No. 11-109

IN THE

Supreme Court of the United States

THEODORE DALLAS, *et al.*,

Petitioners,

v.

L.J., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

MONISHA CHERAYIL
PUBLIC JUSTICE CENTER, INC.
One North Charles Street
Baltimore, MD 21202

MITCHELL Y. MIRVISS
Counsel of Record
VENABLE LLP
750 East Pratt Street
Suite 900
Baltimore, MD 21202
(410) 244-7412
mymirviss@venable.com

(Additional counsel listed on inside cover)

DANIELLE SPINELLI
ANNIE L. OWENS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006

QUESTIONS PRESENTED

1. Whether the Fourth Circuit misapplied Rule 60(b)(5) by holding that a statement in a footnote in this Court's decision in *Horne* v. *Flores*, 129 S. Ct. 2579 (2009), did not effect a "significant" change in law sufficient to justify vacatur of a 1988 consent decree intended to remedy serious legal violations imperiling foster children, where the State does not contend that it has complied with the terms of the decree or that the decree is no longer necessary.

2. Whether the Fourth Circuit misapplied the law-of-the-case doctrine by finding that its 1988 decision holding that the decree was premised on a valid federal cause of action had not been overruled, without revisiting the merits of the 1988 decision.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 11-109

THEODORE DALLAS, *et al.*,

Petitioners,

v.

L.J., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

STATEMENT

For three decades, petitioners have failed to provide adequate shelter, health care, and other basic necessities to thousands of foster children in their custody, in violation of federal statutes and the Constitution. This case presents the question whether the Fourth Circuit misapplied Federal Rule of Civil Procedure 60(b)(5) when it declined to vacate the longstanding federal consent decree designed to remedy those abuses. The Fourth Circuit concluded that, under these very specific circumstances, where petitioners can point to no significant change in the relevant federal law, have not disputed continuing noncompliance with federal law, and have largely failed to correct the

violations of federal law that led to entry of the decree in the first place, Rule 60(b)(5) does not require vacatur. Nothing about that highly fact dependent—and wholly unexceptional—holding merits this Court's review.

A. Statutory Background And Events Leading To The 1988 Consent Decree

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act (AACWA), Pub. L. No. 96-272, 94 Stat. 500, which mandated wide-ranging reforms of state foster-care and child-welfare systems as a condition of continued federal funding for those programs. Before AACWA, the Social Security Act's requirements for state foster-care systems were less prescriptive, requiring, for instance, that foster children have a "case plan" but not specifying its terms. After studies demonstrated that children were languishing in foster care, Congress enacted AACWA. Foster-care payments were transferred from Title IV-A (the Aid to Families with Dependent Children welfare program) into a new Title IV-E, and new substantive requirements were instituted in both Titles IV-B (42 U.S.C. §§ 620 *et seq.*) and IV-E (§§ 670 *et seq.*). These substantive requirements are imposed on participating States by requiring them to submit detailed plans setting out their compliance to the Department of Health and Human Services as a condition for receiving funding under Titles IV-B and IV-E. *See* 42 U.S.C. §§ 622, 671.

These requirements are extremely specific. For instance, AACWA requires that each child in foster care have a "case plan" prepared by the State agency addressing the safety and appropriateness of his or her placement, the services that the child needs for proper care, and the services the child's parents need to re-

unify with the child or that the child or foster parent needs to facilitate placement in a permanent home. 42 U.S.C. §§ 627(a)(2) [now § 622(b)(8)], 671(a)(16), 675(1), 675(5)(A).[1] Each foster child's caregiver must receive sufficient subsidies to cover the cost of the child's food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance, and transportation for visiting parents. *Id.* §§ 671(a)(1), 672(c), 675(4). States are required to ensure that each foster child receives periodic judicial and internal administrative reviews of, *inter alia*, compliance with case plans, and to report maltreatment of any foster child to the court or law enforcement agency. *Id.* §§ 627(a)(2)(B) [now § 622(b)(8)], 671(a)(9), 675(5).[2]

---

[1] The case plan requirement is the principal vehicle for imposing specific casework mandates on State agencies. Under the 1980 statute, case plans must identify the needs of foster children, their parents, and their foster families; set forth the services to be provided to the children, parents, and foster families (usually through "service agreements" between parents and caseworkers); discuss the appropriateness of services that were provided; and be designed to achieve placement in the least restrictive setting available and in close proximity to the child's home. 42 U.S.C. §§ 675(1), 675(5)(A).

[2] Since 1980, Congress has repeatedly tightened the requirements for State participation in Titles IV-B and IV-E. The child's case plan must include health and education records (including immunization, grade level performance, and official school records) and list medical problems, medications, and the names and addresses of health and education providers; describe the programs and services that each older youth needs to reach independence; state the reasons for subsidized guardianship placements with relatives per § 673(d); provide for continued placement of the child in the original home school where possible; assure the child's educational stability; and require periodic visits to children placed out-of-state. 42 U.S.C. §§ 675(1)(C)-(G) & 675(5). For every child

As Maryland attempted to implement AACWA, appalling conditions were discovered in Baltimore's foster-care system: chronic abuse of children by foster parents; children lacking basic medical care; children living with alcoholic or abusive foster parents; and children languishing in foster care for years without case plans, services, or visits by caseworkers. In 1984, respondents, a class of Baltimore foster children (currently comprising more than 4,000 children), sued under 42 U.S.C. § 1983, alleging violations of federal statutory law and the Constitution. Specifically, respondents sought damages and a permanent injunction to remedy petitioners' violations of, *inter alia*, 42 U.S.C. §§ 627(a)(2) [now § 622(b)(8)], 671(a)(1), 671(a)(3), 671(a)(9), 671(a)(10), 671(a)(15), 671(a)(16), 672(c), 675(1), 675(5), and the Due Process Clause of the Fourteenth Amendment.

