No. 19-574

In The Supreme Court of the United States

SHEILA J. POOLE, Commissioner of the New York State Office of Children & Family Services,
Petitioner,

v.

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR *AMICI CURIAE* STATES OF CONNECTICUT, ALASKA, ARIZONA, COLORADO, DELAWARE, DISTRICT OF COLUMBIA, HAWAI'I, IDAHO, ILLINOIS, INDIANA, MAINE, MICHIGAN, MISSISSIPPI, NEVADA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA IN SUPPORT OF PETITIONER

WILLIAM TONG
Attorney General
State of Connecticut
CLARE E. KINDALL
*Solicitor General**
BENJAMIN ZIVYON
MICHAEL BESSO
CAROLYN SIGNORELLI
EVAN O'ROARK
SARA NADIM
Assistant Attorneys General

165 Capitol Avenue
Hartford, Connecticut 06106
(860) 808-5261
Clare.Kindall@ct.gov

Counsel for Amicus Curiae
State of Connecticut

**Counsel of Record*

[Additional Counsel Listed At End Of Brief]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

The *amici* States, like all States, administer foster care programs through the expenditure of state funds. Under its spending power, Congress—in the Adoption Assistance and Child Welfare Act of 1980 (CWA), 42 U.S.C. § 670, *et seq*.—adopted Title IV-E of the Social Security Act to reimburse States for certain eligible foster care payments. These partial reimbursements, made pursuant to 42 U.S.C. §§ 670-679, are available only for certain types of expenses that are made on behalf of particular foster children. These reimbursements concern and cover only a fraction of the costs of a State's foster care system.

The *amici* States have an interest in ensuring that this Spending Clause legislation is interpreted in a manner that supports rather than disrupts the operation of this quintessentially state-level program. In particular, the *amici* States have an interest in retaining control over their foster care programs and not having their spending priorities overridden by federal courts based on a statute that does not clearly and unambiguously create privately enforceable rights.[1]

[1] Pursuant to Rule 37.2(a), counsel of record for the parties were notified of the States' intent to file this *amicus curiae* brief. Although not required by operation of Rule 37.4, counsel also consented to the filing of this brief.

SUMMARY OF ARGUMENT

The *amici* States respectfully request that the Court grant the petition and hold that the CWA does not create an individual cause of action that would embroil courts in the business of setting foster care maintenance payments. Congress enacted the CWA not to displace the States' role as primary decision maker with respect to foster care services, but to provide funds to help States carry out that responsibility. The Second Circuit's decision, like earlier ones in the Sixth and Ninth Circuits; *see D.O. v. Glisson*, 847 F.3d 374, 378 (6th Cir.), *cert. denied*, 138 S. Ct. 316 (2017) (recognizing private right of action); *California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 982 (9th Cir. 2010) (same); inverts the congressional plan and deeply intrudes on state prerogatives.

In the wake of the Sixth and Ninth Circuit decisions, district courts are already facing demands to undertake intrusive management of state systems for foster care payments. This litigation not only involves lower courts in disputes about foster care payments, it also interferes with state policymaking regarding how best to design and manage each State's respective foster care system. For example, the imposition of additional obligations on States beyond what is clearly and unambiguously included in the text of the CWA entails expenditures of additional state funds, which may not be reimbursed later by the federal government. Lawsuits that force the reallocation of state funds from one aspect of the foster care system

into others distort States' foster care policies and impair their ability to operate and manage their respective foster care systems. The issue before this Court, whether States may be sued under 42 U.S.C. § 1983 by persons seeking to receive additional foster care payments, therefore has profound practical importance and grave federalism implications.

The *amici* States also agree fully with New York's argument that the division among the circuits is deepened by the Second Circuit's decision here. This division on the existence of a private right under the CWA and a private cause of action is sufficiently ripe and entrenched to warrant this Court's immediate consideration.

REASONS FOR GRANTING THE PETITION

I. Whether the Adoption Assistance and Child Welfare Act of 1980 Creates a Private Right to Receive Foster Care Maintenance Payments and Creates a Private Cause of Action Are Matters of Great Importance to the *Amici* States.

States have long possessed primary authority over our nation's foster care systems. Congress did not limit that authority when it enacted the CWA in 1980. Rather, as New York explains (Pet. 6-8), the CWA simply created a mechanism through which the federal government would reimburse the States for some of their foster care expenditures. The law did not create

private rights and did not, therefore, create a private right of action against the States.

