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, in Her Official Capacity,

Petitioner,

v.

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
CAROLINE A. OLSEN
Assistant Solicitor General

28 Liberty Street
New York, New York 10005
(212) 416-8016
barbara.underwood@ag.ny.gov
**Counsel of Record*

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INTRODUCTION

Respondent's arguments against certiorari continue to disregard the fact that foster care in the United States is, and always has been, a "traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435 (1979). Congress adhered to that long-standing principle when it enacted the Adoption Assistance and Child Welfare Act of 1980 (CWA), Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. § 670 et seq.), deliberately choosing to supplement rather than supplant diverse state foster care policy choices. Consistent with congressional intent, the U.S. Department of Health and Human Services (HHS) has repeatedly recognized that the CWA respects state funding choices over foster care rather than compelling particular expenditures.

The court of appeals thus misconstrued the CWA in holding that the statute imposes an affirmative spending obligation on the States, payable out of state funds, to cover the cost of federally specified foster care expenditures at a rate determined by federal courts in suits brought by individual foster parents. Respondent offers no sound basis to avoid or delay review of this erroneous decision. There is no dispute that the decision below deepens an entrenched circuit split on the precise legal question presented here. Respondent's attempts to minimize the importance of the issue are meritless. If allowed to stand, the decision below will allow private federal lawsuits to interfere with state policy choices about foster care expenditures in a way that Congress never intended; and, as respondent admits, the States' only option to avoid that burden would be to forgo hundreds of millions of dollars in federal funding.

There is no merit to respondent's suggestion that the Court delay granting certiorari until final judgment. The threshold legal question at issue is squarely presented now, and will not be materially affected by further proceedings (which have been stayed until June 2020 in any event). This Court should therefore grant review and resolve the circuit split over this important issue.

ARGUMENT

I. There Is an Undisputed Circuit Split on an Important Threshold Legal Issue That Only This Court Can Resolve.

As the petition explains, four courts of appeals have split over whether the CWA gives individual foster parents a private federal right of action to challenge the adequacy of a State's foster care maintenance payments. (Pet. 17-21.) District courts outside of these four circuits are also in conflict.[1] As a result of this divide, plaintiffs in sixteen States may now bring individual lawsuits to compel States to make foster care expenditures under (purported) federal standards, while plaintiffs in seven other States may not.

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[1] *Compare D.G. ex rel. Stricklin v. Henry*, 594 F. Supp. 2d 1273, 1278-81 (N.D. Okla. 2009) (finding no privately enforceable right); *Olivia Y. ex rel. Johnson v. Barbour*, 351 F. Supp. 2d 543, 559-65 (S.D. Miss. 2004) (same); *with Lamaster v. Indiana Dep't of Child Servs.*, No. 4:18-cv-0029, 2019 WL 1282043, at *4 (S.D. Ind. Mar. 20, 2019) (finding a privately enforceable right); *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 172 (D. Mass. 2011) (same); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 290-93, 302-03 (N.D. Ga. 2003) (same).

Respondent does not dispute the existence of the conflict nor the unlikelihood that the circuit split will resolve itself without this Court's intervention. Instead, respondent observes (Br. in Opp. 11-12) that this Court recently declined to resolve this conflict when it denied certiorari in *D.O. v. Glisson*, a case in which the Sixth Circuit held that the CWA creates "an individually enforceable right to foster care maintenance payments." 847 F.3d 374, 378 (6th Cir.), *cert. denied*, 138 S. Ct. 316 (2017). But this case is a better vehicle than *D.O.* to address the specific question presented here—and resolved in opposite directions by the Eighth and Ninth Circuits—of whether §§ 672(a)(1) and 675(4)(A) give rise to a private right of action to challenge the *adequacy* of States' foster care reimbursement rates. *See Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1197-98 (8th Cir. 2013); *California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 980-82 (9th Cir. 2010). By contrast, the plaintiff in *D.O.* had been denied foster care maintenance payments *altogether*. *See* 847 F.3d at 376. The adequacy of the State's rates was not at issue in that case, as it is here.

In any event, whatever the reason for the Court's denial of certiorari in *D.O.*, the decision below indisputably deepens an entrenched split among the circuits that will not be resolved without this Court's intervention. This continuing divide causes disuniformity in a nationwide federal funding scheme. And it thwarts the objectives of the expert agency that Congress has tasked with administering federal foster care subsidies under the CWA. As the petition explains (Pet. 28-29), HHS has determined that States should have substantial flexibility in administering foster care programs and has repeatedly interpreted § 675(4)(A)'s definition

of "foster care maintenance payments" not as a spending mandate, but instead as a list of state expenditures eligible for federal reimbursement.[2] Without this Court's intervention, federal judges in three circuits (and several other districts) will simply disregard this position, creating a patchwork of different rules regarding the requirements of federal law under a statutory program that affects all fifty States.