The named plaintiffs had suffered severe neglect and abuse. For instance, L.J. lived with a gravely alcoholic, mentally ill foster mother and an 85-year-old disabled man who shared his bed; scars from chronic abuse covered his body. He had no case plan and was rarely visited by caseworkers. Four-month-old O.S. was fed

---

who has lived in foster care for fifteen of the last twenty-two months, was abandoned, or has a parent that killed or severely abused a child, States must seek termination of parental rights. *Id.* § 675(5)(E). Prospective caregivers must have criminal and child-maltreatment background checks. *Id.* § 671(a)(20). Foster parents must be provided the knowledge and skills to meet each child's needs. *Id.* § 671(a)(24). Adult relatives must be notified of each child's removal from home and the right to seek placement of the child with them and to apply for licensure. *Id.* § 671(a)(29). School-age children must be enrolled in school, and reasonable efforts must be made to place siblings together. *Id.* §§ 671(a)(30)-(31).

adult food that was chewed and regurgitated by the foster mother. P.G. lost her vision in one eye after petitioners neglected to provide ophthalmological treatment. C.A.J.A. 55-143. Extensive evidence confirmed systemic lapses in safety and health care. *See L.J. ex rel. Darr* v. *Massinga*, 699 F. Supp. 508, 514, 531-533 (D. Md. 1988) (*L.J. I*) (summarizing evidence and findings).

In 1987, after a two-week evidentiary hearing, the district court granted a preliminary injunction and denied petitioners' motion for summary judgment on qualified immunity grounds, finding that petitioners were likely to prevail on both their statutory and their constitutional claims and that the relevant law was clearly established. *See L.J. I*, 699 F. Supp. at 528-540. The Fourth Circuit affirmed, holding that respondents were likely to prevail on their claims that the State had violated 42 U.S.C. §§ 627(a)(2), 671(a)(9), 671(a)(10), 671(a)(16), 675(1), and 675(5), and noting that petitioners did not seriously contest that the foster children's claims amounted to a violation of the Due Process Clause. *L.J. ex rel. Darr* v. *Massinga*, 838 F.2d 118, 122, 123-124 & n.3 (4th Cir. 1988) (*L.J. II*).

Petitioners filed a petition for a writ of certiorari seeking review of the Fourth Circuit's judgment affirming the denial of their qualified immunity defense. They did not challenge the lower courts' rulings that respondents' statutory and constitutional claims justified injunctive relief under Section 1983. *See* Pet., No. 87-1796, *Massinga* v. *L.J.* (U.S. May 2, 1988). While the petition was pending, petitioners negotiated a consent decree (the "1988 decree") requiring a case plan for each child; judicial and administrative reviews; diverse placement options; criminal background checks of foster parents and health, safety, and fire inspections of

foster homes; monthly home visits; health assessments and care; facilitation of permanent placements; school enrollment; and a caseload cap. C.A.J.A. 171-186.

B. The Contempt Petition And Negotiation Of The Modified Consent Decree

The 1988 decree mandated compliance with its substantive provisions by 1990. But petitioners failed to comply by 1990, or indeed at all. In 2002, Maryland's Department of Legislative Services (DLS) conducted an audit of the foster-care system and issued a report revealing petitioners' rampant neglect. DLS found grave problems ranging from failure to conduct criminal background checks of foster parents to failure to provide treatment to emotionally disturbed children. C.A.J.A. Supp. 1-3. Subsequent DLS audits also found continuing violations, as did performance reviews by the State. *Id.* at 52 n.54, 98-109, 119-120, 138-139, 156-157. DLS also found that petitioners were submitting incorrect and unreliable compliance data to the district court that concealed the gravity of the continuing violations. *Id.* at 172-175. After petitioners revised their reporting practices, they themselves began to report substantial noncompliance with the decree. *Id.* at 179; C.A.J.A. 456-468; Pet. App. 8.

Severe budget cuts during the recession of 2001-2002 led to a shortage of foster parents. C.A.J.A. Supp. 25-27. Children were placed en masse in group homes that were not adequately monitored, and petitioners surreptitiously used their offices as illegal, unlicensed shelters. Conditions were chaotic. Scores of children slept in deplorable settings without bedding, mattresses, showers, proper medical attention, toys, books, undergarments, and other necessities. Boys slept on a hard linoleum floor or sat up in hard plastic chairs. Ba-

sic hygiene was ignored, and one girl required emergency-room treatment for an acute infection caused by unsanitary conditions. A diabetic child subsisted on fast food for weeks. An infant with a feeding tube was left without trained staff. *Id.* at 15-27, 56-60; Pet. App. 9.

Petitioners' violations of AACWA were serious. Children lacked basic health, mental-health, dental, educational, and other services. Petitioners failed to provide case plans and administrative reviews required by 42 U.S.C. §§ 622(b)(8), 671(a)(16), 675(1), and 675(5)(A). Subsidy amounts stagnated for fifteen years, in violation of §§ 671(a)(1) and 672(c). While petitioners minimize these violations, arguing that respondents unreasonably demanded "100 percent compliance" (Pet. 14), in reality the violations were widespread and egregious, affecting thousands of children. For example, in September 2008, petitioners admitted that:

- 69% of case plans lacked required service agreements with parents;
- 35% of children placed with relatives had no case plan at all;
- 48% of foster children were not enrolled in school after changing placements;
- 60% of parents had been denied visits with their children;
- 43% of foster children did not receive regular medical care and 48% lacked required health assessments;
- 80% of cases were not timely transferred after staff left;
- 89% of cases lacked administrative reviews; and

- caseworkers missed visits to 35% of the children.

C.A.J.A. 391, 402, 404, 405-406, 411-413, 417; Pet. App. 10-11.

In short, despite the 1988 decree, the foster-care system remained a shambles, with thousands of children deprived of basic services. And there were many examples of individual children who suffered neglect or abuse comparable to that visited on the original named plaintiffs decades before.

Petitioners misleadingly suggest (Pet. 6, 14-15) that respondents treated every trivial instance of noncompliance as an opportunity to hale them into court. In fact, despite petitioners' continuing failure to comply with basic requirements, respondents initiated contempt proceedings only once. After a year of intensive negotiations in which petitioners refused to enter into any enforceable agreement, respondents had no choice but to seek court enforcement of the decree in late 2007. Petitioners did not dispute the data showing chronic violations and instead, at the enforcement hearing, offered to negotiate a new enforceable agreement with compliance and exit standards if respondents would stay the contempt proceedings. Pet. App. 11. Respondents readily agreed.

C. The 2009 Modified Consent Decree

Petitioners and respondents held eight months of intensive negotiations, mediated by two national child-welfare experts. Petitioners' highest officials, including the Secretary of the Maryland Department of Human Resources and four high-level assistant attorneys general, participated in nearly all sessions. In June 2009, the parties agreed on a modified consent decree (MCD)

setting substantive requirements and specifying the data that would be used to confirm petitioners' compliance and enable their eventual exit from the decree.