It is well established that Congress's exercise of its Spending Clause power does not necessarily entail authorization for private parties to undertake litigation pursuant to the federal law. To the contrary, this Court presumes that such legislation does *not* create a privately enforceable right. In *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), the Court explained that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Id.* at 28. To overcome this presumption, Congress must have created a right "in clear and unambiguous terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002). Indeed, as *Gonzaga* notes, only twice since *Pennhurst* has the Supreme Court found spending legislation to give rise to enforceable rights. 536 U.S. at 280. Furthermore, four years ago this Court affirmed that it would not find an unenumerated right of action unless the text and structure of a statute show an unambiguous intent to create one. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1387-88 (2015) (plurality op.). Yet nothing in the CWA refers to foster care maintenance payments as a "right." The CWA's foster care maintenance provisions do not at all contain the "'*unmistakable focus* on the benefited class'" that is present in, for example, Title VI of the Civil Rights Act

of 1964 and Title IX of the Education Amendments of 1972. *See Gonzaga Univ.*, 536 U.S. at 284 (emphasis in original) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979)). To reiterate, and as *Armstrong* affirmed from *Gonzaga*: "Our precedents establish that a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred.'" 135 S. Ct. at 1387-88 (plurality op.) (quoting *Gonzaga*, 536 U.S. at 283).

By reading the CWA to nonetheless create private rights and a concomitant private right of action, the Second Circuit—along with the Sixth and Ninth Circuits—have not merely misapplied this Court's Spending Clause jurisprudence. They have undermined the traditional state-federal balance in the foster care system, producing wasteful litigation and judicial micromanagement of state foster care systems. This Court should not let that result stand.

A. The Second Circuit's Decision Invites Unwarranted Litigation and Federal Judicial Interference with State Foster Care Systems.

The Second Circuit's declaration that the CWA provides an individual, private cause of action invites unwarranted litigation and judicial interference with state foster care systems, thereby undermining fundamental principles of federalism. The Second Circuit decision—and those of the Sixth and Ninth Circuits—authorize courts to interfere with States'

ability to implement foster care policy and operate their foster care systems. Litigation in states in the wake of the Ninth Circuit's decision in *Wagner, supra*, reveals the significant intrusion that follows from private causes of action and individualized demands for payments from the state foster care system. *See*, *e.g.*, *Ah Chong v. McManaman*, 154 F. Supp. 3d 1043 (D. Haw. 2015). Foster parents are demanding that federal courts make *individualized determinations* of the payments that are due *per foster child*. *See*, *e.g.*, *id*. at 1062 ("this Court will determine what the foster care maintenance payment would have been *for each of the children*") (emphasis added). This simply cannot have been Congress's intent when it enacted the CWA.

This invitation to litigation is not insignificant. Judge Livingston, in her dissent in the decision below, already noted one effect on foster care systems of privately initiated litigation: "the majority's decision raises the prospect that scarce foster care resources, instead of going to foster children, will be squandered in litigation destined to produce arbitrary and inconsistent results." Pet. App. 54a-55a (Livingston, J., dissenting). Since the Sixth and Ninth Circuit decisions in *Glisson* and *Wagner*, there have been numerous suits filed by foster parents that require district courts to micromanage the administration of state foster care systems. *See*, *e.g.*, *Lamaster v. Indiana Dep't of Child Servs.*, No. 4:18CV029RLYDML, 2019 WL 1282043 (S.D. Ind., Mar. 20, 2019) (relying in part on *Glisson* in recognizing enforceable right to foster care maintenance payments and therefore denying

motion to dismiss claim); *Ah Chong v. McManaman*, 154 F. Supp. 3d at 1050, 1061-62 (denying Hawaii's motion for summary judgment, in part, thereby allowing class action and individual suits for foster care maintenance payments to proceed to trial); *Foster Parents Ass'n of Washington State v. Dreyfus*, No. C11-5051 BHS, 2013 WL 496062 (W.D. Wash. Feb. 7, 2013), order clarified, No. C11-5051 BHS, 2013 WL 2444205 (W.D. Wash. June 4, 2013) (denying Washington's motion for summary judgment and declining to "overrule binding precedent," namely, *Wagner*); *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 172 (D. Mass. 2011) (relying in part on *Wagner* in recognizing privately enforceable right to individualized case plans and foster care maintenance payments); *Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 387 (D.R.I. 2011) (relying on *Connor B.* in recognizing privately enforceable right to adequate foster care maintenance payments in suit filed on behalf of foster children); *C.H. v. Payne*, 683 F. Supp. 2d 865 (S.D. Ind. 2010) (recognizing enforceable right to foster care maintenance payments based, in part, on district court's decision in *Wagner*).

