

**NLWJC - Kagan**

**Counsel - Box 025 - Folder 001**

**Welfare - Cause of Action**

THE WHITE HOUSE  
WASHINGTON

4-18-96

Jeff -

I just got this from Jen Klein.  
It's the newest version of what she  
showed us last week. Could you take  
a look at it and call me today  
or tomorrow? Many Thanks.

Elena

All <sup>the</sup> for a good

Elab. 'ness of draft as new strands  
makes it all more bizane.  
to think that they intended  
to freedom such actions.

**Suggested Revisions to Medicaid Cause of A.001 (April 2, 7:23 p.m.)  
(4/10/86 a.m.)**

"(z)(1) Except as provided in this subsection, no beneficiary\* or provider may bring an action in Federal court arising from this title unless the beneficiary or provider has exhausted an administrative process established by the State consistent with paragraph (4).

"(2) Paragraph (1) shall not apply to an action brought -

"(A) for the enforcement of the [provisions/requirements] under subsection (a)(10)(D) (relating to qualified medicare beneficiaries) and section 1905(p) (relating to medicare cost-sharing);

"(B) for the enforcement of section 1919 (relating to nursing home standards);

"(C) for the enforcement of section 1927 (relating to prevention of spousal impoverishment);

"(D) for the enforcement of ~~section (a)(10)~~ . . . .

"(3) Paragraph (1) shall not apply to an action brought in a case in which -

"(A) a delay in provision of services during the administrative process may result in serious impairment to the health, or in irreparable injury to, the individual;

"(B) the responsible officer in the administrative process lacks authority to provide for the relief requested or there is otherwise no adequate remedy [at law];

"(C) compliance with the exhaustion requirement of such paragraph would be futile.

"(4) In the case of an action brought by a beneficiary,\* an administrative process

is consistent with this section only if -

"(A) it provides for timely fair hearings consistent with the requirements of subsection (a)(3) and Subpart E of Chapter IV of 42 Code of Federal Regulations (as in effect as of January 1, 1985), and

"(B) it does not restrict the rights of beneficiaries\* to such a hearing because they are enrolled in an entity contracting on a risk basis under section 1903(m) or in an entity contracting with a State under a waiver under section 1915(b) or section 1115.

Subparagraph (B) shall not be construed as preventing a State from providing for a fair hearing through such an entity so long as such hearing meets the requirements of subparagraph (A).

(b) EFFECTIVE DATE: - The amendments made by this section shall apply to actions initiated on or after October 1, 1986.

[ Issue: does use of the term "beneficiary" foreclose an action by an applicant for benefits? Should we say "individual?"

*? for benefits*

could be furthered if H.R. 4 were amended to require that each state seek public input regarding, or at least publish, its proposed plan prior to submitting it to the federal government.)

Implicit in the NGA proposal is that each state commit to comply with the criteria it sets forth in its plan. This commitment should be made an explicit plan requirement.

Federal authority to approve state plans and to issue implementing regulations would provide fuller protection to beneficiaries. Currently, H.R. 4, as revised by the NGA, would not grant such federal authority, and amendments to provide such authority seem unlikely.

However, a state plan that explicitly sets forth and binds a state to meeting its program criteria may well give rise to an individual's right to bring a private action to enforce the provisions of a state plan. Section 1130A of the Social Security Act explicitly overturns the Supreme Court's decision in Suter v. Artist M., 112 S. Ct. 1360 (1992), which held that an individual does not have a private right of action to enforce the elements of a state plan. The private right of action afforded by Section 1130A would provide at least one mechanism for ensuring that states would operate their welfare programs in conformance with their state plans. The likelihood that courts will recognize such a private right of action would be enhanced if the "no entitlement" language in Section 401(b) of H.R. 4 were clarified to read as follows:

Does not provide a priv rt of action

"This part shall not be interpreted to entitle any individual or family to assistance as a matter of federal law under any State program funded under this part; provided that this provision shall not be construed to preclude any claim that assistance has been unlawfully reduced, denied or terminated.

Why not more specific language?

rhetorical definition of entitlements nor in Goldberg v Kelly - precludes any claims whatsoever.

