

4-26-2018

## A Case for Revisiting the Child Welfare Act

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### Recommended Citation

Hannah Dudley, *A Case for Revisiting the Child Welfare Act*, 59 B.C.L. Rev. E. Supp. 444 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/25>

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# A CASE FOR REVISITING THE CHILD WELFARE ACT

**Abstract:** In 2017, in *D.O. v. Glisson*, the U.S. Circuit Court of Appeals for the Sixth Circuit held that the Child Welfare Act of 1980 (the “Act”) creates a privately enforceable right to foster care maintenance payments and that this right could be enforced by an individual through the use of § 1983. In a similar case, *Midwest Foster Care and Adoption Ass’n v. Kincaide*, the Eighth Circuit held that the Act does not create a privately enforceable right and thus, could not be enforced through the use of 42 U.S.C. § 1983. This Comment argues that the Eighth Circuit’s determination is correct with respect to the factors presented by the Supreme Court in 1997, in *Blessing v. Freestone*. It is likely that Congress did not intend for the Act to have no means of enforcement; therefore, the Act needs to be amended.

## INTRODUCTION

In 2017, in *D.O. v. Glisson*, the U.S. Circuit Court of Appeals for the Sixth Circuit held that the Federal Adoption Assistance and Child Welfare Act of 1980 (the “Act”) produces a private right to foster care maintenance payments and that this private right can be enforced using 42 U.S.C. § 1983.<sup>1</sup> In *Glisson*, two young boys were removed from their mother’s home and placed in the care of their mother’s aunt.<sup>2</sup> The aunt filed suit against the Secretary of Kentucky’s Cabinet for Health and Family Services (the “Secretary”) after being denied foster care maintenance payments.<sup>3</sup> The Sixth Circuit reversed the district court’s grant of summary judgment in favor of the state of Kentucky and, in doing so, created a split with the Eighth

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<sup>1</sup> *D.O. v. Glisson*, 847 F.3d 374, 375–76 (6th Cir. 2017), *cert. denied* 138 S. Ct. 316 (2017) (reversing the decision of the U.S. District Court for the Eastern District of Kentucky by ruling that the Federal Adoption Assistance and Child Welfare Act of 1980 (the “Act”) created a privately enforceable right to foster care maintenance payments which can be enforced through the use of 42 U.S.C. § 1983).

<sup>2</sup> *Id.* at 376.

<sup>3</sup> *Id.* One specific part of the Act outlines a mechanism in which states give foster care parents “foster care maintenance payments” and the state can later be reimbursed by the federal government if the state follows certain guidelines. 42 U.S.C. § 672(a) (2012). Foster care maintenance payments serve the purpose of bolstering the foster family’s income in order to better take care of the foster child. *Id.* § 675(4)(A). The payment includes money to cover the cost of, among other things, food, clothing, shelter, and daily supervision. *Id.* The foster care maintenance payments are a small part of a larger plan which is approved by the Secretary of Kentucky’s Cabinet for Health and Family Services (the “Secretary”). *Id.* § 671(a). The Secretary oversees the administration of the Act; therefore, the children’s aunt filed suit against the Secretary to ensure enforcement of the Act. *Id.* § 676; *see Glisson*, 847 F.3d at 376.

Circuit.<sup>4</sup> The Supreme Court recently denied a Petition for Writ of Certiorari.<sup>5</sup> In 2013, in *Midwest Foster Care and Adoption Ass'n v. Kincade*, the Eighth Circuit held that the Act failed to create a privately enforceable right and that the Act cannot be enforced using § 1983.<sup>6</sup>

This Comment analyzes the arguments of both the Sixth and Eighth Circuits.<sup>7</sup> Part I provides a detailed background of the Act, explains what is needed to create a privately enforceable right, and discusses the rebuttable presumption of § 1983 enforceability.<sup>8</sup> Part II details the apparent split between decisions from the Sixth and Eighth Circuits.<sup>9</sup> Part III analyzes the circuit split and ultimately finds that because the intent of Congress does not align with the proper analysis of the statute, this issue should be left alone by the courts and given to Congress to fix.<sup>10</sup>

## I. HOW IS A PRIVATE RIGHT CREATED, AND WHAT PART DOES § 1983 PLAY?

Section A of this Part develops and discusses the history of the Act.<sup>11</sup> Section B discusses what is necessary for a right to be deemed a “privately enforceable right.”<sup>12</sup> Section C explains the presumption of § 1983 enforceability once a right is deemed to be a privately enforceable right.<sup>13</sup>

### *A. The Act*

The safety and welfare of the nation’s children has long been a goal of Congress.<sup>14</sup> In 1935, Congress passed the Social Security Act, providing federal funds to states to encourage them to participate in a variety of dif-

<sup>4</sup> See *Glisson*, 847 F.3d at 376 (contrasting with the Eighth Circuit’s decision in which the court held that the Act is a privately enforceable right); *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1194 (8th Cir. 2013) (holding that the Act is not a privately enforceable right).

<sup>5</sup> *Glisson*, 847 F.3d 374, 375–76, cert. denied 138 S. Ct. 316.

<sup>6</sup> *Kincade*, 712 F.3d at 1194.

<sup>7</sup> *Glisson*, 847 F.3d at 376; *Kincade*, 712 F.3d at 1203.

<sup>8</sup> See *infra* notes 11–51 and accompanying text.

<sup>9</sup> See *infra* notes 55–103 and accompanying text.

<sup>10</sup> See *infra* notes 104–129 and accompanying text.

<sup>11</sup> See *infra* notes 14–25 and accompanying text.

<sup>12</sup> See *infra* notes 26–37 and accompanying text.

<sup>13</sup> See *infra* notes 38–51 and accompanying text.

<sup>14</sup> See HOUSE WAYS & MEANS COMM., *Child Welfare Legislative History*, in GREEN BOOK (2012), <http://greenbook.waysandmeans.house.gov/2012-green-book/chapter-11-child-welfare/legislative-history> [<https://perma.cc/4XW9-5RPJ>] (presenting background material and data on the major U.S. entitlement programs). The protection of children as an objective of federal policy noticeably began in 1912 when Congress created the Federal Child’s Bureau, initiated to “investigate and report” matters dealing with child welfare and safety. *Id.*

ferent welfare systems.<sup>15</sup> In 1980, Congress enacted Title IV-E of the Social Security Act, otherwise known as the Act.<sup>16</sup> The Act regulates the state-managed foster care and adoption systems for children who are removed from the homes of their families and details the process in which “foster care maintenance payments” are provided to families who take in foster care children.<sup>17</sup> The purpose of the Act is to equip states to support foster care families and children during the child’s journey into their foster care home and also to encourage movement within the foster care system.<sup>18</sup>

The Act outlines three important steps that states must follow in order to be eligible for reimbursement.<sup>19</sup> First, each state must submit and approve a proper plan to the Secretary of Health and Human Services.<sup>20</sup> A proper plan must contain thirty-six features that force a specific level of state oversight by requiring, among other things, that local level programs are coordinated with state programs and that the state monitor and evaluate foster care activities.<sup>21</sup> If the plan does not lay out all thirty-six features and the state fails to correct the plan, then the government will withhold federal funding.<sup>22</sup> Second, each state must provide “foster care maintenance payments” for each child who has been taken from the home of a relative and assigned into the foster care

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<sup>15</sup> See *id.* (showing that beginning in 1935 there were multiple additions and amendments to the Social Security Act that were aimed primarily at increasing the amount of funding states were receiving to help protect children and also increasing the number of children that were eligible for help).

