child, typically in the aftermath of a sudden crisis within their families, with virtually no notice and thus no preparation whatsoever. See 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, 108 (2019) (observing that "[m]ost kinship caregivers did not plan nor intend to be parenting their relative's children," that "it is often a crisis that prompts the need for kinship care, while non-relative foster parents have been prepared through education and training and have elected to raise a foster child," and that "kinship caregivers do not have the luxury of *planning* to bring a child into their home") (emphasis added) (citations omitted). By Ohio's own admission, "[m]any 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."[17]

[17] See Office of Children Services Transformation, Final Recommendations of the Children Services Transformation Advisory Council, Ohio Office of Children Services Transformation (Nov. 2020 https://content.govdelivery.com/attachments/OHOOD/2020/11/19/file_attachments/1606570/Transformation%20Final%20Report%20FINAL.pdf, at 15).

Congress unquestionably considered these practical realities as it formulated foster care payments legislation. See Miller v. Youakim, 440 U.S. 125, 141–42 (1979) (noting that Committee Reports suggest that increasing federal matching payments would encourage relatives "not legally responsible for support" to undertake the care of foster children "in order to obtain the best possible environment for the child" (citing S. Rep. No. 744, p. 164; H. R. Rep. No. 544, p. 101, U.S. Code Cong. & Admin. News 1967, p. 3001)). In fact, according to the United States Supreme Court, *this is the very reason* that Congress determined that, unlike their licensed non-relative counterparts, *relative* foster parents may receive benefits upon mere approval. See Youakim, 440 U.S. at 140–41 (1979) (observing that Congress's "authoriz[ation] [of] an approval procedure as an alternative to actual licensing of 'foster family homes'" literally "evinced" its desire to entitle "children placed in related foster homes" to full "Foster Care benefits."). Indeed, over the years, "many [s]tates" have deemed "relatives' homes" to be exempt "from the licensing requirements imposed" upon other foster caregivers. Id. Ultimately, "by including an approval procedure," Congress "meant to encompass foster homes not subject to State licensing requirements, in particular, related foster homes." Miller v. Youakim, 440 U.S. 125, 134, 139–41 (1979) (given the "overriding goal of providing the best available care for *all* dependent children removed from their homes because they were neglected," the program has always been designed to "meet the particular needs

of *all* eligible neglected children" – *regardless of* "*whether they are placed with related or unrelated foster parents*") (citing S. Rep. No. 165, at 6; 107 Cong. Rec 6388 (1961) (remarks of Sen. Byrd)) (emphasis added)).

Notably, this Court relied upon the fact that, although Congress has changed aspects of the Act over the years, it has not "modified the definition of 'foster family home' that the [Supreme] Court interpreted in Youakim." See Glisson, 847 F.3d at 383–84. Thus, this Court's confirmation – that "*the Act allows states to place children with unlicensed relatives*" who are "approved" per the state's approval standards – is fully consistent with the Supreme Court's observation "that the statute 'defines [family foster care] in sweeping language.'" Id. at 383 (emphasis added) (citing Youakim, 440 U.S. at 135; accord Native Vill. of Stevens v. Smith, 770 F.2d 1486, 1488 (9th Cir. 1985) (holding that "Section 672(c) has been complied with since the tribal council *approved* T.O.'s foster home placement," and an "approved foster home" necessarily suffices to qualify the foster home for full foster care maintenance payments) (emphasis added); Youakim v. Miller, 562 F.2d 483, 488 (7th Cir. 1977), aff'd, 440 U.S. 125 (1979) (the law "*does not* require that an approved [relative foster] home actually meet the standards for licensed foster homes" in order to qualify for entitlement benefits) (emphasis added).

That this Court got it right in Glisson was confirmed by Congress's subsequent 2018 amendment to the definition of "foster family home" at 42 U.S.C.

