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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Jay R. Langenbahn
Lindhorst & Dreidame, Co., L.P.A
Trial Attorney for Plaintiffs
312 Walnut Street Suite 3100
Cincinnati, OH 45202
513-421-6630

Eric Thompson
Ira Lustbader
Stephanie Persson
Children's Rights
88 Pine Street, Suite 800
New York, NY 10005
212-683-2210

Julie A. Gryce
DLA Piper LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101-4297
619-699-2700

Richard F. Dawahare
Richard F. Dawahare, Esq.
3948 Palomar Blvd.
Lexington, Kentucky 40513
859-608-0200

Daniel Turinsky
Jonathan M. Kinney
DLA Piper LLP (US)
1251 Avenue of the Americas, 27th Fl.
New York, NY 10020-1104
212-335-4500

Paul B. Lewis
DLA Piper LLP (US)
33 Arch Street, 26th Floor
Boston, MA 02110
617-406-6070

Counsel for Plaintiffs/Appellants

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I. INTRODUCTION

Plaintiff-Appellants (hereinafter "Plaintiffs"), approved relative foster parents and foster children in state custody placed in their relatives' homes by the state child welfare agency, seek to have an Ohio state official, Defendant-Appellee Matthew Damschroder, director of the Ohio Department of Job and Family Services (hereinafter "Defendant"), end a continuing violation of federal law and comply with the provisions of 42 U.S.C. § 672 under Title IV-E of the Social Security Act.[1] Defendant's jurisdictional challenges have no merit. Plaintiffs' claims fall squarely within the long-standing Ex parte Young exception to sovereign immunity and therefore are not barred by the Eleventh Amendment. Ex parte Young, 209 U.S. 123, 159 (1908); Milliken v. Bradley, 433 U.S. 267, 289 (1977). Additionally, even if, as Defendant contends, the claims of one out of the four Named Plaintiff children and her relative Named Plaintiff foster parent became moot after her relative foster parent gained permanent custody, the claims of six other Named Plaintiffs – for whom Defendant does not dispute standing or jurisdiction – have standing to proceed. On the merits of this appeal, Defendant cannot escape the plain meaning of 42 U.S.C. § 672, establishing Plaintiffs' enforceable entitlement to the same Foster

[1] Plaintiffs do not appeal the dismissal of their claims as to Governor DeWine, who is thus no longer a party.

Care Maintenance Payments provided to licensed non-relative foster parents, an entitlement further supported by myriad evidence of Congressional intent.

II. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS

A. There Is No Eleventh Amendment Bar To Issuing The Prospective Injunctive And Declaratory Relief Plaintiffs Seek

It is well-established that, under Ex parte Young, "a federal court may, without violating the Eleventh Amendment, issue a prospective injunction against a state officer to end a continuing violation of federal law." Price v. Medicaid Dir., 838 F.3d 739, 746-47 (6th Cir. 2016) (citing Ex parte Young, 209 U.S. at 159). Thus, this Court has held that in suits "concerning a state's payment of public benefits under federal law," "a federal court may enjoin the state's officers to comply with federal law by awarding those benefits in a certain way going forward." Price, 838 F.3d at 747. That is precisely the subject of this case.

Here, Plaintiffs only seek to require Ohio to prospectively comply with 42 U.S.C. § 672 and provide eligible foster care children in state custody with Foster Care Maintenance Payments as mandated to meet their basic needs. (Compl. RE 7, Page ID # 87-88.) This statute undisputedly "confers a monetary entitlement upon qualified foster families" to receive public benefits under federal law. D.O. v. Glisson, 847 F.3d 374, 378 (6th Cir. 2017); see also Miller v. Youakim, 440 U.S. 125, 134 (1979). The District Court thus correctly determined that Plaintiffs "meet[ ] the requirements of the *Ex parte Young* exception because … [they] seek [only]

prospective injunctive and declaratory relief requiring Defendants, state officials in their official capacities, to comply with their alleged obligations under … [that] federal statute." (7/29/21 Order, RE 57, Page ID # 1378.) "That is the kind of prospective injunctive relief that Ex parte Young squarely permits." Price, 838 F.3d at 747 (sovereign immunity does not bar suits "concerning a state's payment of public benefits under federal law" going forward).