The MCD was modeled on approaches that had proven successful in similar cases. Its substantive requirements follow federal law, requiring use of case plans to implement many of AACWA's substantive provisions. While petitioners now complain that the MCD is "onerous" (Pet. 15), they agreed to its terms and selected the forty (not 126) data points used to monitor compliance and determine eventual exit. The parties' joint motion to approve the MCD stated that the decree "includes specific terms and standards upon which the Defendants will be deemed to be in compliance and allowed to terminate the [MCD] and exit from active supervision by this Court" and represented that the MCD's approach had led to successful resolution of other cases. C.A.J.A. 640.

Petitioners repeatedly touted the MCD, claiming that it would lead to "better, more comprehensive care." C.A.J.A. 1170. The Governor lauded it as an "important step" in improving the Baltimore child-welfare system. *Id.* at 1168. Indeed, the Secretary of the Maryland Department of Human Resources went on a publicity tour promoting her achievement[3] and later praised the MCD as a "very strong" agreement,

[3] *See A Breach of Trust*, Balt. Sun, Aug. 6, 2009, *available at* http://articles.baltimoresun.com/2009-08-06/news/0908050042_1_consent-decree-court-jurisdiction-federal-oversight.

emphasizing that petitioners' commitment to carry out its reforms was "unwavering."[4] C.A.J.A. 725-726.

D. Petitioners' Motion To Vacate The 1988 Decree And Opposition To Entry Of The 2009 Modified Consent Decree

After the parties jointly moved for approval of the MCD, this Court issued its decision in *Horne* v. *Flores*, 129 S. Ct. 2579 (2009). *Horne* held that when a State complies with federal law and implements "a durable remedy" for the original noncompliance, a court should not rigidly continue to enforce its original order, and that relief is proper under Federal Rule of Civil Procedure 60(b)(5). *Id.* at 2595.

Here—while petitioners recently have made significant strides—their own data reported contemporaneously with their motion to vacate vividly showed continuing violations of federal law and nothing even approaching a durable remedy. Pet. App. 63-64; C.A.J.A. 774-775, 777, 790. Indeed, petitioners have never contended—nor could they—that they have remedied the Baltimore foster care system's many violations.[5]

---

[4] Far from interfering with petitioners' operations, the consent decree has led to a productive partnership between petitioners and respondents aimed at reforming Baltimore's foster-care system. Indeed, the MCD is the only order since 1988 that has been entered over an objection. Moreover, petitioners recently asked respondents' co-counsel, Rhonda Lipkin, to replace the expert who verifies the accuracy, validity, and reliability of petitioners' compliance reports. Dist. Ct. Dkt. No. 614-615. That petitioners prefer Ms. Lipkin to the neutral expert selected by the parties speaks volumes.

[5] Petitioners' most recent compliance report reveals, *inter alia*, that 98% of foster children with family reunification plans did

Nonetheless, stating that *Horne* was the basis for their change in position, petitioners moved under Rule 60(b)(5) to vacate the 1988 decree and opposed entry of the MCD they had themselves proposed just days earlier. Petitioners contended that the district court had no authority to enter or enforce the decrees. They relied on a footnote in *Horne*, which made the unexceptional point that private plaintiffs cannot bring a claim to enforce a federal statute that lacks a private right of action. 129 S. Ct. at 2598 n.6. Petitioners claimed that the footnote in *Horne*, read together with this Court's then-seventeen-year-old decision in *Suter* v. *Artist M.*, 503 U.S. 347 (1992)—which petitioners argued held that there is no private right of action to enforce AACWA—constituted a significant change in law justifying vacatur of the 1988 decree. Petitioners all but ignored the fact that the decrees also rested on respondents' constitutional claims.

The district court denied petitioners' motion to vacate the 1988 decree and entered the 2009 modified decree over their objection. The Fourth Circuit affirmed in a unanimous decision written by Judge Duncan, holding that (1) the district court did not abuse its discretion in denying petitioners' Rule 60(b)(5) motion to vacate the 1988 decree because footnote 6 of *Horne* was not a significant intervening change in decisional law requiring vacatur under this Court's "flexible standard" (*see* Pet. App. 16-21), and that *Suter* had not

---

not receive required parent-child visits; 73% of foster homes did not meet licensing requirements; 70% of children lacked service agreements for case plans; 70% were not visited monthly; 54% of children entering foster care did not receive necessary healthcare; and 49% of families at risk of having children removed did not receive services required by case plans. Dist. Ct. Dkt. No. 618.

overruled *L.J. II*, which remained law of the case (*id.* at 21-28; and (2) petitioners' objections to the 2009 MCD therefore also lacked merit (*see id.* at 28-32). The Fourth Circuit denied petitioners' request for rehearing en banc, with no judge requesting a poll. *Id.* at 166.

REASONS FOR DENYING THE WRIT

Petitioners present no question warranting this Court's review. As an initial matter, their efforts to depict this case as another *Horne* v. *Flores* (at, *e.g.*, Pet. 36-37) are inapt. To be sure, as *Horne* held, continued enforcement of a consent decree against a State is not equitable—and contravenes principles of federalism—when the State has remedied the violations of federal law that gave rise to the decree in the first place. But petitioners do not, and cannot, claim that they have implemented any such remedy here. To the contrary, the record below is filled with petitioners' own data documenting serious, continuing violations. And there is nothing inequitable, and nothing that violates principles of federalism, in requiring petitioners to abide by a consent decree binding them to provide basic care and safety for foster children, when they have never satisfied the requirements of applicable federal law and do not dispute that many of the serious problems that led to the decree still plague Baltimore's foster-care system.

The specific questions that petitioners claim this case presents are no more compelling than their misguided appeal to equity. *First*, petitioners contend that the Fourth Circuit misapplied Rule 60(b)(5) by holding that the district court was not required to vacate the 1988 consent decree. Petitioners do not assert here, nor did they contend below, that federal law had been

satisfied or that the decrees are detrimental to the public interest, as was the case in *Horne*. Rather, they argued that a footnote in *Horne*—which merely reiterated "the well-established principle that private plaintiffs cannot bring a claim to enforce a statute that lacks a private right of action" (Pet. App. 21)—coupled with this Court's then-seventeen-year-old decision in *Suter* v. *Artist M.*, 503 U.S. 347 (1992)—was a significant change in governing law requiring vacatur. Petitioners now challenge the Fourth Circuit's rejection of that argument. As petitioners concede, however, this question presents nothing more than the allegation that the Fourth Circuit "misappl[ied]" (Pet. i) settled law to a specific set of facts. As such, it is not worthy of this Court's review.