II. Certiorari Is Warranted to Resolve a Question of Immediate and Surpassing Importance.

Respondent attempts to minimize the importance of the question presented by asserting that the decision below will minimally intrude on States' ability to administer their own foster care systems. (Br. in Opp. 15-16.) But contrary to respondent's characterization here, its claims in this lawsuit do not seek to impose only the "modest" burden of requiring States merely to "*consider* the cost of [the] basic necessities listed in [§ 675(4)(A)] when calculating maintenance payments." (Br. in Opp. 18 (emphasis added)). As respondent more candidly acknowledges elsewhere in its brief in opposition, its claims under the CWA will require the district court here to "calculate the costs of food, clothing, or other necessities" for New York foster children (Br. in Opp. 23) and establish a judicially determined reimbursement rate sufficient to "cover the cost of caring for a child" (*id.* at 4). This calculation

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[2] *See also, e.g.*, Congressional Research Serv., *Child Welfare: A Detailed Overview of Program Eligibility and Funding for Foster Care, Adoption Assistance and Kinship Guardianship Assistance Under Title IV-E of the Social Security Act* 17 (2012) (internet) ("[T]here is no federal minimum or maximum foster care maintenance payment rate.").

is no simple mathematical exercise of the kind that federal judges "engage in . . . every day," as respondent contends. (*Id.* at 18.) Rather, as the dissent below correctly recognized (Pet. App. 30a), setting rates for foster care payments involves sensitive policy judgments about how to allocate scarce taxpayer resources to benefit a diverse population of children with unique needs and living situations—precisely the kinds of determinations that are better suited for expert state agencies, rather than federal courts. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 333 (2015) (Breyer, J., concurring in part and in judgment).

By contrast, as the petition explains, the decision below would subject state and local foster care decisions to a uniform federal standard, determined by federal judges and enforced by individual foster parents, which would directly supplant the States' carefully calibrated decisions about who and what to cover, not only in their foster care systems but also in closely related areas such as adoption programs. In particular, under respondent's interpretation, States will be forced to prioritize spending on the limited number of foster children and expenditures mentioned in the CWA, rather than the broader class of expenses that many States, including New York, have chosen to provide. (See Pet. 23-24.) For example, New York is a national leader in preventive services—including mental health and parental counseling services—designed to keep birth families together and avoid the need for foster care placement entirely. These preventive measures, which have historically not been reimbursable under the CWA, have led to a substantial decline in the population of children in foster care

in New York, from 37,000 in 2002 to 16,000 in 2018.[3] *See* Social Services Law § 409 et seq.; 18 N.Y.C.R.R. §§ 423.1–.7. But New York may be forced to divert funding from these preventive services, as well as from other programs that are not federally reimbursable under the CWA, if the decision below is allowed to stand.[4] (See Br. for Amici States 10-14.)

Respondent's answer is that "nothing requires" the States "to accept federal funds" at all if they wish to preserve their historical discretion to determine their own foster care priorities. (Br. in Opp. 16.) But this blithe suggestion underscores the radical nature of respondent's theory and the importance of this Court's immediate review. New York alone receives approximately $300 million annually in funds under the CWA. Respondent has essentially acknowledged that New York must choose either to forgo this funding or accede to further federal district court proceedings that will supplant New York's own rate-setting process for foster care maintenance payments. The disruptive nature of this "choice" is the reason that the dissent below correctly described the court of appeals' decision as "upending the relationship between the federal government and state foster care systems while ushering dozens of federal judges in this Circuit

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[3] *See* N.Y. Office of Children & Family Servs., *Strategic Planning and Policy Development* (2018) (internet).

[4] Certain preventive services may be reimbursable under recent changes to federal law enacted by the Family First Prevention Services Act of 2018, Pub. L. No. 115-123, § 50711(a), 132 Stat. 65, 232-40 (codified as 42 U.S.C. § 671(e)). But it is unlikely that all of the services New York provides will satisfy the strict criteria for reimbursement under the Family First Act, and many are likely to remain fully funded by the State.

into the delicate and sensitive world of local child-welfare policymaking." (Pet. App. 30a.)

III. The Decision Below Incorrectly Interpreted the CWA.

The court of appeals wrongly concluded that §§ 672(a)(1) and 675(4)(A) reflect an unambiguous congressional intent to give foster parents a privately enforceable right to challenge the adequacy of state foster care maintenance payments. As the petition explains, the CWA was designed to assist States that choose to offer foster care services while preserving the State's historic discretion over the administration of foster care. To that end, States receive partial reimbursement for (some of) the expenditures they choose to make on behalf of certain federally eligible foster children. But the CWA was not intended to impose a spending mandate on the States to fully cover the cost of every expenditure listed in § 675(4)(A)'s definition of "foster care maintenance payment." (Pet. 4-8, 27-33; *see also* Pet. App. 37a.)