"[F]iscal consequences to state treasuries," as a result of prospective equitable relief, is the "permissible and often [ ] inevitable consequence of [this] principle." Edelman v. Jordan, 415 U.S. 651, 667-68 (1974); Papasan v. Allain, 478 U.S. 265, 278 (1986) ("relief that serves directly to bring an end to a present violation of federal law is not barred . . . *even though accompanied by a substantial ancillary effect on the state treasury*") (emphasis added). See also S & M Brands, Inc. v. Cooper, 527 F.3d 500, 507 (6th Cir. 2008) ("a federal court can issue prospective injunctive and declaratory relief compelling a state official to comply with federal law, regardless of whether compliance might have an ancillary effect on the state treasury") (citations omitted); Banas v. Dempsey, 742 F.2d 277, 285 (6th Cir. 1984) (Ex parte Young clearly permits injunctive relief to compel state officials to comply with federal law, even if the cost of that compliance requires the expenditure of money by the state), aff'd sub nom. Green v. Mansour, 474 U.S. 64 (1985); Coal. for Basic Hum. Needs v. King, 654 F.2d 838, 842 (1st Cir. 1981) (no Eleventh

Amendment bar to injunction regarding AFDC benefits and collecting cases that "required payment of money directly from a state treasury to bring about compliance with the requirements of a state-federal cooperative federalism program").

Defendant mischaracterizes the jurisprudential landscape by arguing that "[i]f the money is the focus, the Ex parte Young exception does not apply." Appellees' Brief at 42. The opinions upon which Defendant relies, however, are inapposite in that the circumstances they examined were retroactive and compensatory. Id. As such, those holdings do not apply here, where Plaintiffs seek relief from present and ongoing violations of federal law. For example, in Kelley v. Metro. Cty. Bd. of Educ. of Nashville & Davidson Cty., Tenn., 836 F.2d 986 (6th Cir. 1987), the Eleventh Amendment barred the suit because the School Board sought only "recovery of money from the state" in the form of "compensation," as opposed to "relief [ending a] violation of federal law." Id. at 989-91. See also, Barton v. Summers, 293 F.3d 944, 949 (6th Cir. 2002) (finding that suit seeking portion of state money due under a settlement agreement with tobacco manufacturers was "tantamount to an award of damages for a past violation of federal law"); Ernst v. Rising, 427 F.3d 351, 370-71 (6th Cir. 2005) (finding Eleventh Amendment applied where Plaintiffs sought a "direct monetary award" as opposed to a "request for equal welfare benefits," and where concerns were "compounded by the fact that this case does not present a mere going-forward welfare benefit problem" but had "backward-looking components.");

Diaz v. Michigan Dep't of Corr., 703 F.3d 956, 962, 964 (6th Cir. 2013) (holding that "Appellants do not have a right to sue state officials for monetary damages" and noting that "the Supreme Court and this Circuit barred suits *for damages* only, not for equitable relief") (emphasis in original).

Ultimately, where, as here, Plaintiffs seek only relief ordering that a public benefits program comply with federal law prospectively, the Eleventh Amendment does not bar Plaintiffs' claims. Price, 838 F.3d at 746-47.

B. The Named Plaintiffs' Claims Are Not Moot

Defendant only challenges as moot the claims of one child, B.F., and her relative foster mother, D.R., because D.R. ultimately gained permanent guardianship of B.F. As such, it is entirely unnecessary for this Court to examine the mootness question at all – because it is undisputed that at least six Named Plaintiffs have standing and an active case and controversy remains with respect to them.[2]

Moreover, even if this Court were to consider Defendant's limited mootness assertion, it would fail. Plaintiffs' claims in this putative class action seeking to resolve the claims of thousands of children in foster care and their relative foster parents fall within well-established exceptions to the mootness doctrine, because they are "inherently transitory" and "capable of repetition yet evading review." See,

[2] H.C., Y.C., and T.E. remain in state custody and in the care of their relative foster parents, T.M., K.T., and T.T.

e.g., Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 399, 404 & n.11 (1980); Sosna v. Iowa, 419 U.S. 393, 402 & n.11 (1975); Ball v. Wagers, 795 F.2d 579, 581 (6th Cir. 1986); Corrigan v. City of Newaygo, 55 F.3d 1211, 1213 (6th Cir. 1995*);* Brackeen v. Haaland, 994 F.3d 249, 371 n.14 (5th Cir. 2021) (finding "'capable of repetition, yet evading review' exception to mootness" applied where plaintiff's "adoption was 'in its duration too short to be fully litigated prior to [final disposition]'") (citation omitted). Children enter and leave foster care for a variety of reasons every day – e.g., being adopted, gaining permanency, or reaching the age of majority. In such cases, the named plaintiffs' standing and ability to represent the class relates back to the date the complaint was filed. See Cty. of Riverside v. McLaughlin, 500 U.S. 44, 51-52 (1991); Geraghty, 445 U.S. at 398-99; Sosna, 419 U.S. at 402 & n.11; Gerstein, 420 U.S. at 110 & n.11; see, e.g., Marisol A. v. Giuliani, No. 95 Civ. 10533(RJW), 1998 WL 265123, at *7 (S.D.N.Y. May 22, 1998) (claims of foster children are "inherently transitory" because "[c]hildren enter and leave the system all the time[,]" thus "class certification [for named plaintiff] relates back to the filing of the complaint").