Second, petitioners seek review of the question whether a particular provision of AACWA provides a private right of action. That question, however, is not presented by this case. Indeed, the Fourth Circuit expressly stated that it was not reaching the issue. Pet. App. 32. Instead—having already held that Rule 60(b)(5)'s requirements for vacatur were not met—the Fourth Circuit merely applied its own law-of-the-case doctrine to hold that petitioners had not met their burden of demonstrating that they were entitled to have that issue revisited many years after the issue had been decided. Again, therefore, petitioners' actual challenge is to the Fourth Circuit's fact-specific application of well-settled and splitless law-of-the-case doctrine. That question, too, is not worthy of this Court's review. Moreover, even if the AACWA question were properly presented here, the decree is also supported by respondents' constitutional claims—a point that, as the Fourth Circuit observed (*id.* at 16 n.6), petitioners have not

meaningfully contested, and that is an adequate alternative ground for the court of appeals' judgment.

I. PETITIONERS' FIRST QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW

A. Petitioners' First Question Presented Merely Challenges The Fourth Circuit's Application Of Settled Law Regarding Rule 60(b)(5) To Highly Fact-Specific Circumstances

1. Petitioners' challenge to the Fourth Circuit's case-specific application of well-settled Rule 60(b)(5) principles does not warrant this Court's review. This Court has made clear that "a flexible approach is often essential to achieving the goals of reform litigation," *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 381 (1992), both because "injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances" and because such injunctions "often raise sensitive federalism concerns," *Horne* v. *Flores*, 129 S. Ct. 2579, 2593 (2009). Nonetheless, "it does not follow that a modification will be warranted in all circumstances." *Rufo*, 502 U.S. at 383. Even in the institutional-reform context, modification under Rule 60(b)(5) is appropriate only "when 'it is no longer equitable that the judgment should have prospective application,' not"—as petitioners would have it—"when it is no longer convenient to live with the terms of a consent decree." *Id.* (quoting Fed. R. Civ. P. 60(b)(5)). Therefore, the party seeking modification must establish that "a *significant* change either in factual conditions or in law" has rendered the continued enforcement of the decree inequitable. *Id.* at 384 (emphasis added).

The Fourth Circuit properly applied this "flexible approach" in holding that the district court was not re-

quired to grant petitioners' motion. *See* Pet. App. 18 (discussing the "flexible approach," and explaining that, under that approach, "courts are directed to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant" (citing *Horne*, 129 S. Ct. at 2595) (internal quotation marks omitted)). Contrary to petitioners' contention that the Fourth Circuit failed to apply the "flexible approach," the court merely found no merit in petitioners' argument that there had been the "significant" change in law necessary to warrant relief. *See* Pet. App. 18-21; *Rufo*, 502 U.S. at 384.[6]

The *only* purported changed circumstance petitioners have identified is a single footnote in *Horne*, 129 S. Ct. at 2598 n.6, which they claim constitutes a significant change in law rendering continued enforcement of the decree inequitable. But Footnote 6 merely reiterated a well-established legal principle—that private plaintiffs cannot bring a claim to enforce a statute that does not provide a private right of action. *See id.* ("'Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" (quoting *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001))). That principle

[6] The Fourth Circuit thus did not, as petitioners claim (at 23), hold that "a party moving for relief [under Rule 60(b)(5)] based on an intervening change in law must show that an earlier decision in the case was 'dead wrong.'" Rather, the court applied this formulation of its law-of-the-case principles later in the decision (Pet. App. 30) in answering the separate question whether "the district court erred in entering the 2009 modified consent decree … because the decree lacked a valid legal basis" (*id.* at 28), which was not part of the court's Rule 60(b)(5) analysis (*see id.* at 14-28).

is far from novel, as evidenced by the footnote's supporting citation to *Sandoval* and was well established long before the 1988 decree. *See, e.g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 145 (1985) (citing cases).

Accordingly, Footnote 6 falls far short of qualifying as "a significant change" in law that could require vacatur of the 1988 decree. *Rufo*, 502 U.S. at 383. This Court has made plain that, even under the "flexible approach," mere clarification of the law is insufficient to justify modification of a consent decree: "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Id.* at 389. A clear holding directly on point is required. *See Agostini* v. *Felton*, 521 U.S. 203, 217 (1997) ("The views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.").

Here, the court of appeals correctly recognized Footnote 6 as nothing more than a reiteration of settled principles that does not require vacatur under Rule 60(b)(5). Pet. App. 21 ("At most, *Horne* reinforced the well-established principle that private plaintiffs cannot bring a claim to enforce a statute that lacks a private right of action."). Indeed, "neither Appellants' brief nor Appellants' counsel at oral argument could articulate the former state of the law that the *Horne* footnote allegedly changed." *Id.* at 20.

Moreover, Footnote 6 addressed an issue wholly inapposite to this case. As noted, *Horne* held that continued enforcement of an injunction against a State

agency is inequitable if the agency has remedied the violations underlying the decree—in that case, violations of the Equal Education Opportunities Act of 1974 (EEOA). Footnote 6 addressed the tangential argument that, notwithstanding the State's compliance with the EEOA, the injunction should remain in effect to enforce an entirely different law, the No Child Left Behind Act, which was not a basis for the injunction and, indeed, had never been a part of the plaintiffs' case. Because it was undisputed that the No Child Left Behind Act does not provide a private cause of action, the Court unsurprisingly concluded that the Act could not be used as a substitute ground to support the injunction once the violations of the EEOA had been remedied. As the Fourth Circuit determined, there was nothing new in that conclusion.

Horne thus did not vacate the underlying judgment on the ground that the district court's order was not based on a judicially enforceable federal right. *See* Pet. App. 19 ("Footnote 6 did not relate to the validity of the judgment as a legal remedy."). Rather, *Horne* held that changed *factual* circumstances—compliance with federal law and demonstration of a durable remedy to ameliorate the violations—could obviate the need for the injunction and thus justify modification under Rule 60(b)(5). *See* 129 S. Ct. at 2589 (Rule 60(b)(5) relief appropriate if State could prove it was "fulfilling its statutory obligation"); *id.* at 2595 (the "critical question" in the Rule 60(b)(5) inquiry is whether the order's "objective" "has been achieved" by a "durable remedy").