<sup>16</sup> See 42 U.S.C. § 670 (2012) (declaring that the purpose of Title IV-E is to enable states to provide for foster care children and to authorize the appropriations that would be paid to the states).

<sup>17</sup> See *id.* (declaring congressional purpose); *id.* § 672(a) (explaining the eligibility requirements for the state, foster care placement, Aid to Families with Dependent Children, and alien children). Title IV-E of the Social Security Act covers the entirety of the Act, and within Title IV-E, there are many different sections pertaining to different parts of the Act. *Id.* §§ 670–679(c).

<sup>18</sup> *Id.* § 670. The Act served to “establish a program of adoption assistance, to strengthen the program of foster care assistance for needy and dependent children, to improve the child welfare, social services, and aid to families with dependent children programs, and for other purposes.” Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. §§ 670–679(c)).

<sup>19</sup> 42 U.S.C. §§ 672, 674(a).

<sup>20</sup> *Id.* § 671(a).

<sup>21</sup> *Id.* § 671(a)(1)–(36). These features in this plan include that the state must: (1) declare that it will report any sort of abuse of the child; (2) grant an individual the right to a “fair hearing” if the individual’s afforded benefits are denied; (3) make reasonable efforts to “preserve and reunify families”; (4) aid in the creation of a case plan for “each child receiving foster care maintenance payments”; and (5) make provisions for health insurance coverage for children with special needs. *Id.*

<sup>22</sup> See *id.* § 671(a) (detailing the features necessary for a state’s plan to be approved by the Secretary which then makes the state eligible for federal reimbursement for “foster care maintenance payments”).

system.<sup>23</sup> The costs provided include expenses such as the child’s food, clothing, and shelter.<sup>24</sup> The final relevant section of the Act details the process of how states will receive reimbursement from the federal government after providing maintenance payments to foster families.<sup>25</sup>

### *B. When Is a Right a Private Right?*

To determine whether a statute creates a privately enforceable right under § 1983, one must look to Congressional intent to determine whether the legislation was meant to “unambiguously” create a privately enforceable right.<sup>26</sup> In 1997, in *Blessing v. Freestone*, the Supreme Court laid out three factors for courts to consider in assessing Congressional intent in this context.<sup>27</sup> First, Congress must have intended to benefit the plaintiff. Second, the right being conveyed must be clear and not “so vague and amorphous that its enforcement would strain judicial competence.” Third, the right must create a “binding obligation” for the states.<sup>28</sup> To reach the determination that Congress intended to benefit the plaintiff, thereby satisfying the first factor, a court should conduct a three prong analysis, considering whether: (1) the statute contained “rights-creating language;” (2) the statute has an individual and not an “aggregate focus;” and (3) there is a “federal review mechanism.”<sup>29</sup>

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<sup>23</sup> See *id.* § 672(a)(1) (mandating “foster care maintenance payments” for each child who has been removed from a relative’s home and placed into the foster care system).

<sup>24</sup> See *id.* § 675(4)(A) (defining the term “foster care maintenance payments” as payments that provide for items such as “food, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home or visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement”).

<sup>25</sup> See *id.* § 674(a) (explaining that states shall be reimbursed equal to the percentage of medical assistance required of the foster care maintenance payments).

<sup>26</sup> See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 282–83 (2002) (holding that a privately enforceable right is created when it can be determined that Congress intended to create that private right).

<sup>27</sup> See *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (finding that where Congress intended to benefit the plaintiff, the right conveyed is clear, and the right creates an obligation for the state, a privately enforceable right is created).

<sup>28</sup> *Glisson*, 847 F.3d at 377 (citing *Blessing*, 520 U.S. at 340–41); see *Gonzaga*, 536 U.S. at 283 (clarifying the *Blessing* test in that it is “rights” and not “benefits” or “interests” that are enforced using § 1983); see also Barbara Vargo, *Who Can Sue? The Sixth Circuit in D.O. v. Glisson Deepens the Split Over a Private Right of Action to Foster Care Maintenance Payments*, 51 CREIGHTON L. REV. 215, 218 (2017) (explaining that the Sixth Circuit’s reasoning in *Glisson* was based on the three factor test set forth in *Blessing* to decide if the statute created a privately enforceable right).

<sup>29</sup> See *Kincade*, 712 F.3d at 1196–97 (citing *Gonzaga*, 536 U.S. at 287, 289–90) (finding that the first factor of the *Blessing* test is met when the statute contains “rights-creating language,” the statute does not have an “aggregate focus,” and there is no “federal review mechanism”).

In 2006, in *Harris v. Olszewski*, the Sixth Circuit held that Medicaid's "freedom-of-choice" provision was a privately enforceable right.<sup>30</sup> In *Harris*, Medicaid recipients argued that the statute's freedom-of-choice provision created a privately enforceable right and sought to challenge the state of Michigan's procedure for regulating incontinence products through Medicaid, which gave all distribution rights to a single distributor.<sup>31</sup> After analyzing the three factors outlined above, the Sixth Circuit held that the provision allowed Medicaid users to choose their own healthcare sources; thus, it created a privately enforceable right.<sup>32</sup> In *Harris*, the court reasoned that all three factors had been met, emphasizing that Congress intended the statute to benefit the individual because the freedom-of-choice provision included the language "any individual eligible for medical assistance."<sup>33</sup> Furthermore, the court determined that the provision was not "vague" or "amorphous" and that it created an obligatory duty, binding upon the state.<sup>34</sup>

In contrast, in 2012, in *Gonzaga University v. Doe*, the Supreme Court held that the Family Educational Rights and Privacy Act of 1974 ("FERPA") did not give students a privately enforceable right to keep their education records private.<sup>35</sup> Here, the Court found that the provision failed to satisfy the first factor of the *Blessing* test because the provision had no rights creating language, had an aggregate effect, and simply provided regulation to the Secretary of Education.<sup>36</sup> Thus, after assessing these three prongs and determin-

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<sup>30</sup> See 42 U.S.C. § 1396a(a)(23) (2012) (codifying the "freedom-of-choice" provision by stating that individuals eligible for Medicaid may receive medical assistance from any place certified to execute the services needed); *Harris v. Olszewski*, 442 F.3d 456, 460 (6th Cir. 2006) (holding that Medicaid's freedom-of-choice provision satisfied all three factors that are needed to consider a privately enforceable right created).