There is no bar to this Court's jurisdiction.

III. DEFENDANT'S ARGUMENTS ON THE MERITS FAIL

A. The Plain Meaning Of 42 U.S.C. § 672 Controls

42 U.S.C. § 672 requires "[e]ach State with a plan approved under this part [to] make foster care maintenance payments on behalf of *each* child . . . placed in a foster family home," further defined as a home "that is licensed *or approved* by the State in which it is situated as a foster family home that meets the standards established for the licensing *or approval*." 42 U.S.C. §§ 672(a)(1), (2)(C), (c)(1)(A)(i) (emphasis added). See Appellants' Opening Br. (hereinafter "Opening Br.") at 17-18, 24-25. Defendant does not dispute, nor could he, that (i) Ohio has an approved Title IV-E state plan, and (ii) Defendant placed the Plaintiff children in foster homes the state approved pursuant to its own standards established for such approval.[3] See Opening Br. at 5-6, 18-20, 26-28. Instead, Defendant functionally argues that Section 672 does not mean what it literally says, and therefore that the statute's "or approved[/al]" provision does not have anything to do with the state's actual approval process. The District Court adopted this error as well.[4]

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[3] 42 U.S.C. § 671(a)(10)(A) requires a state's Title IV-E plan to provide for the establishment or designation of a state authority with responsibility for establishing and maintaining standards for foster family homes. In Ohio, that authority is the Ohio Department of Job and Family Services.

[4] The District Court erroneously held that the term, "or approved" *should not* be interpreted in accordance with its plain meaning. (See 7/29/21 Order, RE 57, Page ID # 1389 ("[c]aregivers who may be approved as relative foster caregivers as the term 'approved' is used under Ohio Administrative Code § 5101:2-42-18, or used colloquially, . . . are not [necessarily] 'approved' under 42 U.S.C. § 672").)

Defendant first argues that the statute's twice-repeated phrase, "or approved[/al]," should not be given any independent meaning or effect. See Appellees' Br. at 44-45 (suggesting that "the phrases 'licensed . . . by the state' and 'approved by the state'" are "coextensive" and arguing that "Congress's inclusion of 'or approved' [simply] accommodates the varying terms that States use for licensure"). Contrary to fundamental canons of both statutory construction and the English language (see Opening Br. at 31), Defendant suggests that this is one of the rare and unique circumstances in which "surplusage" is acceptable. See Appellees' Br. at 44 ("[t]his is one . . . instance" in which the interpretation with "redundancy" makes more sense than the interpretation without it).

However, it is well established that "[t]he plain, commonsense meaning of a statute controls absent ambiguity or some result 'demonstrably at odds' with the drafter's intent." United States v. Moore, 73 F.3d 666, 668 (6th Cir. 1996) (quoting Kelley v. E.I. DuPont de Nemours and Co., 17 F.3d 836, 842 (6th Cir. 1994)); see also Fed. Energy Reg. Comm'n v. Martin Expl. Mgmt. Co., 486 U.S. 204, 209 (1988) ("The plain meaning of the statute decides the issue presented."). Although (as Defendant acknowledges) "the rule against surplusage is not *always* 'a silver bullet,'" this Circuit has specifically held that the "use of the word 'or'" clearly "provides two *distinct*" and analytically independent subcategories. United States v. Pritchard, 964 F.3d 513, 519 n.1 (6th Cir. 2020) (brackets and citation omitted)

(emphasis added).[5] This is consistent with Supreme Court guidance on this very subject. See United States v. Woods, 571 U.S. 31, 45 (2013) (instructing that the terms on either side of an "or" are almost always "to be given separate meanings") (internal quotations omitted); see also Opening Br. at 25 (citing additional cases). Indeed, as even Defendant recognizes (see Appellees' Br. at 40), Courts "assume that Congress adopts the customary meaning of the terms it uses." Price, 901 F.3d at 750.

The cases upon which Defendant relies to avoid the plain meeting of 42 U.S.C. § 672 are unavailing, as they concern statutes in which surplusage was deemed common and unavoidable. See Appellees' Br. at 44-45 (citing Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 881 (2019) (declining to find redundancy dispositive in costs statute where "redundancy is 'hardly unusual'")); Marx v. Gen. Revenue Corp., 568 U.S. 371, 385 (2013) (finding "no interpretation [of costs statute] gives effect to every word"); Barton v. Barr, 140 S. Ct. 1442, 1453 (2020) (surplusage not dispositive where all potential statutory interpretations resulted in redundancies). The statute at hand presents no such issues.