These cases clearly have not been confined to the "very limited review" of a state's foster care system that the Second Circuit majority presumed. *See* Pet. App. 22a. The district court litigation in *Ah Chong*, as just one example, belies the majority's sanguine view. Recognizing that it was "bound by the controlling Ninth Circuit precedent" in *Wagner*, the court in *Ah Chong* was forced to delve into the most minute details

of Hawaii's foster care payment scheme. *See Ah Chong*, 154 F. Supp. 3d 1050. That state's system included various forms of payments to foster parents (*e.g.*, variable basic board rate based on age of children, "foster care related payments," "foster care related benefits," and "difficulty of care" payments). Some of these payments covered the cost of the items outlined in the CWA, but some were unrelated to those items. *Id*. at 1053-54. The *Ah Chong* district court also recognized that, while all foster parents incur certain expenses, some may not incur other CWA coverable expenses depending on their individual circumstances and that of the foster children in their home. *Id*. at 1053, 1057. One such example is the "difficulty of care" category, for those children—some, on a case-by-case basis—who require a "higher level of care and supervision." *Id*. at 1047. This one category of payment reveals the complexities involved in determining individual claims for enhanced payments beyond what the State currently calculated under existing guidelines.

The *Ah Chong* litigation also involved more than mere readily identifiable money amounts setting forth payments and reimbursements. Rather, the litigants in *Ah Chong* challenged the very sets of data that the district court should consider. Furthermore, each side—the private plaintiffs and the state defendants—intended to introduce the testimony of expert witnesses. *Id*. at 1052, 1058. The district court ultimately determined that it would be necessary to decide whether Hawaii's basic board rate was

adequate to cover the cost of a foster child's food, shelter, and miscellaneous expenses, among other contested issues—the result of which, to reiterate, would be that the court would contemplate individualized child-by-child payment determinations. *See id*. at 1062.

The *Ah Chong* case illustrates the inherent problems with forcing district courts to serve as state policymakers. Different foster parents in different States are differently situated, which is why foster care maintenance rates are often set by States at the local level. Pet. App. 34a (Livingston, J., dissenting). "[C]alculating the 'cost' of [the CWA] items implicates numerous and difficult policy judgments about foster care and childrearing, not to mention overall program administration, that federal judges are ill equipped to make and that go entirely unaddressed in the statute. . . ." *Id*. at 51a. The majority's decision here will only lead to more protracted and costly litigation that drains state resources, which could be better spent ensuring that the needs of foster children are met.

The prospect of growing litigation over foster care payments counsels a respect for the core principles of federalism. *See*, *e.g.*, *Gonzaga Univ.*, 536 U.S. at 283; *cf. Alden v. Maine*, 527 U.S. 706, 749 (1999) (recognizing that "'subjecting a state to the coercive process of judicial tribunals at the instance of private parties'" is an "'indignity'" (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887))). As the *amici* States argue below, this respect for federalism includes recognition that states

must be permitted to implement policies and programs in the area of foster care that ought not to be disrupted merely because certain individual foster parents seek additional state money.

B. The Second Circuit's Decision Interferes with State Policymaking in the Area of Foster Care.

The second significant effect of the Second Circuit's decision involves interference with state policymaking. This Court has recognized that family matters—to which foster care services directly pertain—are a "traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435 (1979). The *amici* States each have well-developed foster care systems designed to meet the needs and objectives of their respective populations. In Connecticut, for example, the General Assembly has a standing Committee on Children that regularly reviews and modifies, as necessary, the various aspects of state oversight of foster care.[2] The proper operation of child welfare programs, then, involves policymaking that is properly left to the political branches of the state governments. Those policy decisions necessarily involve system-wide considerations, such as balancing child welfare expenditures against expenditures on other aspects of