"entitlement" ↓ but really a private rt.

Our thoughts? Flesh out a bit more?

strategy helpful?

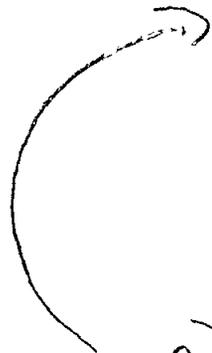
2) next wk's testim - Wed. Clearance tmrw.

criteria set forth in plan.

Get rid of 9/4/77

514-4969

Laws a mess



1) Stat provisions -  
obstacle

2) Prob -

1) Need specificity

2) Need explicit cardinal  
finding.

Finish memo to J/K  
once talk to Anna Durander

continue 1 or more individual waivers described in subsection (a).

"SEC. 416. ASSISTANT SECRETARY FOR FAMILY SUPPORT.

"The programs under this part and part D shall be administered by an Assistant Secretary for Family Support within the Department of Health and Human Services, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be in addition to any other Assistant Secretary of Health and Human Services provided for by law.

"SEC. 417. LIMITATION ON FEDERAL AUTHORITY.

"No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.

"SEC. 418. DEFINITIONS.

"As used in this part:

"(1) ADULT.--The term 'adult' means an individual who is not a minor child.

"(2) MINOR CHILD.--The term 'minor child' means an individual who--

C:\WORD\DPTYGNCL.ALD\HR4ENROL

Doc 1 Pg 42 Ln 29 Pos 14

(even if some discretion  
in part of st as to  
how to satisfy it)

Fed neg v.  
state neg.

Diff b/w a law saying what  
or plan must include  
and law saying  
or must have plan - can  
be whatever.

In latter case,  $\Sigma$  is whether  
st has violated own law  
in former,  $\Sigma$  is whether st  
has violated fed law??

~~HTH~~

No comp. preference for any  
particular kind of conduct

Absolutely  
necessary



Funding expressly conditional?  
- on state compliance w/ plan  
negs?

too vague + ambiguous -

eq 2a for implementation of plans'  
required provisions -

but not for provisions attached to states.

Funding needs to be expressly conditioned  
on compliance

Make as precise as possible.

① States ID criteria / publish

② Reg st to adhere to above -  
w/ particularity

✓  
'med pass to  
man carry act.

(Scute - no priority  
action.  
Overturned by statute)

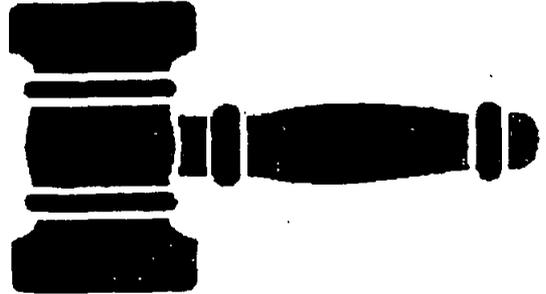
Statute testifying 21th.

Bill Curry 66597

DEPARTMENT OF HEALTH & HUMAN SERVICES  
THE GENERAL COUNSEL  
ROOM 713-F

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DATE: Feb. 22, 1996

TO : Elana Kagan

DEPARTMENT/OFFICE: WH Counsel

PHONE NO. 456-7903

FAX NO. 456-2146

FROM: HARRIET S. RABB  
GENERAL COUNSEL

*690-  
63/8*

COMMENTS: \_\_\_\_\_  
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No. of Pages (including cover) 4



## DEPARTMENT OF HEALTH &amp; HUMAN SERVICES

Office of the Secretary

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The General Counsel  
Washington, D.C. 20201

TO: Elana Kagan  
Counsel's Office

FROM: Harriet S. Rabb  
Anna L. Durand

SUBJECT: Accompanying Memo

DATE: February 23, 1996

Kathy Wollman suggested that we send the attached to you directly. When we spoke with Kathy last night, we didn't know you'd called; please accept our apologies.

Anna has an appointment out of the office this morning but should be back in time for us to call you some time after mid-morning to discuss the attached and our sense of strategy related to it.

We look forward to talking with you.

2ND CASE of Level 1 printed in FULL format.