Petitioners do not even attempt to establish that compliance with federal law has rendered continued enforcement of the 1988 decree unnecessary, and for good reason. Their own data reveal that they remain in gross noncompliance with AACWA and that the ram-

pant neglect that necessitated the 1988 decree continues unabated. Children still are not receiving required health care, case plans still are woefully deficient or non-existent, and administrative reviews still are not taking place. Indeed, this case presents the opposite of *Horne*: chronic noncompliance with federal law, and no durable remedy in sight.

2. Petitioners also contend that the Fourth Circuit erred by rejecting their argument that, when read in conjunction with Footnote 6 in *Horne*, this Court's 1992 decision in *Suter* v. *Artist M.*, 503 U.S. 347 (1992), provides sufficient grounds for vacating the 1988 decree. That contention similarly presents no issue worthy of this Court's review.

As a threshold matter, the court of appeals suggested that, even if petitioners' contentions otherwise had merit, their unexplained seventeen-year delay in filing a motion to vacate based on *Suter* would render their motion untimely under Rule 60(c). *See* Pet. App. 21-22 ("[E]ven if *Suter* had indeed changed the law, Appellants' lengthy delay in filing a motion based upon it would bring into question the appropriateness of equitable relief."); Fed. R. Civ. P. 60(c) (motions under Rule 60(b)(5) must be brought "within a reasonable time"). Such delay is an adequate alternative ground for disposing of petitioners' *Suter*-based claim. Indeed, other circuits have denied as untimely motions to vacate decrees brought after unexplained delays that were much shorter than seventeen years. *See*, *e.g.*, *Rease* v. *AT&T Corp.*, 358 F. App'x 73, 75-76 (11th Cir. 2009) (per curiam) (six-year delay not reasonable); *FTC* v. *Namer*, 2007 WL 2974059, at *10 (5th Cir. Oct. 12, 2007) ("fourteen years after entry of judgment does not qualify as a reasonable time for application of Rule 60");

Moolenaar v. *Government of Virgin Is.*, 822 F.2d 1342, 1348 (3d Cir. 1987) (two-year delay not reasonable).

But even if petitioners' motion had been timely, *Suter* did not effect the kind of significant change in law that would require vacatur under Rule 60(b)(5). As the Fourth Circuit recognized, *Suter* did not overrule the Fourth Circuit's decision in *L.J. II*, upon which the 1988 decree rests. It did not even involve the same statutory provisions at issue here. Pet. App. 22-28. Although this Court in *Suter* held that 42 U.S.C. § 671(a)(15) did not create judicially enforceable individual rights, it was silent as to Sections 622(b)(8), 671(a)(16), 675(1) and 675(5), the principal provisions involved in this case. *Suter*, 503 U.S. at 358-364. Indeed, petitioners acknowledge that *Suter*'s reach is limited to § 671(a)(15) (*see* Pet. at 12-13, 32), a provision that *L.J. II* did not address. Thus, petitioners are simply wrong to imply that *Suter* should be read broadly to hold that *no* provision of AACWA that lays out requirements of a state plan can be privately enforceable. *See* Pet. 2.

As the court of appeals recognized, Congress itself has made clear that such a reading of *Suter* goes too far. Pet. App. 23-26. In the wake of *Suter*, Congress enacted 42 U.S.C. § 1320a-2 to clarify that "[i]n an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan." *See ASW* v. *Oregon*, 424 F.3d 970, 977 n.11 (9th Cir. 2005) (Section 1320a-2 "overturned *Suter* to the extent the Court held that simply by virtue of being a plan requirement Congress foreclosed the possibility that the provision could create an individually enforceable federal right"). The statute also made clear

that it was intended to restore pre-*Suter* law. Congress did so, in principal part, by "overturning any … grounds applied in *Suter* [other than to hold § 671(a)(15) unenforceable] … but not applied in prior Supreme Court decisions respecting such enforceability." 42 U.S.C. § 1320a-2.

Congress's explicit objective was to ensure that individual plaintiffs could continue to enforce AACWA and similar statutes to the same extent they could before *Suter*. *See* H.R. Rep. No. 102-1034, at 1304 (1992) (Conf. Rep.) (affirming that the amendment "'preserves private rights of action as they existed before the *Suter* v. *Artist M.* Supreme Court decision'" in order to "assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter* v. *Artist M*"); *see also* 138 Cong. Rec. S17689 (daily ed. Oct. 8, 1992) (statement of lead sponsor Sen. Riegle) (Congress's intent was to assure that "low-income children [do not lack] recourse through the Federal courts when States fail to implement State plan requirements under the Foster Care program of the Social Security Act"); *Implication of Supreme Court Decision in* Suter *v.* Artist M.*: Hearing Before the Subcomm. of Social Security and Family Policy of the S. Comm. on Finance*, 102d Cong. 8 (1992) (opening statement of Sen. Riegle) ("we can[not] leave the people in these programs without any way to protect their interests"). Therefore, even if *Suter* could be read as holding that no provision in AACWA is privately enforceable, Congress abrogated that holding. *See Blessing* v. *Freestone*, 520 U.S. 329, 342 (1997) (section-specific inquiry necessary to determine "whether each separate claim satisfies the various

criteria we have set forth for determining whether a federal statute creates rights"); *see also Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2002) (applying *Blessing*, 520 U.S. 329).

The Fourth Circuit thus properly held that *Suter* did not overrule or significantly undermine *L.J. II* to the extent that vacatur of the consent decree was required. *See Rufo*, 502 U.S. at 383-384. Nothing about the court's application of settled Rule 60(b)(5) principles to the facts here justifies this Court's review.

3. Finally, the undisputed facts of this case belie petitioners' core claim that continuing federal judicial supervision of their foster-care program violates federalism principles. Nothing in *Horne* was intended to weaken federal courts' ability to remedy violations of federal law: "It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief." *Horne*, 129 S. Ct. at 2594.

But even more fundamentally, in the institutional-reform context, federalism concerns are most acute when consent decrees remain in place even though "one or more of the obligations placed upon the parties has become impermissible under federal law," *Rufo*, 502 U.S. at 388; the State has complied with federal law, *see Horne*, 129 S. Ct. at 2589; or the objects of the consent decree have been obtained, *see Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 441-442 (2004). Petitioners have not attempted to establish that any of those scenarios exists here. To the contrary, it was petitioners' admitted noncompliance that led to the 2009 MCD. By the time respondents had initiated contempt proceedings, the inappropriate placement of children in group homes rather than foster homes had increased dramati-

cally; petitioners had resorted to placing children illegally in unlicensed office buildings for overnight housing; and roughly half of Baltimore's foster children did not receive basic dental or medical care.