<sup>31</sup> *Harris*, 442 F.3d at 460. The plaintiffs pursued relief using § 1983, arguing that because the state only allowed a single provider to distribute incontinence products for Medicaid recipients in Michigan, the state was disobeying the freedom-of-choice provision. *Id.*

<sup>32</sup> *Id.* at 460–61. The Sixth Circuit found that the Medicaid provision at question passed the three factors laid out in *Blessing*. *Id.* First, the court reasoned that by stating "any individual eligible for medical assistance," the statute was intending to benefit the individual plaintiff, specifically beneficiaries that are eligible for Medicaid coverage. *Id.* at 461. Second, the mandate does not "contain the kind of vagueness that would push the limits of judicial enforcement." *Id.* at 462. Finally, the statute uses mandatory terms like "must . . . provide" creating a "binding obligation" for the state. *Id.*

<sup>33</sup> *Id.* at 461.

<sup>34</sup> *Id.* at 462.

<sup>35</sup> Compare *id.* at 460 (holding that as the statute at issue provided individuals the ability to choose any qualified provider or supplier, it was focused on the individual being benefited, thus creating a privately enforceable right), with *Gonzaga*, 536 U.S. at 276, 287 (holding that where the statute simply regulated the state as an actor, it did not focus on the individual being benefited, thus failing to create a privately enforceable right).

<sup>36</sup> *Gonzaga*, 536 U.S. at 290. The Court in *Gonzaga* clarified that § 1983 can only be used to enforce the "rights, privileges, or immunities secured by the Constitution and laws." *Id.* at 283. The court reasoned that the statute speaks directly to the Secretary of Education, simply directing his or her actions; there is no essence of the "individual entitlement" that § 1983 serves to enforce.

ing the first factor of the *Blessing* test was not met, the Court found that Congress did not intend to benefit the plaintiff in question through FERPA.<sup>37</sup>

### C. *The Presumption of § 1983 Enforceability*

Section 1983 serves as a mechanism to protect individual rights that have been secured by the Constitution or laws of the United States.<sup>38</sup> For a statute to be enforceable under § 1983, the statute must create a right for individuals, not simply consist of a law per the three part test in *Blessing*.<sup>39</sup> For example, Medicaid reimbursements have been found to comprise a privately enforceable right.<sup>40</sup> Section 1983 is often used as an enforcement mechanism for individuals' rights secured by the Constitution or the laws that do not have their own enforcement scheme in place.<sup>41</sup>

Once it has been established that a private right was created by a specific statute, there becomes a rebuttable presumption that the right is en-

*Id.* at 287. In addition, there is no “rights-creating language” that shows Congress’s intent to convey a new right. *Id.*; see Vargo, *supra* note 28, at 228 (explaining that the court in *Gonzaga* decided that the Family Educational Rights and Privacy Act of 1974 (“FERPA”) did not create a privately enforceable rights because it lacked “rights-creating language,” focused largely on the Secretary of Education and not the individual, and provided for a review board to investigate potential violations that provided the plaintiff with other ways to pursue his rights).

<sup>37</sup> *Gonzaga*, 536 U.S. at 287, 290–91.

<sup>38</sup> 42 U.S.C. § 1983 (2012); see *Gonzaga*, 536 U.S. at 285 (explaining that § 1983 is used to carry out rights “secured by the Constitution and laws of the United States”); *Blessing*, 520 U.S. at 340 (noting that a plaintiff has to be enforcing a “federal right” and that § 1983 is not to be used to enforce an abuse of federal law). Section 1983 came into existence with the Civil Rights Act of 1871. Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1426 (2003). Section 1983 assisted in preserving the civil rights of African Americans when former Confederates attempted to re-establish slavery. *Id.* In its beginning stages, § 1983 only guaranteed “Constitutional rights” and did not refer to laws. *Id.* In 1874, Congress supplemented the statute with the verbiage “and laws.” *Id.* There was a lot of debate about what this additional verbiage added to the statute. *Id.* Finally, in 1980, the Supreme Court, in *Maine v. Thiboutot*, held that the meaning of the words “and laws” in the statute referred to “federal statutory rights”; consequently, the Court allowed private individuals who were intended to benefit from those rights to bring suit under § 1983. *Id.* at 1430.

<sup>39</sup> *Blessing*, 520 U.S. at 340 (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)). See generally MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION (Geoffrey Erwin et al. eds., 2d ed. 2008) (discussing the three *Blessing* factors that distinguish a federal right from a federal law); Barbara J. Van Arsdale et al., *Civil Rights, in 15 AMERICAN JURISPRUDENCE, SECOND EDITION* § 69 (2018) (explaining that in order for a statute to be enforced using § 1983, it must be found that Congress planned for the statute to be a privately enforceable right).

<sup>40</sup> See *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 514 (1990) (finding the Boren Amendment to be a privately enforceable right, reasoning that it satisfies all of the *Blessing* factors and that Congress did not set forth a sufficiently elaborate independent enforcement mechanism to disqualify § 1983 enforcement mechanisms).

<sup>41</sup> Mank, *supra* note 38 at 1437. If a statute has an “unusually elaborate” enforcement mechanism used to enforce compliance, then § 1983 cannot be used as an avenue for enforcement. *Id.*

forceable using § 1983.<sup>42</sup> This presumption can be rebutted if a party shows Congress intended for § 1983 to not be available as a means of enforcement for the specific right at issue.<sup>43</sup> Congress can close off § 1983 as an avenue for enforcement either “expressly” or “impliedly.”<sup>44</sup> If Congress expressly closes off § 1983 by explicitly stating that it is not to be used as a remedy for a specific right, then § 1983 cannot be an option for enforceability.<sup>45</sup> Congress can also imply that a specific right is not to be enforced by § 1983 by creating a “comprehensive enforcement scheme” that is not compatible with § 1983; although to date, courts have only interpreted this to have occurred twice.<sup>46</sup> If Congress is determined to have not closed off § 1983 enforceability, individuals can use § 1983 to protect the private right at issue.<sup>47</sup>

Notably, the mere availability of an enforcement mechanism within a statute does not, in and of itself, defeat the possibility of § 1983 enforceability.