§ 672(c)(1)(A), which added language further clarifying the inclusion of homes meeting alternate "approval" standards within the definition.[18] Compare Pub. L. 115–123, Sec. 50741, 132 Stat. 255 (2018) ("[t]he 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*"') (emphasis added) with Pub. L. 96-272, title I, §101, 94 Stat. 500, 504 (1980).[19] Of course, Congress made this change with continued awareness of the unique concerns faced by unlicensed relatives seeking to care for relative children. See, e.g., 164 Cong. Rec. S799-01, S800 (daily ed. Feb. 8, 2018)

[18] This 2018 amendment is "entitled" to considerable "weight" in further illuminating the meaning of this statute. Glidden Co. v. Zdanok, 370 U.S. 530, 541 (1962); Great N. R. Co. v. United States, 315 U.S. 262, 277 (1942) ("It is settled that subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." (internal quotes and citation omitted)); see also United States v. Tapert, 625 F.2d 111, 121 (6th Cir.1980) ("[i]t is a common and customary legislative procedure to enact amendments strengthening and clarifying existing laws"); Shukoski v. Indianhead Mountain Resort, Inc., 166 F.3d 848, 852 (6th Cir. 1999) (statutory amendment "was adopted to resolve any possible confusion and to enunciate more clearly the coverage"); May Dep't Stores Co. v. Smith, 572 F.2d 1275, 1278 (8th Cir. 1978) (A "subsequent amendment and its legislative history, although not controlling, is nonetheless entitled to substantial weight in construing the earlier law.").

[19] The prior definition which was interpreted by this Court in Glisson stated: "[T]he term 'foster family home' means a foster family home for children which is licensed by the State in which it is situated *or has been approved*, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing." 42 U.S.C. § 672(c)(1)(A) (emphasis added).

(testimony of Sen. Hatch noting that this 2018 legislation will assist "relatives who seek to take in children rather than have them end up in [un-related] foster care"). Thus, the District Court's erroneous supposition – that "licensed *or approved*" foster family homes and the applicable standards established for the licensing *or approval* must require "the same" licensing standards, for all foster family homes whether licensed or approved, see 7/29/21 Order, RE 57, Page ID # 1389, cannot possibly stand. Indeed, the District Court's interpretation of the statute would render the "or approved" and "or approval" parts of the §672(c)(1)(A) definition of a "foster family home" meaningless and superfluous. See Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation omitted); Bailey v. United States, 516 U.S. 137, 146 (1995) (where Congress uses two separate terms or phrases, it must be assumed that Congress intended that "*each* term" would "have a particular, nonsuperfluous meaning") (emphasis added). Thus, the District Court's decision must be deemed erroneous because it cannot properly "rely upon a definition of 'foster family home' which directly conflicts with the federal statutory definition." Youakim v. Miller, 562 F.2d 483, 488 (7th Cir. 1977), aff'd, 440 U.S. 125 (1979).

Other Title IV-E provisions are likewise inconsistent with the District Court's erroneous interpretation of 42 U.S.C. § 672(c)(1)(A) as mandating identical

standards for both approved relative foster families and their licensed non-relative counterparts. For example, 42 U.S.C. § 671(a)(19) "requires states to give preference to adult relative caregivers," provided that "the relative caregiver meets the relevant safety standards." D.O. v. Glisson, 847 F.3d 374, 383 (6th Cir. 2017) (citing § 671(a)(19)). Thus, in the unique case of "*relative* foster family homes," states are vested with the discretion to waive "non-safety standards" as they deem necessary "on a case-by-case basis."[20] See id. (citing § 671(a)(10)(D)) (emphasis added). The very existence of this waiver provision – expressly afforded *only* to *relative* foster parents (who can otherwise be approved) – "comports with Congress' preference for care of dependent children by relatives, a policy underlying the categorical assistance program since its inception." Youakim, 440 U.S. 125 at 141 (citing S. Rep. No. 628, 74th Cong., 1st Sess., 16–17 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess., 10–12 (1935)). Such Congressional preference makes it clear that Congress intended to allow state standards to treat this specific subset of foster family homes differently. Id.

[20] Indeed, Ohio is one of the states that has implemented 42 U.S.C. § 671(a)(10)(D)'s waiver provision and permits waivers of certain non-safety related standards for relative foster homes. See 7/29/21 Order, RE 57, Page ID # 1373; 42 U.S.C. § 671(a)(10)(D) ("a waiver of any standards established pursuant to subparagraph (A) may be made only on a case-by-case basis for non-safety standards (as determined by the State) in relative foster family homes for specific children").