---

[2] *See* https://www.cga.ct.gov/kid/; *see also*, *e.g.*, https://www.cga.ct.gov/app/special/Subcommittee%20Assignments.pdf (Appropriations Sub-Committee on Human Services, with cognizance over fiscal appropriations concerning children and families matters).

the social safety net, appropriating revenue sources and optimal taxation rates, and balancing the needs of various participants within the child welfare system.[3]

The Second Circuit's decision will result in private litigants inviting judges to undertake foster care policy decision-making and override decisions made by state legislatures and child welfare professionals. A look at Connecticut's foster care system illustrates the likely effects of intrusions into state policymaking that would follow from permitting individual causes of action for foster payments. As noted, foster care is part of a broader state system of child protection. *See*, *e.g.*, Conn. Gen. Stat. § 17a-90, *et seq*. (statutory chapter governing "child welfare"). Connecticut spends nearly $200 million on foster care-related services.[4] This amount covers a wide range of costs beyond those involving reimbursable payments to foster families—the state receives federal reimbursement of about $24 million, just a fraction of its total expenditures.[5] This reimbursable amount accounts for payments to foster families for food, transportation, clothing, education, child care, and other specifically approved costs. In Connecticut, the payable daily rate per foster child also

---

[3] *See*, *e.g.*, https://www.cga.ct.gov/2006/rpt/2006-R-0504.htm (example of Connecticut's Office of Legislative Research report on state foster care expenditures).

[4] In State Fiscal Year 2019 (July 2018 through June 2019), Connecticut made foster care-related expenditures of $197,055,436.66.

[5] In State Fiscal Year 2019, Connecticut received in federal reimbursement a total of $23,801,676.00, roughly 12% of total expenditures.

depends on the child's age: ages 0 to 5 is $25.73 per day; ages 6 to 11 is $26.03 per day; ages 12 and over is $28.24 per day.[6] The State also made the policy choice to increase the daily rates for cases of children who are medically complex ($45.25 per day), have special therapeutic needs ($88.42 per day), and who are classified with "medically fragile therapeutic" needs ($96.02 per day).[7] Money that the *amici* States spend beyond reimbursable amounts reflects each State's policy choices. For example, Connecticut devotes available resources to address important needs of the foster care population for child behavioral and mental health services.

Given necessarily limited state budgets, lawsuits challenging the adequacy of these rates—demanding funding in addition to the established rates—would require the stripping of money from these other areas. Judicially sanctioned reallocation of money to provide additional payments to foster families would necessarily require a reduction in money available to address other important policy goals, such as providing mental health services to foster children. For example, individual case-by-case demands by foster parents could require Connecticut to reduce the enhanced per diem rates, described above, that it allocates for special needs children. One child's litigation can result in a decreased rate for an entire group of special needs

---

[6] *See* https://www.cga.ct.gov/2006/rpt/2006-R-0504.htm (Connecticut Office of Legislative Research, "Foster Care Expenditures").

[7] *See id*.

children. That is precisely why States have always had the authority to implement their overall statutory schemes.

The Second, Sixth, and Ninth Circuits' decisions, finding individual rights and permitting individual causes of action, will also interfere with the *amici* States' ability to adopt policies to comply with the Families First Prevention Services Act of 2017. *See* 42 U.S.C. § 671, *et seq*. (enacted as part of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123). The Act's "purpose . . . is to enable States to use Federal funds available under parts B and E of title IV of the Social Security Act to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services." Foster parent litigation to secure additional state payments would reduce funding to meet the goals of this new federal law—such as funding to biological relatives to further the goal of maintaining children safely within their extended family. These policy goals, both state and federal, would be thwarted by individually-driven litigation focused narrowly on enhancing payments to some foster families.

Leaving policymaking in this area to the political branches ensures a more holistic decision-making process in shaping foster care policy, unlike the otherwise narrow focus on the parties to litigation. The political branches employ, and receive input from, child welfare experts who have spent their careers

considering the important question of how to best meet the needs of foster children in the particular State or region. This contrasts with private litigation, where the personal interests of the litigants may predominate over the broader public interest in the welfare of foster children.

By granting the petition for certiorari and reversing the decision of the Second Circuit, the Court will ensure that, consistent with the text and objectives of the CWA, the judicial branch is not called upon to intrude on the policymaking authority of the States.