SUE SUTER, ET AL., PETITIONERS v. ARTIST M., ET AL.

No. 90-1488

SUPREME COURT OF THE UNITED STATES

503 U.S. 347; 112 S. Ct. 1360; 1992 U.S. LEXIS 1953; 118 L. Ed. 2d 1; 60 U.S.L.W. 4251; 92 Cal. Daily Op. Service 2532; 92 Daily Journal DAR 4015; 6 Fla. Law W. Fed. S 106

December 2, 1991, Argued

March 25, 1992, Decided

PRIOR HISTORY: [\*\*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: 917 F.2d 980, reversed.

SYLLABUS:

The Adoption Assistance and Child Welfare Act of 1980 provides that a State will be reimbursed by the Federal Government for certain expenses it incurs in administering foster care and adoption services, if it submits a plan for approval by the Secretary of Health and Human Services. Among its requisite features, an approved plan must provide that it "shall be in effect in all" of a State's political subdivisions and "be mandatory upon them," 42 U.S.C. § 671(a)(3), and that "reasonable efforts will be made" to prevent removal of children from their homes and to facilitate reunification of families where removal has occurred, § 671(a)(15). Respondents, child beneficiaries of the Act, sought declaratory and injunctive relief, alleging that petitioners, the Director and [\*\*2] the Guardianship Administrator of the Illinois agency responsible for investigating charges of child abuse and neglect and providing services for abused and neglected children and their families, had failed to make reasonable efforts to preserve and reunite families, in contravention of § 671(a)(15). The District Court denied petitioners' motion to dismiss, holding, inter alia, that the Act contained an implied cause of action and that suit could also be brought under 42 U.S.C. § 1983. The court entered an injunction against petitioners, and the Court of Appeals affirmed. That court relied on *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510, to hold that the "reasonable efforts" clause of the Act could be enforced through a § 1983 action, and applied the standard of *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080, to find

that the Act created an implied right of action entitling respondents to bring suit directly under the Act.

Held:

1. Section 671(a)(15) does not confer on its beneficiaries a private right enforceable in a § 1983 action. Pp. 7-15.

(a) Section 1983 is not available to enforce a violation of a federal statute where Congress has foreclosed enforcement in the enactment [\*\*3] itself and "where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 93 L. Ed. 2d 781, 107 S. Ct. 766. Congress must confer such rights unambiguously when it intends to impose conditions on the grant of federal moneys. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531. Thus, statutory provisions must be analyzed in detail, in light of the entire legislative enactment, to determine whether the language in question created rights within the meaning § 1983. Pp. 7-9.

(b) Congress did not unambiguously confer upon the Act's beneficiaries the right to enforce the "reasonable efforts" requirement. The Act is mandatory only insofar as it requires a State to have an approved plan containing the listed features; and it is undisputed that the Illinois plan provides that reasonable efforts at prevention and reunification will be made. Respondents err in basing their § 1983 argument, in part, on § 671(a)(3)'s "in effect" language, which is directed to the requirement that the plan apply to all of a State's political subdivisions and is not intended to otherwise modify the [\*\*4] word "plan." Unlike the Medicaid legislation in *Wilder*,

503 U.S. 347, \*; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*4; 118 L. Ed. 2d 1, \*\*\*

*supra* -- which actually required the States to adopt reasonable and adequate reimbursement rates for health care providers and which, along with regulations, set forth in some detail the factors to be considered in determining the methods for calculating rates -- here, the statute provides no further guidance as to how "reasonable efforts" are to be measured, and, within broad limits, lets the State decide how to comply with the directive. Since other sections of the Act provide mechanisms for the Secretary to enforce the "reasonable efforts" clause, the absence of a § 1983 remedy does not make the clause a dead letter. The regulations also are not specific and provide no notice that failure to do anything other than submit a plan with the requisite features is a further condition on the receipt of federal funds. And the legislative history indicates that the Act left a great deal of discretion to the States to meet the "reasonable efforts" requirement. Pp. 9-15.

2. The Act does not create an implied cause of action for private enforcement. Respondents have failed to demonstrate that Congress intended to make such a remedy [\*\*5] available. See *Cort, supra; Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16. Pp. 15-16, 100 S. Ct. 242, 62 L. Ed. 2d 146.