[5] Notably, for both 42 U.S.C. § 672(c)(1)(A) and the statutory subsection examined in Pritchard, the terms at issue are not defined therein. See United States v. Pritchard, 964 F.3d 513, 519 (6th Cir. 2020) (confirming that the statute "does not define [these] terms" (internal quotation and citation omitted)).

Moreover, even assuming, *arguendo*, that any ambiguity exists in Section 672, "[i]f 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." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); Bevan & Assocs., LPA v. Yost, 929 F.3d 366, 375 (6th Cir. 2019) ("When confronted with an argument over the meaning of a statute, this court's paramount concern is the legislative intent of its enactment.") (internal quotation and citation omitted). Here, *Congress's intent is clear*, as has already been ascertained by both this Circuit and the Supreme Court. See Opening Br. at 24-27 (citing D.O. v. Glisson, 847 F.3d 374, 382-383 (6th Cir. 2017) (holding that 42 U.S.C. § 672(c)(1)(A)(i) "contemplates two categories of foster families," where Congress included the second category of "approved" foster family homes that "*allows states to place children with unlicensed relatives*" in order to "[r]eflect[ ] Congress's preference that children live with family members") (emphasis added)), and Opening Br. at 28-29 (citing Miller v. Youakim, 440 U.S. 125, 134, 139-41 (1979)) ("by including an approval procedure," Congress "meant to encompass foster homes not subject to State licensing requirements, in particular, related foster homes" (citing S. Rep. No. 165, at 6; 107 Cong. Rec 6388 (1961) (remarks of Sen. Byrd)).

Congress's intent has also been confirmed by a recent clarifying amendment to the statute adding the second "or approval" to the end of 42 U.S.C. § 672(c)(1)(A)(i)), which was accompanied by a note that such legislation will assist "relatives who seek to take in children rather than have them end up in [un-related] foster care." See Opening Br. at 30-31 (citing 164 Cong. Rec. S799-01, S800 (daily ed. Feb. 8, 2018)). Clearly, Congress did not consider the use of "or approval" redundant, finding it worthy of its first amendment in decades to the definition of "foster family home" at 42 U.S.C. § 672(c)(1)(A)(i). See Glisson, 847 F.3d at 384 (Congress had not "modified the definition of 'foster family home' that the [Supreme] Court interpreted in *Youakim*"). See generally, United States v. Breeding, 109 F.3d 308, 311 (6th Cir. 1997) ("Congress may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases[,]" while noting that "an amendment to a statute does not necessarily indicate that the unamended statute means the opposite") (internal quotations and citations omitted)); see also Opening Br. at 30, footnote 18 (citing additional cases). Indeed, such clarification served to further Congress's well-recognized goal of placing children with relatives to the extent possible, confirming that as approved relatives they are entitled to the same full Foster Care Maintenance Payments as licensed non-relatives.[6] See Opening Br. at 25. Defendant does not offer an alternative explanation

[6] Defendant's argument that Plaintiffs' interpretation of 42 U.S.C. § 672(c)(1)(A)(i)

as to why Congress might have made this change to 42 U.S.C. § 672(c)(1)(A)(i) in 2018. This is, of course, because no alternative explanation exists.

Finally, in light of the plain meaning of the statute and consistent with Congressional intent, Defendant is misplaced in his repeated reliance on the same non-statutory materials that were erroneously cited by the District Court for the proposition that licensed foster family homes and approved foster family homes must both comply with one set of "the same" and "identical" licensing standards to be covered by the statute. Appellees' Br. at 7, 21, 41, 50 (citing Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4032 (January 25, 2000); U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE POLICY MANUAL §8.3A.8(c), question 5, (2021); 65 Fed. Reg. 4020)). In fact, the federal regulations Defendant cites are, instead, consistent with a statutory definition of "foster family home" that *includes* "approved" foster families. See, e.g., 65 Fed. Reg. 4020, 4034 (Jan. 25, 2000) ("definition of 'foster family home' gives tribal licensing or approval authorities the jurisdiction to license *or approve* homes") (emphasis added); 45 C.F.R. § 1355.20(a)

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would lead to a result that is "contrary to congressional intent" is thus legally as well as factually risible. See Appellees' Br. at 46, 50. As should be obvious, if foster children placed in relative foster homes are thereby denied the protections and support Title IV-E provides, then it necessarily follows that such a practice is inconsistent with the statutory preference for placing foster children with approved (yet non-licensed) relative foster caregivers.

(2012) ("Anything less than full licensure *or approval* is insufficient for meeting title IV–E eligibility requirements.") (emphasis added); 65 Fed. Reg. 4020, 4033 (Jan. 25, 2000) (repeating throughout that the law "requires a foster family home to meet all of the State requirements for full licensure *or approval*") (emphasis added). See also Opening Br. at 38-41.