Petitioners nonetheless complain that the MCD limits the ability of a newly appointed State official to implement the policies of her choosing. They offer no support for this assertion. In any event, this Court has made clear that relief under Rule 60(b)(5) is not appropriate merely because "it is no longer convenient to live with the terms of a consent decree." *Rufo*, 502 U.S. at 383. Accordingly, while the federalism concerns petitioners so fervently invoke may well be significant in other cases where the State claims compliance with federal law—such as *Horne* itself—*this* case is manifestly ill-suited to serve as a vehicle for vindicating those concerns.

B. The Fourth Circuit's Application Of Rule 60(b)(5) Does Not Conflict With Decisions Of This Court Or Of Other Courts Of Appeals

Contrary to petitioners' contentions, the Fourth Circuit's Rule 60(b)(5) analysis does not conflict with decisions of this Court or of other courts of appeals. Specifically, petitioners' contention that the Fourth Circuit's application of a "rigid, 'dead fish' approach" to the Rule 60(b)(5) analysis conflicts with the "flexible" approach prescribed by this Court and employed by the Sixth and Seventh Circuits lacks merit. *See* Pet. 24-25 (citing *John B.* v. *Goetz*, 626 F.3d 356 (6th Cir. 2010) (per curiam); *Evans* v. *City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc); *O'Sullivan* v. *City of Chicago*, 396 F.3d 843 (7th Cir. 2005)).

As discussed above, the Fourth Circuit *did* apply the "flexible" approach to the Rule 60(b)(5) question in

this case, consistent with this Court's precedent. *See Horne*, 129 S. Ct. at 2595; *Rufo*, 502 U.S. at 383-384. The court expressly considered whether there has been "'a significant change either in factual conditions or in law' that makes 'enforcement of the decree … detrimental to the public interest.'" Pet. App. 14-15 (quoting *Rufo*, 502 U.S. at 384). In doing so, it emphasized the importance of "ensur[ing] that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant," and "remain[ing] attentive to the fact that federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation." Pet. App. 18 (citing *Horne*, 129 S. Ct. at 2595 (internal quotation marks omitted)).

There is no merit to petitioners' suggestion (at 23-24) that this Court's decision in *Agostini* v. *Felton*, 521 U.S. 203 (1997), supports a grant of certiorari. That decision was "intimately tied to the context in which it arose"—namely, a decree based on a prior decision of this Court, rendered in the same litigation, that subsequently had been all but expressly overruled by this Court's case law. *Id.* at 238. As shown above, neither *Horne* Footnote 6 nor *Suter* materially changed the applicable law, let alone significantly changed the law, as had occurred in *Agostini*. Petitioners, by contrast, do not ask this Court to reconsider its own decision rendered in the course of this litigation, or to apply controlling new precedent previously decided by this Court, but instead seek review of the court of appeals' routine

determination not to create new law under the guise of a Rule 60(b)(5) motion.[7]

Petitioners' contention that the Fourth Circuit's Rule 60(b)(5) analysis conflicts with the approach taken by the Sixth and Seventh Circuits also lacks merit. Neither of those circuits has addressed *Horne* Footnote 6, let alone treated it as a change in law justifying Rule 60(b)(5) relief. And both circuits apply a flexible approach to motions to modify or vacate institutional-reform decrees that is fully consistent with the Fourth Circuit's approach.

United States v. *Tennessee*, 615 F.3d 646 (6th Cir. 2010), applies the same approach to Rule 60(b) motions in the institutional-reform context as does the Fourth Circuit. In that case, the Sixth Circuit explained that, when considering whether to modify institutional-reform consent decrees under Rule 60(b)(5), "courts must take a 'flexible approach,'" which considers "whether a significant change either in factual conditions or in law renders continued enforcement of the judgment detrimental to the public interest." *Id.* at 652 (citing *Horne*, 129 S. Ct. at 2594, 2596-2597 (internal quotation marks omitted)). In that case—as here—the court denied a Rule 60(b)(5) motion to vacate a decree because defendants could not show that a significant

---

[7] *See, e.g.*, *Horne*, 129 S. Ct. at 2593 ("Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests."); *Browder* v. *Director, Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review"); 11 Wright & Miller, *Federal Practice & Procedure* § 2863 (2d ed. 1995) (Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment").

change of law had occurred where neither the Supreme Court nor a reported Sixth Circuit decision had "squarely addressed" the issue decided by the prior judgment, even though other circuits and unreported Sixth Circuit decisions allegedly were to the contrary. *Id.* at 656-657 (citing *Rufo*, *Agostini*, and *Horne*). Accordingly, there is no merit to petitioners' assertion that the Sixth Circuit's application of the 60(b)(5) standard conflicts with the Fourth Circuit's approach in this case.

In *John B.*, the Sixth Circuit applied a similar analysis, but held that a newly reported Sixth Circuit decision *did* constitute a change in law necessitating vacatur. *See* 626 F.3d at 362-363 (vacating portions of the decree implementing provisions of Medicaid and AACWA in light of *Westside Mothers* v. *Olszewski*, 454 F.3d 532 (6th Cir. 2006)). Although the court determined that Rule 60(b)(5) relief was appropriate based on the decree at issue in that case and in light of specific new Sixth Circuit law, it did not apply a different legal standard than the Fourth Circuit here. *See John B.*, 626 F.3d at 362-363; *see also Brown* v. *Tennessee Dep't of Fin. & Admin.*, 561 F.3d 542, 546-548 (6th Cir. 2009) (applying "flexible approach" to vacate portions of consent decree implementing federal Medicaid requirements in light of "important change in law" announced in *Westside Mothers*). To the contrary, *John B.* applies the same standard to different facts and reaches a different result, merely confirming that the purported "misappl[ication]" of Rule 60(b)(5) that petitioners challenge is too fact-bound to be worthy of this Court's review.

Nor does the Fourth Circuit's flexible approach to Rule 60(b)(5) conflict with Seventh Circuit case law. That court's decision in *Evans* v. *City of Chicago*, 10

F.3d 474, 475-476 (7th Cir. 1993) (en banc) (plurality opinion), involved a consent decree that rested on an earlier decision that—in contrast to the decision underpinning the 1988 decree here—had been explicitly overruled by the Seventh Circuit *before* the judgment became final. The en banc plurality held that vacatur under Rule 60(b)(5) was appropriate because that change in law made clear that no colorable federal claim supported the decree. *Id.* at 481-483. Nothing about that holding or the Seventh Circuit's analysis conflicts with the Fourth Circuit's decision.