917 F.2d 980, reversed.

COUNSEL: Christina M. Tchen, Special Assistant Attorney General of Illinois, argued the cause for petitioners. With her on the briefs were Susan Getzendanner, Charles F. Smith, and Kimberley K. Baer, Special Assistant Attorneys General.

Deputy Solicitor General Roberts argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Starr, Assistant Attorney General Gerson, Michael R. Dreeben, and Anthony J. Steinmeyer.

Michael G. Dsida argued the cause for respondents. With him on the brief were Patrick T. Murphy and Lee Ann Lowder. \*

\* Briefs of amici curiae urging reversal were filed for the State of Louisiana et al. by William J. Guste, Jr., Attorney General of Louisiana, Jesse James Marks and David A. Dalia, Assistant Attorneys General, James H. Evans, Attorney General of Alabama, Grant Woods, Attorney General of Arizona, Daniel E. Lungren, Attorney General of California, Gale A. Norton, Attorney General of Colorado, Charles M. Oberly III, Attorney General of Delaware, John Payton, Corporation

Counsel of the District of Columbia, Michael J. Bowers, Attorney General of Georgia, Warren Price III, Attorney General of Hawaii, Larry EchoHawk, Attorney General of Idaho, Linley E. Pearson, Attorney General of Indiana, Bonnie J. Campbell, Attorney General of Iowa, Robert T. Stephan, Attorney General of Kansas, Frederic J. Cowan, Attorney General of Kentucky, Michael E. Carpenter, Attorney General of Maine, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Mike Moore, Attorney General of Mississippi, William L. Webster, Attorney General of Missouri, Marc Racicot, Attorney General of Montana, Frankie Sue Del Papa, Attorney General of Nevada, Robert J. Del Tufo, Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Lacy H. Thornburg, Attorney General of North Carolina, Nicholas J. Spaeth, Attorney General of North Dakota, Lee Fisher, Attorney General of Ohio, Susan Brimer Loving, Attorney General of Oklahoma, Dave Frohnmayer, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, James E. O'Neil, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Mark W. Barnett, Attorney General of South Dakota, Paul Van Dam, Attorney General of Utah, Jan C. Graham, Solicitor General, Jeffrey L. Amestoy, Attorney General of Vermont, Mary Sue Terry, Attorney General of Virginia, Ken Eikenberry, Attorney General of Washington, Mario J. Palumbo, Attorney General of West Virginia; and for the Council of State Governments et al. by Richard Ruda and Charles Rothfeld.

Briefs of amici curiae urging affirmance were filed for the American Association for Protecting Children et al. by James D. Weill and Robert G. Schwartz; for the American Bar Association by Talbot S. D'alemberte; for the Illinois State Bar Association et al. by Robert E. Lehrer, Dennis A. Rendleman, Roger B. Derstine, Richard L. Mandel, John J. Casey, Michael A. O'Connor, Alexander Polikoff, Roslyn C. Lieb, Gary H. Palm, and Thomas F. Geraghty; and for the National Association of Counsel for Children et al. by Christopher A. Hansen, John A. Powell, Harvey M. Grossman, Ira A. Burnim, Henry Weintraub, Martha Bergmark, and Mark Soler.

Kenneth C. Bass III, Thomas J. Madden, and Jeffrey Kuhn filed a brief for the National Council of

503 U.S. 347, \*; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*5; 118 L. Ed. 2d 1, \*\*\*

Juvenile and Family Court Judges as amicus curiae.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined.

OPINION BY: REHNQUIST

OPINION: [\*350] [\*\*\*8] THE CHIEF JUSTICE delivered the opinion of the Court.