Moreover, the entitlement scheme permits further flexibility in the form of "variances," which is "different from a waiver in that it constitutes an alternative equivalent method to meet the standard," thereby allowing state Title IV-E agencies to "meet a standard for licensure in a way other than that specified in the State . . . rule that governs licensure." See U.S. Department of Health & Human Services, ACF, Program Instruction, Log No. ACYF-CB-PI-10-11 (July 9, 2010), at 24. Without question, and contrary to the District Court's holding, an "alternate equivalent method" is not "the same" or identical. Compare id. with 7/29/21 Order, RE 57, Page ID # 1388-1389.

It is also notable that the District Court compounded its error by repeatedly inserting the word "licensing" to erroneously modify "standards" when discussing other Title IV-E sections, despite the clear lack of any such limitation or qualifier in those provisions. For example, 42 U.S.C. § 671(a)(10)(A) requires that the State Plan provide for:

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

The District Court, however, erroneously presented 42 U.S.C § 671(a)(10)(A) as requiring states to "provide for the establishment or designation of a state authority

that is responsible for establishing and maintaining *licensing* standards for foster family homes . . . .” 7/29/21 Order, RE 57, Page ID # 1368 (citing, but not quoting, 42 U.S.C. § 671(a)(10)(A)) (emphasis added). *Nowhere* in this provision does it refer to “licensing” standards. Similarly, the District Court presented 42 U.S.C. § 671(a)(10)(B) as requiring the state’s plan to “apply these *licensing* standards to any foster family home that receives Title IV-E funds.” Id. (citing, but not quoting, 42 U.S.C. § 671(a)(10)(B)) (emphasis added). But, again, 42 U.S.C. § 671(a)(10)(B) does not employ the word “licensing” to qualify or limit the word “standards” (“the standards established pursuant to subparagraph (A) shall be applied by the State to any foster family home . . . .”). When qualified in Title IV-E, such “standards” are qualified by “licensing *or approval*.” See 42 U.S.C. § 672(c)(1)(A) (emphasis added).

2. Denying Foster Care Maintenance Payments to Approved Relative Foster Homes is a Violation of 42 U.S.C. §672 Under Binding Circuit Precedent

The District Court’s attempt to distinguish this case from this Court’s binding precedent in Glisson is unavailing. First, the District Court tried to avoid Glisson’s holding that the “‘failure to make [foster care] maintenance payments [based] on the distinction between relative and non-relative foster care providers, [] plainly violates federal law’” by finding that Ohio is withholding foster care maintenance payments from approved foster families in Ohio – *not* because they are relative caregivers, but

"because . . . [they] are relative caregivers [who] are not licensed foster caregivers under Ohio law." 7/29/21 Order, RE 57, Page ID # 1390-1391 (quoting, in part, D.O. v. Glisson, 847 F.3d at 383). This is a distinction without a difference. It is uncontroverted that, just as Kentucky approved the great-aunt in Glisson according to its state laws as required by federal law, see Glisson, 847 F.3d at 383, Ohio approved Plaintiff relatives as unlicensed foster caregivers *only because* they are relatives and pursuant to Ohio's approval regulations expressly *designed for* relative foster caregivers, as recognized by the District Court itself. See 7/29/21 Order, RE 57, Page ID # 1386-1388 ("Plaintiffs allege that Plaintiffs who are relative foster caregivers are 'approved relative foster parents' by ODJFS and are entitled to foster care maintenance payments under Title IV-E in light of this approval"); see also Compl., RE 7, Page ID # 65, 68-70, 74, at ¶¶ 6, 16-18, 34. Thus, the District Court's moniker of "non-licensed" fails to recast the reality that, in Ohio, "approved" non-licensed foster homes that are being denied foster care maintenance payments are, by definition, relative foster homes.[21] This practice is in direct contravention of Glisson's holding. See Glisson, 847 F.3d at 383; see also Miller v. Youakim, 440

[21] The Ohio Admin Code allows for approval of a non-licensed foster home *only* where the individual is a "relative by blood, adoption, or marriage" or is a "qualified nonrelative" fictive kin due to their "familiar and longstanding relationship or bond with the child or the child's family." See Ohio Admin Code §§ 5101:2-42-18(A)(1), 5101:2-42-18(A)(2), 5101:2-42-18(B), 5153.161(A).