Importantly, to the extent that the HHS Child Welfare Policy Manual calls for states to use "the same standards to license or approve all foster homes" (Appellees' Br. at 7), it can only be reconciled with the intent and plain language of the statute as requiring that the "same" sets of standards for "licensing or approval" as applicable (such as in a state like Ohio that has different standards for licensure and approval) be applied to all foster homes whether "licensed or approved." Additionally, the "same" statutorily enumerated minimum baseline safety standards must be met by all foster homes. See, e.g., 42 U.S.C. § 671(a)(20)(A)-(C) (specifically requiring "criminal records checks" and "child abuse and neglect registry" checks before *any* prospective foster parent can be approved for placement of a child); Opening Br. at 32-33, 36-37, 40-42. Defendant's focus on Ohio's purportedly "less-rigorous" "safety" standards notwithstanding (see Appellees' Br. at 42-43), there is no dispute in the record that Ohio's standards for approval of relative foster homes meet Title IV-E's minimum safety requirements enumerated at 42 U.S.C. § 671(a)(20)(A)-(C). To state otherwise would be to claim that Ohio

systematically violates § 671(a)(20)(A)-(C) for children in the custody of the state's IV-E agency and thereby puts them at risk.

Accordingly, Defendant cannot escape Title IV-E's unambiguous mandate that *all* foster children must be placed in homes 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)(i). Indeed, 42 U.S.C. §§ 672(a)(1), (2)(C), and 672 (c)(1)(A)(i) clearly and unambiguously mandate that "[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 . . . into foster care . . .[,]" where "the child has been placed in a foster family home" that is "licensed or approved by the state" under the "standards established for the licensing or approval (emphasis added)."[7] Here, there is no dispute that the Plaintiff children in Defendant's agency's custody were all placed in approved foster homes under Ohio's long-established approval

[7] While Defendant warns that enforcing 42 U.S.C. § 672 could also "upend" other state systems that may similarly not pay Foster Care Maintenance Payments, Appellees' Br. at 46-47, what other states may or may not be doing to comply with Title IV-E is irrelevant to whether Ohio is in compliance. Whatley v. Zatecky, 833 F.3d 762, 782 (7th Cir. 2016) ("[I]t is irrelevant that no one has challenged the statutes of other states . . . . It is the particular language of [this state's] statute that is at issue here. . . ."). The only case Defendants cite on this point is inapposite. In Lipscomb By & Through DeFehr v. Simmons, 962 F.2d 1374, 1376-77 (9th Cir. 1992), the Ninth Circuit only considered the Constitutionality of Oregon's separate state program for support to relative foster caregivers, and no effort was "made to resolve the question on statutory grounds, as was the case in *Miller v. Youakim*." Id. (citing *Youakim*, 440 U.S. 125).

standards and that Plaintiffs are otherwise Title IV-E eligible. Opening Br. at 11-14, 23.

B. Ohio Cannot Circumvent Federal Law By Operating A Self-Declared "Separate" Non-Title IV-E Compliant "State System" For The Plaintiff Class Of Foster Children

Defendant extends his arguments and the errors of the District Court below to their logical (and nonsensical) conclusion by arguing that Ohio should be permitted to "operate[] two foster-care systems" – one that complies with Title IV-E's requirements and another "separate" state system that exists entirely outside of federal law for the Plaintiff class of foster children in Defendant agency's custody who are placed with relatives. See Appellees' Br. 9-12, 14-16, 39, 46-47. Defendant asserts that the existence of this latter state system allows Ohio to place Title IV-E-eligible foster children in state custody, including Plaintiffs, in relative foster homes approved by the state without providing Title IV-E "licensing or approval" of such foster homes or *any* other federal protections and benefits required by Title IV-E. See Appellees' Br. at 10-11, 41, 43. Predictably, Defendant cannot cite any statutory or prudential basis allowing for the operation of his proposed "separate" State System of foster care outside of federal law. This is unsurprising given that the state has opted into Title IV-E and that Section 672 clearly mandates for "each child" the same Foster Care Maintenance Payments whether to approved relatives or licensed non-relatives.

1. Ohio, Having Opted Into Title IV-E With An Approved State Plan, Cannot Opt Out Of Title IV-E Mandates As To The Plaintiff Class Of Foster Children

It is undisputed that "Ohio has an approved Title IV-E state plan," and therefore that "Ohio has thus agreed to be bound by all of the federal requirements under Title IV-E." See Opening Br. at 5-6 (citing 7/29/21 Order, RE 57, Page ID # 1372). Neither Title IV-E nor Ohio's approved state plan provide or allow for the state to opt-out of any mandatory provisions. (See generally, State Plan, RE 50-1.) Nor does Title IV-E permit a state to exclude any class of children once that state opts into the Title IV-E program. Quite the opposite. As even Defendant recognizes, 42 U.S.C. § 671(a)(10)(B) requires that "the standards established pursuant to subparagraph (A) *shall* be applied by the State to *any* foster family home . . . (emphasis added)."[8] See Appellees' Br. at 40.