This case raises the question whether private individuals have the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980 (Adoption Act or Act), 94 Stat. 500, 42 U.S.C. §§ 620-628, 670-679a, either under the Act itself or through an action under 42 U.S.C. § 1983. n1 The Court of Appeals for the Seventh Circuit held that 42 U.S.C. § 671(a)(15) contained an implied right of action, and that respondents could enforce this section of the Act through an action brought under § 1983 as well. We hold that the Act does not create an enforceable right on behalf of the respondents.

n1 Section 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[\*\*6]

The Adoption Act establishes a federal reimbursement program for certain expenses incurred by the States in administering [\*351] foster care and adoption services. The Act provides that States will be reimbursed for a percentage of foster care and adoption assistance payments when the State satisfies the requirements of the Act. 42 U.S.C. §§ 672-674, 675(4)(A) (1988 ed. and Supp. I).

To participate in the program, States must submit a plan to the Secretary of Health and Human Services for approval by the Secretary. 42 U.S.C. §§ 670, 671. Section 671 lists 16 qualifications which state plans must contain in order to gain the Secretary's approval. As relevant here, the Act provides:

"(a) Requisite features of State plan

"In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which --

[\*\*\*9] "(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

"(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need [\*\*7] for removal of the child from his home, and (B) to make it possible for the child to return to his home . . . ." 42 U.S.C. § 671(a)(3), (15).

Petitioners in this action are Sue Suter and Gary T. Morgan, the Director and the Guardianship Administrator, respectively, of the Illinois Department of Children and Family Services (DCFS). DCFS is the state agency responsible for, among other things, investigating charges of child abuse and neglect and providing services to abused and neglected children and their families. DCFS is authorized under Illinois law, see Ill. Rev. Stat., ch. 37, para. 802-1, et. seq. (1989), to gain temporary custody of an abused or neglected child after a [\*352] hearing and order by the Juvenile Court. Alternatively, the court may order that a child remain in his home under a protective supervisory order entered against his parents. See *Artist M. v. Johnson*, 917 F.2d 980, 982-983 (CA7 1990). Once DCFS has jurisdiction over a child either in its temporary custody, or in the child's home under a protective order, all services are provided to the child and his family by means of an individual caseworker at DCFS to whom the child's case is assigned. App. 35-39. [\*\*8]

Respondents filed this class-action suit seeking declaratory and injunctive relief under the Adoption Act. n2 They alleged that petitioners, in contravention of 42 U.S.C. § 671(a)(15) failed to make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred. n3 This failure occurred, as alleged by respondents, because DCFS failed promptly to assign caseworkers to children placed in DCFS custody and promptly to reassign cases when caseworkers were on leave from DCFS. App. 6-8. The District Court, without objection from petitioners, certified two separate classes seeking relief, including all children who are or will be wards of DCFS and are placed in foster care or

503 U.S. 347, \*352; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*8; 118 L. Ed. 2d 1, \*\*\*9

remain in their homes under a judicial protective order. n4 *Artist M. v. [\*353] Johnson*, 726 F. Supp. 690, 691 (ND Ill. 1989). The District Court denied a motion to [\*\*\*10] dismiss filed by petitioners, holding, as relevant here, that the Adoption Act contained an implied cause of action and that suit could also be brought to enforce the Act under 42 U.S.C. § 1983. 726 F. Supp. at 696, 697.

n2 Count III of the complaint alleged that petitioners violated the Due Process Clause of the Constitution. App. 26 This count was dismissed by the District Court and was not appealed. *Artist M. v. Johnson*, 917 F.2d 980, 982, n. 3 (CA7 1990). [\*\*9]

n3 Although DCFS administers the child welfare program for the entire State of Illinois, respondents only alleged violations of the Adoption Act as to Cook County. App. 6.

n4 Specifically, the following classes were certified by the District Court:

"Class A: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in the Circuit Court of Cook County, Juvenile Division ('Juvenile Court'), who are or will be in the custody of [DCFS] or in a home under DCFS supervision by an order of Juvenile Court and who are now or will be without a DCFS caseworker for a significant period of time.

"Class B: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time." *Artist M. v. Johnson*, 726 F. Supp. 690, 691 (ND Ill. 1989).

The "Class B" plaintiffs only raised a constitutional due process claim, which was dismissed by the District Court. See n. 2, supra.