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<sup>42</sup> See *Blessing*, 520 U.S. at 341 (finding that dismissal is appropriate when Congress purposely deprives the plaintiff of § 1983 as a remedy)

<sup>43</sup> *Id.* The use of § 1983 is rarely rebutted, but, if it is rebutted, the defendant has to prove that Congress intended to “specifically foreclose” the use of § 1983 as an enforcement mechanism. *Mank*, *supra* note 38, at 1420.

<sup>44</sup> *Blessing*, 520 U.S. at 341.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* For instance, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, the plaintiffs were fishermen off the coast of New York, and the Court found that the Federal Water Pollution Control Act (“FWPCA”) could not be enforced using § 1983. *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 13–14 (1981). The plaintiffs’ ability to harvest fish was diminishing due to water pollution; accordingly, they brought suit against multiple government entities, stating that the government allowed companies to “dump” their polluted materials into the water. *Id.* at 4–5. The plaintiffs argued that this dumping was inconsistent with the FWPCA. *Id.* at 5 n.6. Looking to the intent of Congress in drafting and passing the FWPCA, the Supreme Court reasoned that the statute had “unusually elaborate enforcement” mechanisms. *Id.* at 13–14. The Court reasoned that because of the explicit enforcement mechanisms present within the FWPCA, Congress did not intend any other enforcement provisions to be used in connection with the statute. *Id.*; see also *Smith v. Robinson*, 468 U.S. 992, 1009, 1010–11 (1984) (holding that where “carefully tailored” administrative enforcement mechanisms that could be reviewed by the courts, if necessary, were present, those independent enforcement mechanisms were sufficient to find that Congress did not intend for § 1983 to be used as an enforcement mechanism for the Education of the Handicapped Act, as § 1983 would essentially make the independent enforcement mechanisms redundant).

<sup>47</sup> *Wilder*, 496 U.S. at 521. The Supreme Court considered the question of whether § 1983 could be used by healthcare providers to challenge a state’s Medicaid reimbursement procedures. *Id.* at 501. The plaintiff, the Virginia Hospital Association, filed suit against various Virginia officials arguing that Virginia’s reimbursement policy violates the Boren Amendment because the rates were neither economic nor efficient. *Id.* at 503. The defendants filed a motion to dismiss, arguing that § 1983 was not the appropriate enforcement mechanism. *Id.* at 504. The defendants asserted that Virginia had provided an elaborate system to ensure efficient payments and that any individual could appeal their reimbursement rates. *Id.* at 520. Ultimately, the Court found that the systems that were put in place by Virginia were not elaborate enough to conclusively show congressional intent to foreclose § 1983 enforceability. *Id.* at 522.



ity.<sup>48</sup> In 1987, in *Wright v. Roanoke Redevelopment & Housing Authority*, the Supreme Court held that the “generalized powers” of the Secretary of Housing and Urban Development to investigate and enforce housing contracts did not constitute an elaborate enough enforcement mechanism to cut off § 1983 enforceability.<sup>49</sup> Thus, it is clear that where there are enforcement mechanisms available, § 1983 enforceability is not automatically foreclosed.<sup>50</sup> In fact, to foreclose a privately enforceable right from § 1983, courts have determined that the enforcement mechanism Congress provides must be “unusually elaborate,” so that there is not a question of whether Congress aimed to have a secondary remedy through the use of § 1983.<sup>51</sup>

## II. FOSTER CARE MAINTENANCE PAYMENTS: ARE THEY A PRIVATELY ENFORCEABLE RIGHT?

Section A of this Part discusses the merits and ruling of *D.O. v. Glisson* in regards to a privately enforceable right.<sup>52</sup> Section B of this Part discusses 42 U.S.C. § 1983 enforceability, the rebuttable presumption that is created, and discusses the Sixth Circuit’s ruling that the Child Welfare Act is enforceable using § 1983.<sup>53</sup> Part C of this Section compares the Eighth Circuit ruling that the Child Welfare Act is not enforceable using § 1983.<sup>54</sup>

### *A. D.O. v. Glisson: Foster Care Maintenance Payments Are a Privately Enforceable Right*

In *D.O. v. Glisson*, the state of Kentucky placed two boys into the foster care system after Kentucky’s Health and Family Services agency began a Dependency, Neglect, and Abuse proceeding against their mother in

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<sup>48</sup> *Blessing*, 520 U.S. at 347; see *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 428 (1987) (holding that the enforcement scheme was not elaborate enough to prove “congressional intent” to impede § 1983 enforcement); *Nat’l Sea Clammers Ass’n*, 453 U.S. at 20 (finding that where the enforcement scheme was “comprehensive” and there was little space for a § 1983 action, a § 1983 action could not be used to bypass the already provided enforcement scheme).

<sup>49</sup> *Wright*, 479 U.S. at 428; see *Wilder*, 496 U.S. at 522 (holding that the Secretary of Health and Human Services’ similar “generalized powers” to oversee Medicaid funding and reject specific plans could not be considered an elaborate enough enforcement mechanism to close off § 1983).

<sup>50</sup> *Blessing*, 520 U.S. at 347.

<sup>51</sup> See *Nat’l Sea Clammers Ass’n*, 453 U.S. at 13–14 (finding that where a statute contains unusually elaborate enforcement provisions which allows authority to sue both individuals and the government, § 1983 cannot be used to enforced the act); Mank, *supra* note 8 at 1437 (stating that a § 1983 suit is not appropriate if there is an “unusually elaborate” enforcement structure within the statute itself).

<sup>52</sup> See *infra* notes 55–84 and accompanying text.

<sup>53</sup> See *infra* notes 85–92 and accompanying text.

<sup>54</sup> See *infra* notes 93–103 and accompanying text.

2012.<sup>55</sup> Shortly after the boys' placement, the plaintiff, the mother's aunt, pursued custody of the two children.<sup>56</sup> The children were placed in the aunt's care after Health and Family Services analyzed her home and conducted a background check.<sup>57</sup> In September 2014, the court granted joint custody to both the mother and aunt; however, the boys continued to live with their aunt.<sup>58</sup> The aunt then filed a motion in family court, requesting foster care maintenance payments from the state of Kentucky.<sup>59</sup> The family court did not directly rule on this issue.<sup>60</sup>

The children's aunt subsequently sued the Secretary of Kentucky's Cabinet for Health and Family Services (the "Cabinet") in federal court, contending that the Act required the state to pay her foster maintenance payments.<sup>61</sup> The district court granted the Cabinet's motion for summary judgment, explaining that the Act provides no privately enforceable rights.<sup>62</sup> The district court reasoned that 42 U.S.C. § 672(a) focused on "the persons or the institution being regulation," and thus, it did not focus on "the individuals who benefit."<sup>63</sup> The district court further stated that the statute does not "unambiguously confer a right to support a cause of action."<sup>64</sup> The district court determined that the Act did not meet the first requirement necessary to create a privately enforceable right, as the statute does not indicate Congressional intention to benefit the plaintiff.<sup>65</sup> The aunt appealed this decision.<sup>66</sup>

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<sup>55</sup> D.O. v. Glisson, 847 F.3d 374, 376 (6th Cir. 2017); see KY. REV. STAT. ANN. § 620.070 (West 2017) (codifying the process by which a Dependency, Neglect and Abuse proceeding is initiated—by the filing of a petitioner by an interested person and then service of a summons upon the parent); *id.* § 620.080 (codifying that a court proceeding will occur in which it will be determined if the child would be dependent, neglected or abused if left in the custody of the parent, and if so, they will be removed from the home).