Once "the Secretary approves [a] state's plan" – as it did here most recently on January 11, 2018 (Opening Br. at 5-6, 17) – the state is obligated to make foster care maintenance payments. D.O. v. Glisson, 847 F.3d 374, 378-79 (6th Cir. 2017)

[8] Where Congress intended to provide states with options under Title IV-E, it did so clearly. See, e.g., 42 U.S.C. § 671(a)(28) ("at the option of the State," a plan may provide "for the State to enter into kinship guardianship assistance agreements to provide kinship guardianship assistance payments on behalf of children to grandparents and other relatives . . . ."). The provision for foster care maintenance payments gives no such discretion: "Each State with a plan approved under this part *shall* make foster care maintenance payments . . . ." 42 U.S.C. § 672(a)(1) (emphasis added).

("[i]t isn't optional") (citing 42 U.S.C. § 672(a)(1)). Once triggered, "strict[ ] compl[iance]" with the obligation to pay for all of the statutorily enumerated items is absolutely mandatory. Cal. All. of Child & Fam. Servs. v. Allenby, 589 F.3d 1017, 1022 (9th Cir. 2009) (even "substantial compliance" will not suffice). Within a given state, the cost of the items listed in 42 U.S.C. § 675(4)(A) cannot vary with the type of home in which children are placed. See id. at 1021 (a state's providing only "partial[ ] cover[age] [of] the cost" of the statutorily enumerated items necessarily "runs afoul of the CWA's mandate"); Youakim v. Miller, 431 F. Supp. 40, 43 (N.D. Ill. 1976) ("*all* wards of the state placed in approved foster homes are eligible for *full* . . . payments" (emphasis added)); see also Opening Br. at 16-23.

Thus, Defendant's argument that Ohio's recently-enacted "Kinship Support Program" somehow absolves the state of its violation of federal law must fail. See Appellees' Br. at 51. There is no dispute that the potential benefits under that program are woefully unequal to the value of the Foster Care Maintenance Payments required by Title IV-E. (See Opening Br. at 21-22; 7/29/21 Order, RE 57, Page ID # 1391-1392.) Ohio's "Kinship Support Program" for relatives, like the state's Ohio Works First benefits program, offers grossly unequal and inadequate payments compared to the Foster Care Maintenance Payments provided to licensed non-relative foster parents, which payments are also time-limited, lack any allowance for special needs, and are disbursed only if funds are available. See Ohio Rev. Code §§

5101.885, 5101.886. (See also 7/29/21 Order, RE 57, Page ID # 1391.) As a matter of law, "the provision of additional payments, reimbursements, and benefits" unquestionably *does not* "excuse a state from meeting its obligations under the CWA to pay for all of the costs enumerated in § 675(4)(A)." See Ah Chong v. McManaman, 154 F. Supp. 3d 1043, 1054 (D. Haw. 2015). And, as stated by this Court, "[t]o the extent the Cabinet's failure to make maintenance payments turns on the distinction between relative and non-relative foster care providers, it plainly violates federal law." D.O. v. Glisson, 847 F.3d 374, 383 (6th Cir. 2017).

2. Ohio Cannot Evade Providing Federally Mandated Title IV-E Protections And Entitlements For Foster Children By Simply Placing Them With Relatives And Calling It A "Separate State System"

Defendant's novel notion of a separate "State System" for foster children placed in approved relative foster homes in state custody is nothing more than a fiction invented for the purposes of this litigation. See Appellees' Br. at 9-12, 14-16. To be clear, the true beneficiaries of the statutory entitlement are the *children*.[9] See D.O. v. Glisson, 847 F.3d 374, 377 (6th Cir. 2017) ("[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 . . . into foster care") (emphasis added) (citing 42

[9] Appellees' brief completely glosses over this fact. See, e.g., Appellees' Br. at 10 (implying that Ohio's system is only set up for "foster *caregivers*") (emphasis added).

U.S.C. § 672(a)(1)). And, as the Supreme Court has already recognized, "all dependent foster children are similarly in need of [ ] protections and monetary benefits." Miller v. Youakim, 440 U.S. 125, 144 (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*." See id. at 134, 139 (1979) (citing S. Rep. No. 165, at 6; 107 Cong. Rec. 6388 (1961) (remarks of S. Byrd)) (emphasis added). Thus, the children's entitlement to the statutory benefit simply does not, and cannot, depend on the type of home into which they happen to be placed by decision of the state. See id. at 140 (the rights of foster children cannot "depend on the happenstance of where they are placed").