The District Court then entered an injunction [\*\*10] requiring petitioners to assign a caseworker to each child placed in DCFS custody within three working days of the time the case is first heard in Juvenile Court, and to reassign a caseworker within three working days of the date any caseworker relinquishes responsibility for a particular case. App. to Pet. for Cert. 56a. The three working day deadline was found by the District Court to "realistically reflect the institutional capabilities of DCFS," *id.*, at 55a, based in part on petitioners' assertion that assigning caseworkers within that time

frame "would not be overly burdensome." *Id.*, at 54a. The District Court, on partial remand from the Court of Appeals, made additional factual findings regarding the nature of the delays in assigning caseworkers and the progress of DCFS reforms at the time the preliminary injunction was entered. App. 28-50.

The Court of Appeals affirmed. *Artist M. v. Johnson*, 917 F.2d 980 (CA7 1990). Relying heavily on this Court's decision in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990), the Court of Appeals [\*354] held that the "reasonable efforts" clause of the Adoption Act could be enforced through an action under § 1983. 917 F.2d at 987-989. n5 [\*\*11] That court, applying the standard established in *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), also found that the Adoption Act created an implied right of action such that private individuals could bring suit directly under the Act to enforce the provisions relied upon by respondents. 917 F.2d at 989-991. We granted certiorari, and now reverse. n6 500 U.S. 915 (1991).

n5 The Court of Appeals also noted that the Fourth Circuit, in *L. J. ex rel. Darr v. Massinga*, 838 F.2d 118 (1988), cert. denied, 488 U.S. 1018, 102 L. Ed. 2d 805, 109 S. Ct. 816 (1989), had found the substantive requirements listed in § 671(a) to be enforceable under § 1983. 917 F.2d at 988.

Several cases have addressed the enforceability of various sections of the Adoption Act. See, e.g., *Massinga*, supra, at 123 (finding case plan requirements enforceable under § 1983); *Lynch v. Dukakis*, 719 F.2d 504 (CA1 1983) (same); *Norman v. Johnson*, 739 F. Supp. 1182 (ND Ill. 1990) (finding "reasonable efforts" clause enforceable under § 1983); *B. H. v. Johnson*, 715 F. Supp. 1387, 1401 (ND Ill. 1989) (finding "reasonable efforts" clause not enforceable under § 1983).

[\*\*12]

n6 Subsequent to oral argument, respondents notified the Court of the entry of a consent decree in the case of *B. H. v. Suter*, No. 88-C-5599 (ND Ill.), which they suggest may affect our decision on the merits, or indeed may make the instant action moot. We find no merit to respondents' contentions, and conclude that the *B. H.* consent decree has no bearing on the issue the Court decides today. Sue Suter, petitioner in this case, is the defendant in the *B. H.* suit, which alleges statewide deficiencies in the operations of DCFS. See *B. H. v. Johnson*, supra. The class approved in *B. H.* contains "all persons who are or will be in the custody of [DCFS] and who have

503 U.S. 347, \*354; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*12; 118 L. Ed. 2d 1, \*\*\*10

been or will be placed somewhere other than with their parents." 715 F. Supp. at 1389.

Respondents suggest that because petitioner has agreed in the B. H. consent decree to provide "reasonable efforts" to maintain and reunify families, she is somehow precluded from arguing in this case that § 671(a)(15) does not grant a right for individual plaintiffs to enforce that section by suit. As we have recognized previously this Term however, parties may agree to provisions in a consent decree which exceed the requirements of federal law. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992) (slip op. 18). Paragraph two of the B. H. decree itself provides that the decree is not an admission of any factual or legal issue. In addition, the B. H. consent decree does not require "reasonable efforts" with no further definition, but rather defines the standard against which those efforts are to be measured. See B. H. Consent Decree para. para. 8, 16(a), pp. 12, 20. Thus, the agreement embodied in the consent decree is not inconsistent with the position petitioner asserts here, namely that § 671(a)(15) requiring "reasonable efforts," without further definition, does not create an enforceable right on behalf of respondents to enforce the clause by suit.