<sup>56</sup> *Glisson*, 847 F.3d at 376.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* (reasoning that because the children were placed in the permanent care of their aunt, the boys were no longer within the definition of "foster children," and the issue was moot).

<sup>61</sup> See *id.* (arguing further that the state's failure to make these payments violated the Constitution's Equal Protection and Due Process Clauses).

<sup>62</sup> See *id.* at 377 (finding that if there is no privately enforceable right, an individual cannot bring a § 1983 enforceability suit).

<sup>63</sup> 42 U.S.C. § 672(a)(1) (2012); see D.O. v. Beshear, No. 5:15-048-DCR, 2016 WL 1171532, at \*5 (E.D. Ky. Mar. 23, 2016), *rev'd sub nom.* D.O. v. Glisson, 847 F.3d 374, 375–76 (6th Cir. 2017), *cert. denied* 138 S. Ct. 316 (2017) (finding that the children are the intended beneficiaries of the Act, but the Act itself is not termed in a way that focuses on the individual beneficiary).

<sup>64</sup> D.O. v. Beshear, 2016 WL 1171532, at \*5.

<sup>65</sup> See *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (detailing that a right is privately enforceable if Congress designed the statute to benefit the plaintiff, the right is not so "vague and amorphous that its enforcement would strain judicial competence," and the statute creates a "binding obligation" for the states); D.O. v. Beshear, 2016 WL 1171532, at \*6 (holding that the first factor of the *Blessing* test is not satisfied and the Act does not create a privately enforceable right).

<sup>66</sup> *Glisson*, 847 F.3d at 376.

On appeal, the Sixth Circuit concluded that the Act does in fact provide a privately enforceable right, as foster parents are owed foster care maintenance payments.<sup>67</sup> The Sixth Circuit explained that, in order to find a privately enforceable right, Congress's intention needs to be that the statute "benefit the plaintiff," the right cannot be "so vague and amorphous" that implementing it would "strain judicial competence," and the statute must "unambiguously impose a binding obligation on the States."<sup>68</sup>

The Sixth Circuit reasoned that the Act specifically intended to benefit foster care children.<sup>69</sup> The state of Kentucky argued that the Act focused on the state, directing the state to regulate the payments and that the proof lies in the fact that the Act is written in the active voice.<sup>70</sup> The court found, however, that an act written in the active voice does not necessarily preclude a statutory provision from being aimed at benefitting the plaintiff.<sup>71</sup> The court reasoned that the provision states that payments are to be made "on behalf of each child," thus focusing on benefiting specific individuals.<sup>72</sup>

Turning to whether the Act's language is too vague, the court found that the Act is not amorphous, but rather specifically lists all of the financial needs that the state is required to cover.<sup>73</sup> The court further reasoned that the lack of specific monetary amounts that need to be paid to foster parents in the Act does not necessarily make the Act "vague" or "amorphous."<sup>74</sup> The Act details that the payments are to provide funding for items such as "food, clothing, shelter, [and] daily supervision."<sup>75</sup> The Act allows for some flexibility on behalf of the foster parents regarding what brand of food they will purchase or where they will shop for clothing, so the Act cannot specify the exact costs of such purchases.<sup>76</sup> These cost decisions are predicated by the stores near a family's home, their particular preferences, and other similar

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 377 (citing *Blessing*, 520 U.S. at 340–41); see *Harris v. Olszewski*, 442 F.3d 456, 459–60 (2005) (holding that through the use of the three aforementioned factors, Medicaid's "freedom-of-choice provision" creates a privately enforceable right).

<sup>69</sup> *Glisson*, 847 F.3d at 378.

<sup>70</sup> *Id.* at 378–79. Kentucky argued that 42 U.S.C. § 674(a)(1) uses an active voice because the subject, the state, performs the action of making foster care maintenance. *Id.*

<sup>71</sup> See *id.* at 379 (detailing that the Supreme Court and the Sixth Circuit have held that laws phrased in active voice can create a privately enforceable right).

<sup>72</sup> *Id.* at 378 (distinguishing the facts in the current case from the facts in *Gonzaga University v. Doe*, where the act simply focused on regulating the governmental agency director, compared to the Act that focuses on the needs of the individual).

<sup>73</sup> 42 U.S.C. § 675(4)(a); *Glisson*, 847 F.3d at 378.

<sup>74</sup> *Glisson*, 847 F.3d at 379.

<sup>75</sup> 42 U.S.C. § 675(4)(a).

<sup>76</sup> *Glisson*, 847 F.3d at 379–80; see *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 495, 519 (1990) ("That the [statute] gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the [statute], but it does not render the [statute] unenforceable by a court.").

factors; yet, the court reasoned that this variability neither necessarily disqualifies the Act nor does it make it so “vague” or “amorphous” that implementation would “strain judicial competence.”<sup>77</sup>

Finally, the court found that the Act explicitly dictated that the state “shall make” foster care maintenance payments and, therefore, creates a duty for the states to make payments to qualified applicants.<sup>78</sup> Meanwhile, the state of Kentucky argued that Congress did not intend the Act to be binding on the states.<sup>79</sup> Rather, the state argued that the Act provided as a list of things that could be completed if the state wanted to be reimbursed by the federal government.<sup>80</sup> The state argued that nothing was actually required of it, as it could choose to forego the conditions set out in the Act and take on the full cost of the payments themselves.<sup>81</sup> The court ultimately gave little weight to the state’s arguments because the Act explicitly explains in mandatory terms that a state “shall make foster care maintenance payments;” thus, the Act cannot be interpreted as merely a roadmap.<sup>82</sup> As a result, the court concluded that these payments are not voluntary; they are required.<sup>83</sup>

The Sixth Circuit ultimately determined that the Act satisfies the three main requirements for an act to embody a privately enforceable right.<sup>84</sup>

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<sup>77</sup> 42 U.S.C. § 675(4)(A); *Glisson*, 847 F.3d at 378–79; see also *Wilder*, 496 U.S. at 519 (inferring that because the statute does not specify the specific amounts to be spent on each item, those decisions are left to the discretion of the foster family).