Indeed, instead of creating a "separate" state system for children placed with unlicensed relatives as Defendant argues (See Appellees' Br. at 11, citing Ohio Admin. Code § 5101:2-42-18 as governing the "State System"), Ohio state statutes implementing Ohio's approved Title IV-E State Plan *and referenced therein* permit children to be placed in "care settings that are licensed, certified *or approved* by the agency of the state having responsibility for licensing, certifying *or approving* facilities of the type in which the child is placed." Ohio Admin. Code 5101:2-42-05 (emphasis added); see, e.g., State Plan, RE 50-1, Page ID # 1178 (referencing Ohio

Admin. Code 5101:2-42-05 for compliance with 42 U.S.C. § 671(a)(19)'s federal preference for kin placements, "provided that the relative caregiver meets all State/Tribal child protection standards"); see also State Plan, RE 50-1, Page ID # 1114 (citing Ohio Admin. Code 5101:2-42-05 for compliance with 42 U.S.C. § 675(1)(A), requiring discussion of safety and appropriateness of child placement in individual case plans). Section 5101:2-42-05 states that foster children shall only be placed in "homes of relative or non-relatives approved . . . in accordance with rule 5101:2-42-18 of the Administrative Code." Yet Ohio Administrative Code § 5101:2-42-18 is the very provision Defendant cites in support of his contention that Ohio operates a wholly separate "State System" for relative caregivers (Appellees' Br. at 11, 41-42). Clearly, Ohio's approval process and standards for relative homes are not "separate" from its Title IV-E plan at all, but inextricably intertwined with it.

Ohio has simply exercised its discretion and "substantial flexibility" under Title IV-E that even Defendant recognizes (Appellees' Br. at 45), to "establish[] and maintain[] [its own] standards," for the "licensing or approval" of foster homes, consistent with best practices. 42 U.S.C. § 671(a)(10)(A), § 672(c)(1)(A)(i). Ohio's decision to establish licensing standards for unrelated foster homes, and different approval standards for kinship homes, comports with Title IV-E *as long as both meet the minimum federally-required safety standards* designated at 42 U.S.C. § 671 (a)(20)(A)-(C).

Defendant's additional contention that this amounts to an impermissible "blanket waiver" of required Title IV-E standards (Appellee's Br. at 49-50) is thus both illogical and wrong. Plaintiffs seek no waiver (blanket or case-specific) because a waiver is not needed. Plaintiffs have met Ohio's approval standards, which Ohio is entitled to set separately from its licensing requirements, as long as they comply with the Title IV-E minimum safety requirements, which is undisputed. Such a dual standards structure falls squarely within Ohio's Title IV-E discretion, its approved State Plan provisions, and its related Administrative Code sections.[10] See Opening Br. at 41-43.

[10] Defendant's additional argument that the provisions of 42 U.S.C. § 671(a)(10)(A) requiring that the state plan include foster home "standards . . . reasonably in accord with recommended standards of national organizations" somehow bars Plaintiffs from Title IV-E benefits because their placements were approved by Ohio under standards that do not comply with Title IV-E's state plan requirements is similarly unavailing. See Appellees' Br. at 20-21, 39-40, 49. As established above, Ohio has in fact approved Plaintiffs' placements under established state approval standards that are not only permissible under Title IV-E, but part of its approved State Plan. In any event, even Defendant recognizes that Section 671 governs state federal reimbursements – not individual eligibility for Foster Care Maintenance Payments under Section 672. See, e.g., Appellees' Br. at 6-8 ("States must" comply with Section 671 "[t]o be eligible for federal foster-care assistance"); see also D.O. v. Glisson, 847 F.3d 374, 376, 379 (6th Cir. 2017) (citing Section 671 for what "a state must" do "to be eligible for federal funds" in partial reimbursement for required Title IV-E payments, while as to the entitlement, "[n]othing in § 672(a) mentions funding"). It is thus also a mischaracterization to say that "foster family home[s]" receive "Title IV-E funds." Appellees' Br. at 7. Under Title IV-E, foster families receive state funds on behalf of foster children from the participating state, such as Ohio. The burden is then placed upon the state to seek partial federal reimbursement.