U.S. 125, 138–39 (1979) (Congress *did not* "intend[ ] to differentiate among neglected children based on their relationship to their foster parents").[22]

The District Court's additional attempt to distinguish Glisson, on the basis of the fact that the relative in that case was an approved Kentucky foster care provider and that this Circuit's prior holding thus "hinge[d] on the application of Kentucky's child welfare laws to the facts of that individual appellant," is similarly misplaced. See 7/29/21 Order, RE 57, Page ID # 1391. The only relevant issue of Kentucky law addressed by the Glisson Court was whether the relative caregiver was "approved" by the state under the state's standards for approval as required by 42 U.S.C. § 672. Glisson, 847 F.3d at 384. The District Court noted that the Glisson appellant "was an approved foster care provider under Title IV-E because Kentucky conducted a standard home evaluation and criminal background check prior to placing the child in her care." 7/29/21 Order, RE 57, Page ID # 1391 (citing Glisson, 847 F.3d at 384). *This is exactly what is alleged to have occurred here*. Ohio performed the non-waivable mandatory background checks and home evaluations on Plaintiffs pursuant

[22] It is also the assumption that "in the absence of a plain indication to the contrary" when Congress enacts a cooperative federalism statute, it does not "mak[e] the federal act dependent upon state law." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43–44 (1989) (analyzing statutory terms regarding adoption under the Indian Child Welfare Act). This is primarily because federal statutes are intended to have "uniform nationwide application," and "the federal program would be impaired if state law were to control." Id. (citation omitted).

to the safety protocols of 42 U.S.C. § 671(a)(20) (A-C) (requiring states to conduct "criminal records checks" and "check any child abuse and neglect registry" for "any prospective foster or adoptive parent"), as well as Ohio Admin. Code § 5101:2-42-18(B), before approving them as foster family homes. See, e.g., Compl., RE 7, Page ID # 68-70, 74, at ¶¶ 16-18, 34.

Plaintiffs thus have clearly pled, and it is undisputed, that they meet the § 672 definition of "foster family home" "approved" pursuant to Ohio's "standards established for . . . approval." 42 U.S.C. § 672(c)(1)(A). Therefore, this Court's holding in Glisson – that relative caregivers "approved" by the applicable state agency are no less entitled to foster care maintenance payments than licensed foster care providers – applies with full force here.[23] See Glisson, 847 F.3d at 383–84 (relative foster caregiver approved by the state entitled to same benefits as a licensed non-relative foster caregiver because they both qualify as a Title IV-E eligible "foster family home" under 42 U.S.C. § 672(c)); see generally Salmi v. Sec'y of

[23] The District Court's holding that, as a matter of law, approved relative homes in which Ohio has placed Plaintiff foster children do not qualify as Title IV-E "foster family homes," that are "licensed or approved" as required by 42 U.S.C. § 672(c)(1)(A), see 7/29/21 Order, RE 57, Page ID # 1389, is deeply incongruous. If left to stand, it would be judicial sanctioning of Ohio placing the whole class of thousands of relative foster children in the state, such as Plaintiff foster children, in non-Title IV-E compliant relative foster homes in direct contravention of federal law. Maintaining such a second-class tier of foster children and foster homes is precisely what this Court and the Supreme Court have recognized the Child Welfare Act prohibits. See Glisson, 847 F.3d at 383–84 (citing Youakim, 440 U.S. 125 (1979)).

Health & Hum. Servs., 774 F.2d 685, 689 (6th Cir. 1985) ("A . . . prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.") (citation omitted).