<sup>78</sup> See *Glisson*, 847 F.3d at 378–79 (reasoning that Congress used “rights creating language” and bound the state to an obligation to provide the “foster maintenance payments”); see also *Blessing*, 520 U.S. at 338 (finding that a statute creates a “binding obligation” if it describes what a state must do to obtain federal funding).

<sup>79</sup> *Glisson*, 847 F.3d at 378–79. Although Kentucky makes this argument, they provide no support for it, and it is unlikely that any state has attempted to fund the foster care maintenance payments on their own. *Id.* See *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1198 (8th Cir. 2013) (finding that 42 U.S.C. § 672(a) provides limitations for what types of foster care payments would be matched with federal funding but does not require that states make the payments to foster families).

<sup>80</sup> *Glisson*, 847 F.3d at 379. Kentucky further argues that the Act was meant to serve as a “roadmap” if the states wanted to be reimbursed with federal monies. *Id.*; see 42 U.S.C. § 672(a)(1) (detailing the process in which the state can be reimbursed for making foster care maintenance payments to foster families).

<sup>81</sup> *Glisson*, 847 F.3d at 379.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 380; see *Wilder*, 496 U.S. at 514 (holding that because the Boren Amendment satisfies all three requirements, the act embodies a privately enforceable right); see also *Cal. State Foster Parent Ass’n v. Wagner*, 624 F.3d 974, 982 (9th Cir. 2010) (holding that the Act is a privately enforceable right because it satisfies the three factors of the *Blessing* test, but not ruling on § 1983 enforceability because the state did not rebut the presumption).

### B. *The Rebuttable Presumption: The Sixth Circuit and § 1983*

There is a rebuttable presumption that the Act can be enforced using § 1983 because the Sixth Circuit found that it creates a privately enforceable right.<sup>85</sup> In *Glisson*, the Sixth Circuit held that the Act's prescribed foster care maintenance payments are enforceable using § 1983.<sup>86</sup> The court was not persuaded by the state of Kentucky's argument that the Secretary's review of the plan served as an independent enforcement mechanism and adequately protected the rights of affected individuals.<sup>87</sup> The state argued that because the Secretary can review the plan, the case is analogous to *Gonzaga University v. Doe*, in which the Secretary of Education was "expressly authorized" to mediate FERPA abuses.<sup>88</sup> In *Gonzaga*, the Supreme Court found that the specific provision within FERPA did not create a privately enforceable right; therefore, it could not be enforced under § 1983.<sup>89</sup> The Sixth Circuit distinguished the facts in *Glisson* from the facts in *Gonzaga* in its determination that the Act created a private right to foster maintenance payments, whereas FERPA did not create any such private right.<sup>90</sup>

In *Glisson*, the Sixth Circuit decided that the oversight given to the Secretary is not elaborate enough to show that Congress intended to foreclose § 1983 enforceability.<sup>91</sup> Thus, the Act's enforcement mechanisms, characterized by the court as weak, do not foreclose § 1983 enforceability.<sup>92</sup>

### C. *The Eighth Circuit and the Unavailability of § 1983 as an Enforcement Mechanism*

In *Midwest Foster Care and Adoption Ass'n v. Kincaide*, the Eighth Circuit found that the Act was not "unambiguously" meant to benefit the plaintiff, failing the first factor of the test set forth in *Blessing v. Free-*

<sup>85</sup> *Glisson*, 847 F.3d at 380 (quoting *Blessing*, 520 U.S. at 341).

<sup>86</sup> *See id.* at 381 (reasoning that because there is neither evidence of congressional intent to foreclose § 1983 enforcement implicitly by creating a separate enforcement mechanism nor explicitly by stating that § 1983 cannot be used to enforce the Act, the Act can be enforced using § 1983).

<sup>87</sup> *Id.*

<sup>88</sup> *Compare id.* at 380 (the Secretary has the power to "withhold funds to non-complying States"), with *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289 (2002) (the Secretary of Education was "expressly authorized" to oversee FERPA abuses).

<sup>89</sup> *Gonzaga*, 536 U.S. at 290–91.

<sup>90</sup> *See id.* (finding that because FERPA's enforcement procedures and federal review procedures are sufficient, there is no private right to be enforced).

<sup>91</sup> *Glisson*, 847 F.3d at 380.

<sup>92</sup> *See id.* (explaining that the Secretary simply "reviews" the plan created by the state and is not given any actual authority to force the state to give foster care maintenance payments to foster care families and, therefore, the statute does not have any sort of enforcement mechanism).

stone.<sup>93</sup> The Eighth Circuit found that because the Act does not contain what it considered to be any “rights-creating language,” the Act could not be deemed to provide a privately enforceable right.<sup>94</sup> First, the court noted that the language present in the Act focuses on the state, which is the subject being regulated.<sup>95</sup> The court likened the statute to FERPA in *Gonzaga*, which was considered “two steps removed from the interests of [the] individual.”<sup>96</sup> The court reasoned that the Act outlines the limitations on states and the types of spending that will be reimbursed with federal money, providing very little direct language about the interests of the foster children.<sup>97</sup>

The Eighth Circuit concluded that the definition of “foster care maintenance payments,” which lists what funds can be used for, does not necessarily create a privately enforceable right.<sup>98</sup> Rather, the list found in § 675(4)(A) of the Act serves as a “ceiling” through which Congress intended to limit state reimbursements.<sup>99</sup> Additionally, § 672(a)(1) states the conditions that must be met prior to initiating the need for foster maintenance payments.<sup>100</sup> Additionally, the court found that the Act has an “aggregate” focus, as the statute links the provision of federal funding to “substantial compliance” by the state.<sup>101</sup> Moreover, each time an individual right is stated, the court determined that the language illustrates what actions prohibit federal reimbursement, which further proves an aggregate focus.<sup>102</sup> In the end, the Eighth Circuit determined that Congress did not “unambiguously-

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<sup>93</sup> *Kincade*, 712 F.3d at 1203; see *Blessing*, 520 U.S. at 340 (holding that in order for a right to be a privately enforceable right, the first factor that must be met is that “Congress must have intended that the provision in question benefit the plaintiff”).

<sup>94</sup> *Kincade*, 712 F.3d at 1197.

<sup>95</sup> *Id.*; see also *Gonzaga*, 536 U.S. at 287 (finding that statutes focused on the individual being regulated, instead of the individual being benefitted, do not contain rights-creating language).

<sup>96</sup> See *Kincade*, 712 F.3d at 1197 (holding that the focus of the Act is too “removed” from the interests of the foster parents); see also *Gonzaga*, 536 U.S. at 287 (finding that where a statute’s regulations are too “removed” from the interests of the person who benefits from the statute, the statute does not create a privately enforceable right).