Respondent's arguments to the contrary are meritless. Like the decision below, respondent relies most heavily on the fact that §§ 672(a)(1) and 675(4)(A) use the term "'each child'" to conclude that the CWA contains sufficient rights-creating language. (Br. in Opp. 19-20.) But that approach merely replicates the error in many lower courts' approach to private rights of action, finding the requisite rights-creating language so long as the federal statute contains *any* language referring to individual beneficiaries. (Pet. 20-21.) This approach is at odds with this Court's precedent, which has focused not on certain talismanic words but instead on the broader question of "whether Congress *intended to create a federal right*" and "'a private

remedy'" at all. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)) (emphasis in original); *see also, e.g.*, *Armstrong*, 575 U.S. at 331-32 (plurality op.); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772-73 (1981).

Here, as the petition explains, §§ 672(a)(1) and 675(4)(A) are best understood in context as identifying certain categories of state foster care payments that will be eligible for partial federal reimbursement under the CWA. (Pet. 28.) These provisions use mandatory language because States *must* make qualifying payments (on behalf of eligible foster children) to be eligible for federal reimbursement for those payments; but they do not impose a freestanding mandate on States to make all of the payments that would be federally reimbursable.

HHS has taken precisely this position in interpreting the relevant provisions of the CWA, expressly rejecting the notion that the CWA creates a federal "entitlement of a particular child to particular benefits or services," and confirming that "a child's [CWA] eligibility entitles a State to Federal reimbursement for a portion of the costs expended for that child's care."[5] In other words, HHS has repeatedly made clear that §§ 672(a)(1) and 675(4)(A) identify only reimbursable, not mandatory, expenditures by the States. (Pet. 28-29.) And applying this view, HHS has repeatedly found New York to be in substantial compliance with the CWA's requirements—most

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[5] Office of the Assistant Secretary for Planning & Evaluation, ASPE Issue Brief, *How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field* 3 (Aug. 2005) (internet).

recently in 2018—with full knowledge of the amounts that New York pays in foster care maintenance payments and the methods it uses to calculate those payments. (Pet. 11-12, 28-30.)

Respondent expends a single sentence dismissing HHS's longstanding views as irrelevant (Br. in Opp. 22), but the position of the expert agency charged by Congress to administer a complex funding scheme should not be so easily cast aside. Under this Court's precedents, HHS's views merit substantial "weight" in light of the technical and "complex" nature of its supervision of foster care in the United States. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000). Because HHS has the most "thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements," *id.* (quotation marks omitted), its rejection of the statutory interpretation underlying respondent's legal claim further weighs in favor of this Court's immediate review.

IV. The Question Presented Warrants Review Now.

Finally, respondent urges the Court to delay review until the district court reaches a final judgment. (Br. in Opp. 28-29.) But further proceedings in the district court will not revisit or alter the pure legal question presented here about the threshold viability of respondent's claim under the CWA. Nor is there any risk that district court proceedings will outpace this Court's review, as the district court has stayed further proceedings until June 1, 2020. (Order, dated Jan. 2, 2020 (E.D.N.Y.).)

Moreover, the question here is particularly well-suited to interlocutory review—as has been the case for the many other private-right-of-action cases that this Court has agreed to hear before final judgment. (See Pet. 34 n.32.) A ruling that no private right of action exists under the CWA is "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1974) (quotation marks omitted). If this Court were to grant the petition for a writ of certiorari and reverse, no further proceedings on remand would be necessary—thus preserving judicial resources and sparing the parties burdensome litigation. (Pet. 33; Br. for Amici States 3-4.)

By contrast, deferring this Court's review until after final judgment would require New York to subject its rate-setting process for foster care maintenance payments to federal judicial interference in a way that would disrupt New York's sensitive policy determinations and subordinate New York's own choices in this area of historical state concern. (Pet. 33-34.) New York updates its basic foster care reimbursement rate annually.[6] Without this Court's intervention, that annual rate-setting process will now be supplanted by the federal district court's own judgment of how New York should "calculate the costs of food, clothing, or other necessities" (Br. in Opp. 23), including decisions about what data to use to calculate costs, whether and how to account for inflation, and whether and how to account for geographic differences in cost of living—questions on which the CWA is entirely silent, as the dissent correctly observed (Pet. App. 53a). Going through this complex process will be enormously

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[6] *See* N.Y. State Office of Children & Family Servs., *Foster Care Rates* (internet).

particularly when, as respondent acknowledges, this Court could very well conclude at the end of the process that there was no private federal right at all.

There is no reason for the district court or the parties to undergo further burdensome litigation when the threshold question of a private right of action under the CWA is already squarely presented. This Court should therefore grant the petition and resolve this important issue now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
CAROLINE A. OLSEN
Assistant Solicitor General
barbara.underwood@ag.ny.gov

January 2020

* *Counsel of Record*