Likewise, there is no conflict with the Seventh Circuit's decision in *O'Sullivan* v. *City of Chicago*, 396 F.3d 843 (7th Cir. 2005). *O'Sullivan* held that, where a subsequent change in law undermined a plaintiff's standing to enforce the decree, the proper course is not to vacate the decree outright, but rather to determine whether continued enforcement is detrimental to the public interest pursuant to Rule 60(b)(5). *Id.* at 868. Accordingly, the court remanded to allow the district court to conduct a flexible balancing per the equitable standards of Rule 60(b)(5). *Id.* Nothing about this unremarkable holding departs from the Fourth Circuit's analysis in this case.

Together, these cases establish a common-sense guideline: Binding precedent that plainly overrules or all but overrules prior law is "significant" for Rule 60(b)(5) purposes, but purported conflicts with nonbinding decisions are insufficient to warrant relief. That is wholly consistent with the Fourth Circuit's reasoning and holding in this case.

II. PETITIONERS' SECOND QUESTION PRESENTED IS NOT PROPERLY PRESENTED IN THIS CASE

A. The Question Whether Section 671(a)(16) Creates A Private Right Of Action Is Not Properly Presented In This Case

In their second question presented, petitioners contend that the Fourth Circuit erred by holding that Section 671(a)(16) creates a private right of action enforceable in federal court. But because the Fourth Circuit expressly refused to reach that issue below, that question is not properly presented. Moreover, because the 1988 decree was also based on due process claims properly vindicated through Section 1983, this case would be a poor vehicle for addressing the question even if it were presented.

1. The Fourth Circuit previously resolved the question whether the sections of AACWA codified at 42 U.S.C. §§ 627(a)(2) [now § 622(b)(8)], 671(a)(9), 671(a)(16), 672(c), 673, 675(1) and 675(5) create a private right of action enforceable through Section 1983 in the decision that affirmed the original 1988 decree. *See L.J. II*, 838 F.2d at 122-123. In the decision below, the Fourth Circuit declined to revisit that issue on the merits. Pet. App. 32.

Specifically, the Fourth Circuit concluded that law-of-the-case doctrine barred a collateral attack on the 1988 decision and that petitioners had not demonstrated that an exception to law-of-the-case doctrine applied. Pet. App. 22-32. Such a ruling by definition is not a ruling on the merits—the very purpose of the doctrine is to avoid revisiting the same merits issue at later stages of the litigation. *See id.*

The issue that petitioners belatedly seek to raise is simply not properly presented in this case. To the ex-

tent that it is distinct from their first question presented, therefore, petitioners' second question reduces to a challenge to the Fourth Circuit's application of its own law-of-the-case doctrine to the facts of this case. But a question regarding a case-specific application of a circuit's law-of-the-case doctrine—which rests on the court of appeals' own judgment regarding what best serves the interests of judicial economy and finality—is particularly inappropriate for this Court's review. *See Arizona* v. *California*, 460 U.S. 605, 618 (1983) (law-of-the-case doctrine "directs a court's discretion, [but] does not limit the tribunal's power").

2. In any event, even if petitioners' second question were properly presented, this case would be a poor vehicle for addressing the issue. The consent decree rests on adequate alternative grounds—namely, it is also based on due process rights that are properly secured through Section 1983. Petitioners do not challenge this independent basis for the decree in their petition, and they largely ignored it below. *See* Pet. App. 16 n.6 (noting, without reaching the issue, that petitioners' challenge to the substantive viability of respondents' due process claims was limited to a footnote in a reply brief before the district court that "was insufficiently developed to establish that contention below"). Therefore, even assuming that Sections 622(b)(8) and 671(a)(16), for example, did not create enforceable individual rights, this would still not be a situation where, as petitioners assert, the State would be saddled with "continued enforcement [of the decree] in the absence of a valid federal claim." Pet. 37.

Consent decrees securing due process rights are common. Petitioners acknowledge (at 5 n.1) that up to 29 similar consent decrees have been entered, many of which rested on constitutional claims like those here.

Indeed, many of the cases petitioners cite (at 29-31) allowed constitutional claims and eventually resulted in consent decrees comparable to the decrees in this case. *See, e.g.*, *Charlie H.* v. *Whitman*, 83 F. Supp. 2d 476, 507 (D.N.J. 2000); *Olivia Y. ex rel. Johnson* v. *Barbour*, 351 F. Supp. 2d 543, 555-556 (S.D. Miss. 2004); *Eric L. ex rel. Schierberl* v. *Bird*, 848 F. Supp. 303, 307-308 (D.N.H. 1994); *Aristotle P.* v. *Johnson*, 721 F. Supp. 1002, 1009-1010 (N.D. Ill. 1989). Moreover, in the wake of *Suter*, courts have consistently rejected attempts similar to this one to vacate foster-care consent decrees where—as here—due process claims or AACWA claims not addressed by *Suter* were present.[8]

B. The Decision Below Does Not Conflict With Decisions Of This Court Or Of Other Courts Of Appeals

1. Petitioners argue that the Fourth Circuit's decision splits with decisions of other courts regarding whether a private right of action exists to enforce AACWA. As an initial matter, as discussed above, the Fourth Circuit's decision cannot have created any conflict on that issue because the court never reached it. Nor does the Fourth Circuit's application of its law-of-the-case doctrine conflict with the decisions of this Court or of other circuits. The Fourth Circuit applies

---

[8] *See Angela R. ex rel. Hesselbein* v. *Clinton*, 999 F.2d 320, 323-324 (8th Cir. 1993); *Timmy S.* v. *Kentucky Cabinet for Human Res.*, 1993 WL 492305, at *4 (6th Cir. Nov. 29, 1993); *R.C. ex rel. Alabama Disability Advocate Program* v. *Nachman*, 969 F. Supp. 682, 702-703 (M.D. Ala. 1997), *aff'd*, 145 F.3d 363 (11th Cir. 1998); *Norman* v. *McDonald*, 930 F. Supp. 1219, 1228 (N.D. Ill. 1996); *Office of Child Advocate* v. *Lindgren*, 296 F. Supp. 2d 178, 185 n.4 (D.R.I. 2004).

its law-of-the-case doctrine to preclude relitigation of issues decided in a previous stage of the case unless the prior decision is "clearly erroneous." Pet. App. 29. That standard is consistent with this Court's articulation of law-of-the-case principles. *See Pepper* v. *United States*, 131 S. Ct. 1229, 1250-1251 (2011) (law-of-the-case doctrine "'does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice"'" (quoting *Agostini*, 521 U.S. at 236)); *Arizona*, 460 U.S. at 618; *see also Agostini*, 521 U.S. at 236 (reciting traditional law-of-the-case principles in an institutional-reform context).