<sup>97</sup> See *Kincade*, 712 F.3d at 1197–98 (finding that when a statute is focused on telling the states what they must do to receive federal funding, that statute is unlikely to create a privately enforceable right).

<sup>98</sup> *Id.* at 1198.

<sup>99</sup> 42 U.S.C. § 675(4)(A); *Kincade*, 712 F.3d at 1197.

<sup>100</sup> 42 U.S.C. § 672(a)(1); see *Kincade*, 712 F.3d at 1198 (finding that the Act generally serves as a “roadmap,” which a state can follow if it wants its funds to be matched by federal money). If the state does not want to follow this roadmap, the state must provide these payments on its own. *Kincade*, 712 F.3d at 1197.

<sup>101</sup> 42 U.S.C. 672(a); see *Kincade*, 712 F.3d at 1200–01 (stating that one factor that shows a statute has an aggregate focus is when a statute is centered around “substantial compliance”).

<sup>102</sup> See *Kincade*, 712 F.3d at 1201 (explaining that when the Supreme Court has found a statute to create a privately enforceable right, these referenced statutes have not been “ensconced” with language that “triggers . . . a funding prohibition”).

ly confer” a privately enforceable right of foster care maintenance payments, and thus, the Act cannot be enforced under § 1983.<sup>103</sup>

### III. THE FUTURE OF THE ACT AND § 1983 ENFORCEABILITY

Section A of this Part reiterates that the Child Welfare Act is not a privately enforceable act and explains the reasoning.<sup>104</sup> Section B of this Part explains that the Sixth Circuit’s ruling might have been based on policy reasoning, rather than statutory interpretation.<sup>105</sup> Section C concludes this Part by arguing that the power to correct this problem rests with Congress.<sup>106</sup>

#### *A. The Child Welfare Act is Not a Privately Enforceable Right*

Though the Act was enacted to protect the foster care system and to ensure foster care maintenance payments, the Act’s text does not demonstrate Congress’s “unambiguous intent” to create a privately enforceable right.<sup>107</sup> Understandably, this conclusion should invoke some emotion, because it means that an individual taking in a foster care child may be left without legal recourse if they do not receive the monetary help that they need to get by.<sup>108</sup> It is a fundamental rule that courts must follow the prescribed tests rather than legislate from the bench.<sup>109</sup> Here, following the test agreed upon by the Supreme Court in *Blessing v. Freestone*, it is clear that the Act fails the first of the three factors because the verbiage included in the Act does not show Congress’s unambiguous intent to benefit the plaintiff.<sup>110</sup> As the Eighth Circuit demonstrates, there is no “rights creating lan-

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<sup>103</sup> *Id.* at 1203.

<sup>104</sup> See *infra* notes 107-118 and accompanying text.

<sup>105</sup> See *infra* notes 119-125 and accompanying text.

<sup>106</sup> See *infra* notes 126-129 and accompanying text.

<sup>107</sup> 42 U.S.C. § 672(a) (2012); see *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1203 (8th Cir. 2013) (holding that there is no proof to show that Congress did “unambiguously confer” a privately enforceable right).

<sup>108</sup> *Kincade*, 712 F.3d at 1203.

<sup>109</sup> See *United States v. Virginia*, 518 U.S. 515, 568, 570 (1996) (Scalia, J., dissenting) (explaining that the role of the court is to “preserve society’s values” and not to “revise” society’s values). Furthermore, courts cannot create tests to change the laws; they must only “evaluate” statutes. See generally Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185 (2007) (discussing the critiques of “legislating from the bench”).

<sup>110</sup> See *Kincade*, 712 F.3d at 1202 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290–91 (2002)) (finding that the Act does not satisfy the first factor of the *Blessing* test); see also *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (explaining that an act is a privately enforceable right if Congress intended to benefit the plaintiff, the right being conveyed is clear and not “so vague and amorphous that its enforcement would strain judicial competence,” and the right creates a “binding obligation” for the states).

guage” apparent within the Act.<sup>111</sup> Though ultimately foster children are the beneficiaries of the Act, the contents of 42 U.S.C. § 672 are largely focused on the “institution being regulated” and contain the layout of the conditions that trigger the federal government’s reimbursement.<sup>112</sup> While the Sixth Circuit reasoned that the Act is focused on the child because it explicitly states “on behalf of each child,” it ignored the express language in the beginning of the Act directed toward the states.<sup>113</sup> In fact, the Act speaks largely to the states, beginning, “[e]ach state with a plan approved under this part”<sup>114</sup> Thus, the language of the Act is not primarily focused on individual foster parents, but instead focused instead on what states need to do to be eligible for reimbursement by the federal government.<sup>115</sup>

Additionally, because the Act has an “aggregate focus,” rather than an individual focus, it cannot be said to create a privately enforceable right.<sup>116</sup> As illustrated in *Gonzaga University v. Doe*, proof of an aggregate focus can be found if an act is determined not to be focused on if the “needs” of a specific person were met and if the text of the Act “triggers” the prevention of repayment.<sup>117</sup> Assessing the Act through this lens, the majority of § 672 is focused on whether the state plan “substantially conforms” to the statute.<sup>118</sup>

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<sup>111</sup> See *Kincade*, 712 F.3d at 1197 (finding that because the Act focuses on the state as the entity being regulated and not on the individual being benefited, the Act does not include any “rights creating language”); see also *Gonzaga*, 536 U.S. at 287 (finding that the presence of rights creating language in a statute is evidence that Congress intended the statute to benefit the particular plaintiff).

<sup>112</sup> *Gonzaga*, 536 U.S. at 287–88; *D.O. v. Beshear*, No. 5:15-048-DCR, 2016 WL 1171532, at \*5 (E.D. Ky. Mar. 23, 2016) *rev’d sub nom.* *D.O. v. Glisson*, 847 F.3d 374, 375–76 (6th Cir. 2017).

<sup>113</sup> *Glisson*, 847 F.3d at 378; see 42 U.S.C. § 672(a)(1) (“Each State with a plan approved under this part . . .”).

<sup>114</sup> 42 U.S.C. § 672(a)(1); see *Kincade*, 712 F.3d at 1198 (finding that the Act largely focuses on what a state needs to do in order to be reimbursed and serves as a roadmap for states to follow).

<sup>115</sup> See 42 U.S.C. § 675(4)(a) (detailing the list of items and services that can be paid for by the state and reimbursed by the federal government); *Kincade*, 712 F.3d at 1198 (finding that the Act simply sets out what states can be reimbursed for and the process by which reimbursement occurs).

<sup>116</sup> See *Kincade*, 712 F.3d at 1200 (finding that the Act creates a link between compliance with conditions and reimbursement and, therefore, has an aggregate focus); see also *Gonzaga*, 536 U.S. at 288 (finding that a statute with an “aggregate focus” cannot create a privately enforceable right).