3. The District Court's Erroneous Interpretation is Unsupportable and Inconsistent with HHS' Approval of Ohio's State Plan

In the first instance, the District Court has afforded undue weight to the extra-legislative materials it relies upon for its erroneous holding, and it has also misinterpreted their meaning. These additional materials cannot supplant the clear meaning of the statute itself and Circuit precedent, especially where most of them pre-date the Glisson decision and the 2018 amendment to 42 U.S.C. § 672(c)(1)(A). See 7/29/21 Order, RE 57, Page ID # 1388-1390 (supporting holding with guidance that is neither legislative nor judicial). Indeed, when it comes to relative persuasive weight, it is axiomatic that policy manuals and informational memoranda are not comparable to unambiguous statutory language, binding U.S. Circuit Court precedent, and legislative clarifying amendments. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise

question at issue, that intention is the law and must be given effect.").[24] Thus, for example, since "[t]he Child Welfare Policy Manual . . . is not a product of notice and comment rulemaking," it is not entitled to deference over clear statutory language and binding precedent. See New York State Citizens' Coal. for Children v. Poole, 922 F.3d 69, 80 n.2 (2d Cir. 2019).

In any event, the federal guidance relied on by the District Court does not establish that a state's standards must be identical for both licensed and approved foster family homes. Rather, at most, it establishes that, consistent with 42 U.S.C. § 672 and this Court's decision in Glisson, states must apply the "same" set of state "licensing" standards for all licensed foster family homes and the "same" set of "approval" standards for all approved foster family homes. Notably, the Federal Regulations cited by the District Court explicitly track the statutory definition of "foster family home" that includes "approved" foster families that meet the standards the state has set for "approval," and thus do not support the District Court's interpretation. See, e.g., 65 Fed. Reg. 4020-4021, 4032-33 (Jan. 25, 2000)

[24] See also Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Relations Auth., 464 U.S. 89, 98 (1983) ("When an agency's decision is premised on its understanding of a specific congressional intent . . . it engages in the quintessential judicial function of deciding what a statute means . . . [and that interpretation] cannot bind a court."); United States v. 29 Cartons of * * * An Article of Food, 987 F.2d 33, 38 (1st Cir. 1993) (agency's interpretation of statute was not dispositive and presented "no occasion for deference" since the question was "purely legal" and "the courts, not the agency, have the last word" as to such matters).

("definition of 'foster family home' gives tribal licensing or approval authorities the jurisdiction to license or approve homes"); 77 Fed. Reg. 896-958, 899 (Jan. 6, 2012) ("Foster family home means, for purposes of Title IV-E eligibility, the home of an individual or family licensed *or approved* as meeting the standards established by the licensing *or approval* authority(ies)" and "[a]nything less than full licensure *or approval* is insufficient") (emphasis added); 45 C.F.R. § 1355.20(a) (2012) (same).[25]

To the extent that other materials cited by the District Court, such as the HHS Child Welfare Policy Manual, provide that "the statute and regulation require that the State use the same standards to license or approve all foster homes" (7/29/21 Order, RE 57, Page ID # 1384), they can only be reconciled with the intent and plain language of the statute as requiring that state standards be applied to all foster homes whether "licensed or approved" – including the explicit minimum baseline standards (e.g., safety standards) that must be met by *both* licensed non-relative *and* approved relative foster homes.[26] See, e.g., 42 U.S.C. § 671(a)(20) (specifically requiring

[25] The same is true of 65 Fed. Reg. 4020-4021, 4032-33 (Jan. 25, 2000), which repeats throughout that the law "requires a foster family home to meet all of the State requirements for full licensure *or approval*." Id. at 4033 (emphasis added).

[26] Similarly, the purpose of the December 2020 Information Memorandum cited by the District Court was to "encourage[] title IV-E agencies to make use of flexibilities and options within the title IV-E program to improve support for relatives and kin caring for children in foster care." (Information Memorandum, RE 50-2, Page ID # 1214 (Ex. B to Pls. Suppl. Mem.).) That is the context in which HHS encouraged foster families to become licensed. It did not, and could not, require licensure or bar entitlement to foster care maintenance payments for unlicensed but approved foster families approved under a State's own approval standards in contravention of 42

"criminal records checks" and "child abuse and neglect registry" checks before any prospective foster parent can be approved for placement of a child). Here, Plaintiffs have adequately and fully alleged that Plaintiffs' relative foster homes met the minimum safety standards under the federal statute (including 42 U.S.C. § 671(a)(20)), as well as all of Ohio's other standards for relative home approval. See Compl., RE 7, Page ID # 68-70, 74, at ¶¶ 16-18, 34.