Moreover, because this case is about the Fourth Circuit's application of its *own* law-of-the-case doctrine, by definition there can be no split with other circuits on that issue. In any event, the Fourth Circuit's "clearly erroneous" exception to the law-of-the-case doctrine is consistent with other circuits' application of that doctrine. *See, e.g.*, *Cohen* v. *Brown Univ.*, 101 F.3d 155, 168 (1st Cir. 1996); *In re Peters*, 642 F.3d 381, 386 (2d Cir. 2011); *Scheafnocker* v. *Commissioner*, 642 F.3d 428, 433 (3d Cir. 2011); *Gene & Gene, L.L.C.* v. *BioPay, L.L.C.*, 624 F.3d 698, 702 (5th Cir. 2010); *United States* v. *Hughes*, 505 F.3d 578, 591 (6th Cir. 2007); *Jarrard* v. *CDI Telecomms., Inc.*, 408 F.3d 905, 911-912 (7th Cir. 2005); *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 994, 1005 (8th Cir. 2010); *Minidoka Irrigation Dist.* v. *DOI*, 406 F.3d 567, 573 (9th Cir. 2005); *Rimbert* v. *Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011); *Mega Life & Health Ins. Co.* v. *Pieniozek*, 585 F.3d 1399, 1405 (11th Cir. 2009).[9]

[9] Petitioners object to the Fourth Circuit's use of the "dead fish" metaphor, but that phrase is a common way to describe the

2. Even if the underlying merits issue were properly presented, the Fourth Circuit's decision does not conflict with any decision of this Court. This Court has never overruled the Fourth Circuit's 1988 holding in *L.J. II*, nor has it spoken to whether Section 671(a)(16), in particular, creates judicially enforceable individual rights.

Petitioners also point to cases from the Eleventh and Sixth Circuits, but, even if the merits question were properly presented here, neither of those decisions would create a split warranting this Court's review.[10] The Eleventh Circuit's decision in *31 Foster Children* v. *Bush*, 329 F.3d 1255 (11th Cir. 2003), did not, as petitioners claim, hold that "§ 671(a)(16) does not create privately-enforceable rights." Pet. 22. Rather, the court "decide[d] whether 42 U.S.C. §§ 675(5)(D) and (E)"—two definitional sections of AACWA that did not even exist at the time of *L.J. II*—"provide rights enforceable under 42 U.S.C. § 1983" in-

---

"clearly erroneous" standard. *See, e.g.*, *United States* v. *Lanham*, 617 F.3d 873, 888 (6th Cir. 2010); *In re Antrobus*, 563 F.3d 1092, 1098 n.2 (10th Cir. 2009); *United States* v. *Becerra*, 155 F.3d 740, 756 (5th Cir. 1998); *Hiram Walker & Sons, Inc.* v. *Kirk Line*, 30 F.3d 1370, 1378 n.2 (11th Cir. 1994) (Dubina, J., concurring) (calling the "dead fish" definition of clearly erroneous "the best I have seen"); *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). In any event, any divergence between the circuits in the precise articulation of the standard does not warrant this Court's review.

[10] Petitioners also err in claiming that New York's "highest state court[]" held that "671(a)(16) does not create privately enforceable rights." Pet. 29. A divided intermediate panel so found based on obsolete reasoning (*Suter*'s now-abrogated state-plan rationale), but the New York Court of Appeals did not affirm on this basis. *See Mark G.* v. *Sabol*, 717 N.E.2d 1067 (N.Y. 1999).

dependently of Section 671(a)(16), which, unlike the broader Title IV-B provision (the current § 622(b)(8)), did not include them in its cross-referenced list of definitional provisions.[11] 329 F.3d at 1268; *see also id.* at 1268-1271.

Nor does the Fourth Circuit's decision create a split with the Sixth Circuit's decision in *John B.*, 626 F.3d 356, that is worthy of this Court's review. The claims and decree in *John B.* involved enforcement of provisions in the Medicaid statute for children and only tangentially involved foster care issues. *Id.* at 358. The court noted in a single sentence, without any textual or contextual analysis, that AACWA does not create enforceable rights because it "requires the state to develop a 'case plan' and a 'case review system' for each child." *Id.* at 363. The court did not elaborate further because it was uncertain whether the decree at issue was based on AACWA at all. *See id.* Moreover, the decree in question expressly reserved defendants' right to challenge enforceability of the statutes, *see id.* at 358-359, so finality was not a bar. In any event, the single, conclusory sentence in *John B.*, a case in which the court was unsure that AACWA was even relevant,

---

[11] Indeed, a consent decree similar to the one in this case remains intact in the Eleventh Circuit notwithstanding *31 Foster Children*. In *Kenny A.* v. *Purdue*, 218 F.R.D. 277, 292-293, 296-297 (N.D. Ga. 2003), the district court allowed certain AACWA case-plan and constitutional claims, leading to a consent decree. Instead of rejecting these claims under *31 Foster Children*, the Eleventh Circuit affirmed an enhanced-fee award to plaintiffs' counsel. *Perdue* v. *Kenny A.*, 532 F.3d 1209 (2008), *rev'd*, 130 S. Ct. 1662 (2010). The *Kenny A.* consent decree remains in effect, belying petitioners' contention that a conflict exists between the Fourth and Eleventh Circuits on the underlying merits issue.

hardly represents a developed split of authority. And given that the Fourth Circuit did not reach the question of AACWA's enforceability, instead merely applying settled Rule 60(b)(5) and law-of-the-case principles to decline to revisit its earlier decision, there is no division of authority that justifies this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MONISHA CHERAYIL
PUBLIC JUSTICE CENTER, INC.
One North Charles Street
Baltimore, MD 21202

MITCHELL Y. MIRVISS
Counsel of Record
VENABLE LLP
750 East Pratt Street
Suite 900
Baltimore, MD 21202
(410) 244-7412
mymirviss@venable.com

DANIELLE SPINELLI
ANNIE L. OWENS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006

OCTOBER 2011