II. Certiorari is also Warranted Because Circuit Courts of Appeals are in Conflict on the Question Presented, and District Court Decisions in Additional Circuits now Exacerbate Confusion Across Nine Separate Circuits.

The *amici* States fully endorse New York's argument that the Second Circuit decision improperly determined that the CWA provides a private cause of action that permits foster parents to sue for additional foster care payments. New York accurately describes the CWA, its purposes, and its operation. Pet. 6-10. New York also persuasively explains that the Second Circuit majority opinion erroneously interpreted the CWA and this Court's precedents. Pet. 27-33.

Most important, New York correctly demonstrated that the Second Circuit decision deepened an

entrenched conflict among the circuits, with the Second, Sixth, and Ninth Circuits on one side and the Eighth Circuit on the other. This split of authority deepens when considering decisions of district courts in other circuits. These cases cross five additional circuits, a split that reveals conflicting authority now across nine different federal circuits. District courts in Mississippi and Oklahoma have determined that the CWA does not afford potential litigants a private cause of action to demand enhanced foster care payments. *See Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 558 (S.D. Miss. 2004) (holding no right of action); *D.G. v. Henry*, 594 F. Supp. 2d 1273, 1280 (N.D. Okla. 2009) (same). Arriving at contrary conclusions, district Courts in Georgia, Indiana, and Rhode Island have held that a private cause of action does exist. *See Kenny A. v. Perdue*, 218 F.R.D. 277, 302-03 (N.D. Ga. 2003) *C.H. v. Payne*, 683 F. Supp. 2d 865 (S.D. Ind. 2010) (recognizing enforceable right to foster care maintenance payments); *Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d at 387 (D.R.I. 2011) (same). Litigation has now spread across the country on this issue. Four circuits have spoken on the issue, with conflicting results; and confusion reigns in district courts around the country. The time has come for this Court's attention and resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM TONG
Attorney General
State of Connecticut
CLARE E. KINDALL
Solicitor General,
Counsel of Record
BENJAMIN ZIVYON
MICHAEL BESSO
CAROLYN SIGNORELLI
EVAN O'ROARK
SARA NADIM
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
165 Capitol Avenue
Hartford, Connecticut 06106
(860) 808-5261
Clare.Kindall@ct.gov
Counsel for Amicus Curiae
State of Connecticut

COUNSEL FOR ADDITIONAL *AMICI CURIAE*

KEVIN G. CLARKSON
Attorney General of Alaska
1031 W. Fourth Avenue, Suite 200
Anchorage, Alaska 99501

MARK BRNOVICH
Attorney General of Arizona
2005 North Central Avenue
Phoenix, Arizona 85004

PHIL WEISER
Attorney General of Colorado
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, Colorado 80203

KATHY JENNINGS
Attorney General of Delaware
Carvel State Building
820 N. French Street
Wilmington, Delaware 19801

KARL A. RACINE
Attorney General for the District of Columbia
One Judiciary Square
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001

CLARE E. CONNORS
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, Idaho 83720

KWAME RAOUL
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601

CURTIS T. HILL, JR.
Attorney General of Indiana
200 West Washington Street, Room 219
Indianapolis, Indiana 46204

AARON M. FREY
Attorney General of Maine
6 State House Station
Augusta, Maine 04333

DANA NESSEL
Attorney General of Michigan
P.O. Box 30212
Lansing, Michigan 48909

JIM HOOD
Attorney General of Mississippi
550 High Street, Suite 1200
Jackson, Mississippi 39205

AARON FORD
Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

DAVE YOST
Attorney General of Ohio
30 E. Broad Street, 14th Floor
Columbus, Ohio 43215

MIKE HUNTER
Attorney General of Oklahoma
313 NE 21st Street
Oklahoma City, Oklahoma 73105

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street NE
Salem, Oregon 97301

ALAN WILSON
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

HERBERT H. SLATERY III
Attorney General and Reporter of Tennessee
301 6th Avenue North
Nashville, Tennessee 37243

KEN PAXTON
Attorney General of Texas
209 W. 14th Street, MC-001
Austin, Texas 78701

SEAN D. REYES
Attorney General of Utah
350 N. State Street, Suite 230
Salt Lake City, Utah 84114

MARK R. HERRING
Attorney General of Virginia
202 North 9th Street
Richmond, Virginia 23219