Finally, there is no more explicit federal guidance as to Ohio's use of distinct licensing and approval standards, consistent with the statutory intent and binding Sixth Circuit precedent, than the federal government's *approval* of Ohio's State Plan that also tracks C.F.R. § 1355.20(a)'s definition of "foster family home." See State Plan, RE 50-1, Page ID # 1172 (Ex. A to Pls.' Suppl. Mem.,) ("[f]oster family home means, for the purpose of title IV–E eligibility, the home of an individual or family licensed *or approved* as meeting the standards established by the State/Tribal licensing *or approval* authority(ies)") (citing 45 C.F.R. § 1355.20(a)).[27] By approving Ohio's State Plan, the federal government has, by definition, found that Ohio's State Plan complies with 42 U.S.C. § 672, including the expansive federal definition of "foster family home" at 42 U.S.C. § 672(c)(1)(A) that includes all

U.S.C. § 672.

[27] See 7/29/21 Order, RE 57, Page ID # 1372 ("Ohio has an approved Title IV-E state plan that it last amended on January 11, 2018").

homes that are "licensed or approved" as "meet[ing] the standards established for the licensing or approval." See Glisson, 847 F.3d. at 383–84 ("the statute 'defines [foster family home] in sweeping language'") (quoting Youakim at 135).

To wit, the state plan section of the statute at 42 U.S.C. § 671 explicitly provides that:

> (a) In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which--
>
> (1) [P]rovides for foster care maintenance payments in accordance with section 672 of this title . . .
>
> (b) The Secretary *shall approve any plan which complies* with the provisions of subsection (a) of this section.

42 U.S.C. § 671 (emphasis added). In approving Ohio's State Plan, the federal government has thus approved Ohio's different standards for approval of relative foster homes as allowed under the statute.[28] Accordingly, as amply pled by Plaintiffs, once Ohio approved Plaintiff relative foster homes pursuant to its standards for such approval, and then placed Plaintiff relative foster children in such approved homes, Ohio was necessarily required to make foster care maintenance payments consistent with federal law and its State Plan. See Glisson, 847 F.3d at 379 ("once the Secretary approves the state's plan, the state '*shall* make foster care maintenance payments'")

[28] Indeed, Ohio has had such distinct approval standards since 2003. See Ohio Admin. Code 5101:2-42-18 ("approval of placements with relative and nonrelative substitute caregivers") (eff. 11-3-2003), 2003-04 OMR 990-991.

(citing 42 U.S.C. 672(a)(1)) (emphasis in original). The District Court's contrary conclusion – that "Plaintiffs who are relative caregivers are not 'licensed or approved' 'foster family homes' under Title IV-E and thus are not eligible for payments under Title IV-E" (7/29/21 Order, RE 57, Page ID # 1389) – directly contradicts 42 U.S.C. § 672, the terms of Ohio's approved State Plan, statutory intent, and binding Circuit precedent.

Plaintiffs in this action have adequately pled a claim for denial of their enforceable entitlement to foster care maintenance payments pursuant to 42 U.S.C. § 672 and 42 U.S.C. § 1983, and the District Court's contrary finding was error.

VII. CONCLUSION

As set forth above, the District Court's decision granting Defendant Damschroder's motion to dismiss for failure to state a claim should be reversed. Accordingly, the District Court's decisions denying as moot Plaintiffs' Motions for Class Certification and Preliminary Injunction should also be vacated.

Date: December 9, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)7 because it contains 11,304 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(4), (5), (6) 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 Office Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of December, 2021 a copy of the foregoing was filed and served via the Court's CM/ECF system. Service, which will send a notice of electronic filing and upon all counsel of record:

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ADDENDUM

PLAINTIFFS-APPELLANTS'
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