<sup>117</sup> See *Gonzaga*, 536 U.S. at 288–89 (further detailing that a statute with an “aggregate focus” does not “give rise to individual rights”); *Blessing*, 520 U.S. at 344 (finding that if there is not “substantial compliance” of Title IV-D, the Secretary cannot force the states to comply, but instead this merely is a “trigger” that allows the Secretary to decrease the amount of money repaid to the state).

<sup>118</sup> 42 U.S.C. § 672; *Kincade*, 712 F.3d at 1198.



### B. What About the Sixth Circuit's Ruling?

The text of the Act appears to not create a privately enforceable right, yet the Sixth Circuit found it did, allowing for privately enforcement under § 1983.<sup>119</sup> One potential factor in the Sixth Circuit's analysis is that if the Act is not a privately enforceable right, then there is no way to ensure that states follow proper procedures or that foster parents are given the money needed to support their children.<sup>120</sup> The Act does not provide independent private enforcement, and without § 1983, it is not clear how a harmed individual could seek assistance.<sup>121</sup> For instance, if an individual took in a foster child anticipating reliance on the foster care maintenance payments, but then did not receive those payments, that situation could have a substantially negative effect on the welfare of the child.<sup>122</sup> Congress likely intended for the foster care maintenance payments to include a privately enforceable right, as the welfare of this nation's children has been and will continue to be an important issue.<sup>123</sup> Without foster care maintenance payments, foster parents may be less likely to take in foster children simply because they do not have the funds to provide for them.<sup>124</sup> Although Congress's intent may have been to create a privately enforceable right, the text of the Act does not unambiguously express any such intent to create a privately enforceable right as required by the *Blessing* test.<sup>125</sup>

### C. The Solution Lies with Congress

Congress should amend the Act to demonstrate a clear commitment to the safety and welfare of the nation's children by creating a privately enforce-

<sup>119</sup> *Gonzaga*, 536 U.S. at 288–89; *Blessing*, 520 U.S. at 244; *Glisson*, 847 F.3d at 381.

<sup>120</sup> *Glisson*, 847 F.3d at 381; see *Blessing*, 520 U.S. at 340 (finding that § 1983 enforceability is only available to enforce a privately enforceable right, not merely a federal law). It has been found that 20% of children in foster care live in poverty, meaning that the foster families that they live with are below the poverty line. Jessica Pac et al., *Poverty Among Foster Children: Estimates Using the Supplemental Poverty Measure*, 91 SOC. SERV. REV. 8, 22 (2017).

<sup>121</sup> *Glisson*, 847 F.3d at 381; see 42 U.S.C. § 672(a)(1) (stating that the Secretary has the ability to review the foster care maintenance plan, but there is no “elaborate enforcement mechanism” provided in the statute).

<sup>122</sup> 42 U.S.C. § 672(a)(1); *Glisson*, 847 F.3d at 381. Foster care children most often come from poor neighborhoods, single-family homes, and have had exposure to things such as substance abuse and instability. Pac, *supra* note 114, at 9–10.

<sup>123</sup> HOUSE WAYS & MEANS COMM., *supra* note 14. Given Congress's commitment to the welfare of our nation's children, it seems likely that they would want individuals to be able to enforce the Act. *Id.*

<sup>124</sup> See *Glisson*, 847 F.3d at 381 (finding there was no federal mechanism for enforcement present within the Act and that without § 1983 enforcement, foster parents may not be able to afford taking foster children in).

<sup>125</sup> See *Kincade*, 712 F.3d at 1202 (the Act fails the *Blessing* test largely because there was no “clear and unambiguous” congressional intent to create a privately enforceable right).

able right.<sup>126</sup> This issue should not be left to the courts, as presently the appropriate interpretation leaves individuals no recourse.<sup>127</sup> Congress should resolve the ambiguities by either molding the Act into a statute that satisfies the *Blessing* test or by detailing an independent private enforcement mechanism by which foster care parents can ensure their right to foster care maintenance payments.<sup>128</sup> Thereafter, courts can find this right is privately enforceable under § 1983, or an independent private enforcement mechanism would allow individuals, such as the aunt in *D.O. v. Glisson*, who have had foster care payments wrongfully withheld to receive justice.<sup>129</sup>

### CONCLUSION

When the Sixth Circuit determined that the Act was a privately enforceable right, enforceable using § 1983, it is possible the court compromised its analysis to justify the end result. Despite ambiguous text, the court concluded that foster care maintenance payments comprise a private right, enforceable using § 1983. Assessing the same Act, the Eighth Circuit held that foster care maintenance payments did not comprise a privately enforceable right and, thus, cannot be enforced using § 1983. Although the result of the Eighth Circuit's decision is detrimental to foster parents and seemingly not in line with Congressional and national sentiments because foster parents may not have judicial remedies for states improperly withholding payments, the analysis correctly applies the *Blessing* factors for determining what is an individual right. The Eighth Circuit appropriately captured the role of courts to interpret the law, rather than supersede legislative authority. Because there is no way for the courts to circumvent Congress and find that the Act does create a privately enforceable right, Congress should amend the Act to ensure that the verbiage shows Congressional intent to create a privately enforceable right. This can be done by including language that "benefits the plaintiff," making the Act not so "vague and amorphous that

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<sup>126</sup> 42 U.S.C. § 672. See generally Peabody, *supra* note 103 (explaining that Judges should not legislate from the bench, rather it is Congress's job to pass necessary legislation).

<sup>127</sup> See *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13–14 (1981) (finding an elaborate enforcement mechanism to force compliance with the FWCPA). Here, § 672 contains no such enforcement mechanism; therefore, without the ability to enforce this right using § 1983, there is no way to ensure that states will comply and give the necessary funds to the foster parents. 42 U.S.C. § 672.

<sup>128</sup> See *Glisson*, 847 F.3d at 381 (finding that the Act can be enforced using § 1983 because using the factors set out in *Blessing*, the Act creates a privately enforceable right); *Kincade*, 712 F.3d (finding that the Act cannot be enforced using § 1983 because the Act fails the first factor of the *Blessing* test).

<sup>129</sup> See *Glisson*, 847 F.3d at 380–81 (explaining that the Act provides no review mechanisms and, thus, the only way that a foster family who has been withheld foster maintenance payments can challenge the state's action is through the use of § 1983).

its enforcement would strain judicial competence,” and clearly stating that it is mandatory for states to pay the foster maintenance payments. Once these three factors are clear in the statute, individuals will be able to sue to enforce their right to foster maintenance payments.

HANNAH DUDLEY

**Preferred Cite:** Hannah Dudley, Comment, *A Case for Revisiting the Child Welfare Act*, 57 B.C. L. REV. E. SUPP. 444 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/444/>.