Indeed, this is precisely what this Court in Glisson recognized and endorsed as being consistent with Title IV-E requirements. See D.O. v. Glisson, 847 F.3d 374, 383 (6th Cir. 2017) ("the Act allows states to place children with unlicensed relatives" who are "approved" per the state's approval standards); see also Miller v. Youakim, 440 U.S. 125, 141 (1979) ("by including an approval procedure," Congress "meant to encompass foster homes not subject to State licensing requirements in particular, related foster homes"). In Glisson, this Court noted that, prior to placement, the Kentucky Cabinet verified that the relative foster parent R.O. met all relevant safety standards by conducting a home evaluation and a background check. See D.O. v. Glisson, 847 F.3d at 384. After determining that R.O.'s home was sufficiently safe per Kentucky's relevant state safety standards, the family court moved the children from another foster provider to R.O.'s care. See id. at 383. Ultimately, this Court concluded that, because the Cabinet "conducted a standard home evaluation and criminal background check on R.O." prior to delivering the children to her care, R.O. "is an approved foster care provider" entitled to Foster Care Maintenance Payments. See id. at 384.

The present case is indistinguishable from Glisson. As in Glisson, it is undisputed here that Ohio approved Plaintiffs' foster homes per its applicable safety standards set for such approvals. (See Compl., RE 7, Page ID # 68-70, 74, at ¶¶ 16-18, 34.) And, as established above and by this Court in *Glisson*, state approval short

of full licensure is sufficient under Title IV-E to require Foster Care Maintenance Payments. See D.O. v. Glisson, 847 F.3d at 384; 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); see also, e.g., 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* [plaintiff's] foster home placement," and an "approved foster home" necessarily suffices to qualify the foster home for full foster care maintenance payments) (emphasis added)).

IV. CONCLUSION

For the reasons set forth in Plaintiffs' Opening Brief and this Reply, Ohio is in violation of the clear mandate of 42 U.S.C. § 672 and the District Court's decision granting Defendant Damschroder's motion to dismiss should be reversed. Accordingly, the District Court's decisions denying as moot Plaintiffs' Motions for Class Certification and Preliminary Injunction should also be vacated.

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Respectfully submitted,

/s/ Jay R. Langenbahn (# 0009460)
Jay R. Langenbahn
LINDHORST & DREIDAME, CO., L.P.A
Trial Attorney for Plaintiffs
312 Walnut Street Suite 3100
Cincinnati, OH 45202
513-421-6630
jlangenbahn@lindhorstlaw.com

/s/ Richard F. Dawahare. Ky. Bar #17273
Richard F. Dawahare
RICHARD F. DAWAHARE, ESQ.
3948 Palomar Blvd.
Lexington, Kentucky 40513
859-608-0200
rfdr@msn.com

/s/ Eric Thompson
Eric Thompson
Ira Lustbader
Stephanie Persson
CHILDREN'S RIGHTS
88 Pine Street, Suite 800
New York, NY 10005
212-683-2210
ethompson@childrensrights.org
ilustbader@childrensrights.org
spersson@childrensrights.org

/s/ Daniel Turinsky
Daniel Turinsky
Jonathan M. Kinney
DLA PIPER LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, NY 10020-1104
212-335-4500
daniel.turinsky@us.dlapiper.com

jonathan.kinney@us.dlapiper.com

/s/ Julie A. Gryce
Julie A. Gryce
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101-4297
619-699-2700
julie.gryce@us.dlapiper.com

/s/ Paul B. Lewis
Paul B. Lewis
DLA PIPER LLP (US)
33 Arch Street, 26th Floor
Boston, MA 02110
617-406-6070
paul.lewis@us.dlapiper.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)7 because it contains 5,866 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.

/s/ Daniel Turinsky
Daniel Turinsky

Counsel for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of March, 2022 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:

Benjamin Flowers
benjamin.flowers@ohioago.gov
Mathura Sridharan
mathura.sridharan@ohioago.gov
Richard Dawahare
rfdr@msn.com
Eric Thompson
ethompson@childrensrights.org
Jay Langenbahn
jlangenbahn@lindhorstlaw.com
Stephanie Persson
spersson@childrensrights.org
Ira Lustbader
ilustbader@childrensrights.org
Jonathan Kinney
jonathan.kinney@us.dlapiper.com
Julie Gryce
julie.gryce@us.dlapiper.com
Paul Lewis
paul.lewis@us.dlapiper.com
Daniel Turinsky
daniel.turinsky@us.dlapiper.com

/s/ Daniel Turinsky
Daniel Turinsky

Counsel for Plaintiffs/Appellants

ADDENDUM

PLAINTIFFS-APPELLANTS' DESIGNATION OF THE RECORD ON APPEAL IN SUPPORT OF APPELLANTS' REPLY BRIEF

DESCRIPTION OF ENTRY	RECORD ENTRY	PAGE ID RANGE
Complaint	7	62-89
State Plan	50-1	1090-1212
Order	57	1364-1392