Respondents next contend that the B. H. decree "may also render much of this case moot." Supp. Brief for Respondents 8. Although petitioner here is the defendant in B. H., the class certified in B. H. does not include children living at home under a protective order, and therefore is more narrow than the class certified in the instant suit. In addition, while DCFS agrees in the B. H. consent decree to certain obligations, for example a ceiling on the number of cases handled by each caseworker, none of these obligations subsumes the injunction entered by the District Court and affirmed by the Court of Appeals below, requiring petitioners to provide a caseworker within three days of when a child is first removed from his home. Cf. *Johnson v. Chicago Board of Education*, 457 U.S. 52, 72 L. Ed. 2d 668, 102 S. Ct. 2223 (1982) (per curiam).

In short, the situation in this case is quite different from that in the cases cited by respondents in which this Court remanded for further proceedings after events subsequent to the filing of the petition for certiorari or the grant of certiorari affected the case before the Court. Unlike the parties in *J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115, 4 L. Ed. 2d 148, 80 S. Ct. 212 (1959) (per curiam) the parties in the case before the Court have not en-

tered a consent decree. Unlike *Kremens v. Bartley*, 431 U.S. 119, 52 L. Ed. 2d 184, 97 S. Ct. 1709 (1977), the B. H. decree does nothing to change the class at issue or the claims of the named class members. And unlike *American Foreign Service Assn. v. Garfinkel*, 490 U.S. 153, 104 L. Ed. 2d 1, 9, 109 S. Ct. 1693 (1989) (per curiam) where we noted that "events occurring since the District Court issued its ruling place this case in a light far different from the one in which that court considered it," *id.*, at 158, the issue of whether the reasonable efforts clause creates an enforceable right on behalf of respondents is the same now as it was when decided by the District Court below.

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[\*355] In *Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), we [\*\*\*11] first established that § 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations. We have subsequently recognized that § 1983 is not available to enforce a violation of a federal statute "where Congress has foreclosed such enforcement of the statute in the enactment [\*356] itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987).

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981), we held that § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et. seq., (1976 ed. and Supp. III) did not confer an implied cause of action. That statute, as well as the statute before us today, was enacted by Congress pursuant to its spending power. n7 In *Pennhurst*, we noted that it was well established that Congress has the power to fix the terms under which it disburses federal money to the States. 451 U.S. at 17, citing *Oklahoma v. CSC*, 330 U.S. 127, 91 L. Ed. 794, 67 S. Ct. 544 (1947); *Rosado [\*14] v. Wyman*, 397 U.S. 397, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970). As stated in *Pennhurst*:

"The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly [\*\*\*12] accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, supra, at 17 (citations and footnote

503 U.S. 347, \*356; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*14; 118 L. Ed. 2d 1, \*\*\*12

omitted).

We concluded that the statutory section sought to be enforced by the Pennhurst respondents did not provide such unambiguous notice to the States because it spoke in terms "intended to be hortatory, not mandatory." 451 U.S. at 24.

n7 Article I, § 8, cl. 1, of the Constitution contains the spending power, which provides, "Congress shall have Power to . . . provide for the . . . general Welfare of the United States."

In *Wright*, the Brooke Amendment to existing [\*15] housing legislation imposed a ceiling on the rent which might be charged low-income tenants living in public housing projects. [\*357] The regulations issued by the Department of Housing and Urban Development in turn defined rent to include "a reasonable amount for [use of] utilities," and further defined how that term would be measured. *Wright*, supra, at 420-421, n. 3. We held that tenants had an enforceable right to sue the Housing Authority for utility charges claimed to be in violation of these provisions. In *Wilder*, 496 U.S. at 503, the Boren Amendment to the Medicaid Act required that Medicaid providers be reimbursed according to rates that the "State finds, and makes assurances satisfactory to the Secretary," are "reasonable and adequate" to meet the costs of "efficiently and economically operated facilities." Again, we held that this language created an enforceable right, on the part of providers seeking reimbursement, to challenge the rates set by the State as failing to meet the standards specified in the Boren Amendment.

In both *Wright* and *Wilder* the word "reasonable" occupied a prominent place in the critical language of the statute or regulation, [\*16] and the word "reasonable" is similarly involved here. But this, obviously, is not the end of the matter. The opinions in both *Wright* and *Wilder* took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created "enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright*, supra, at 423. And in *Wilder*, we caution that "section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law." *Wilder*, supra at 509 quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989).

Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make

"reasonable efforts" to prevent a child from being removed from his home, and once removed to reunify the child with his family? We turn now to that inquiry.

[\*358] As quoted above, 42 U.S.C. § 671(a)(15) requires that to obtain federal reimbursement, a State have a plan which "provides that, in each case, reasonable efforts will be made . . . to prevent or eliminate the need for [\*17] removal of the child from his home, and . . . to make it possible for the child to return to his home . . . . [\*\*\*13] " As recognized by petitioners, respondents, and the courts below, the Act is mandatory in its terms. However, in the light shed by *Pennhurst*, we must examine exactly what is required of States by the Act. Here, the terms of § 671(a) are clear; "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary." Therefore the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features. n8

n8 Contrary to respondents' assertion that finding 42 U.S.C. § 671(a) to require only the filing of a plan for approval by the Secretary would add a new "pre-requisite for the existence of a right under § 1983", Brief for Respondents 22, n. 6, our holding today imposes no new prerequisites" but merely counsels that each statute must be interpreted by its own terms.

[\*\*\*18]

Respondents do not dispute that Illinois in fact has a plan approved by the Secretary which provides that reasonable efforts at prevention and reunification will be made. Tr. of Oral Arg. 29-30. n9 Respondents argue, however, that § 1983 [\*359] allows them to sue in federal court to obtain enforcement of this particular provision of the state plan. This argument is based, at least in part, on the assertion that 42 U.S.C. § 671(a)(3) requires that the State has a plan which is "in effect." This section states that the state plan shall "provide that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." But we think that "in effect" is directed to the requirement that the plan apply to all political subdivisions of the State, and is not intended to otherwise modify the word "plan." n10

n9 The state plan filed by Illinois relies on a state statute and DCFS internal rules to meet the reasonable efforts requirement. Department of Health and Human Services, Office of Human Development Services Administration for Children, Youth and

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503 U.S. 347, \*359; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*18; 118 L. Ed. 2d 1, \*\*\*13

Families, Children's Bureau, State Plan for Title IV-E of the Social Security Act Foster Care and Adoption Assistance, State Illinois 2-13 (1988).

The Illinois statute to which the plan refers imposes a requirement that before temporary custody may be ordered, the court must find that reasonable efforts have been made or good cause has been shown why "reasonable efforts cannot prevent or eliminate the necessity of removal of the minor from his or her home." Ill. Rev. Stat., ch. 37, para. 802-10(2) (1989). The statute further provides that: "The Court shall require documentation by representatives of [DCFS] or the probation department as to the reasonable efforts that were made to prevent or eliminate the necessity of removal of the minor from his or her home, and shall consider the testimony of any person as to those reasonable efforts." Ibid.

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n10 Respondents also based their claim for relief on 42 U.S.C. § 671(a)(9) which states that the state plan shall: "provide[] that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency . . . ."

As this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents anymore than does the "reasonable efforts" clause of § 671(a)(15).

In Wilder, the underlying Medicaid legislation similarly required participating States to submit to the Secretary of Health and Human Services a plan for medical assistance describing the State's Medicaid program. But in that case we held that the Boren Amendment actually required the States to adopt reasonable and adequate [**\*\*20**] rates, and that this obligation was enforceable by the providers. [**\*\*\*14**] We relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates. Wilder, *supra*, at 519, n. 17.

In the present case, however, the term "reasonable efforts" to maintain an abused or neglected child in his home, [**\*360**] or return the child to his home from foster care, appears in quite a different context. No further statutory guidance is found as to how "reasonable ef-

forts" are to be measured. This directive is not the only one which Congress has given to the States, and it is a directive whose meaning will obviously vary with the circumstances of each individual case. How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State.

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Other sections of the Act provide enforcement mechanisms for the reasonable efforts clause of 42 U.S.C. § 671(a)(15). The Secretary has the authority to reduce or eliminate payments to a State on finding that the State's plan no longer complies with § 671(a) or that "there is a substantial failure" in the administration [**\*\*21**] of a plan such that the State is not complying with its own plan. § 671(b). The Act also requires that in order to secure federal reimbursement for foster care payments made with respect to a child involuntarily removed from his home the removal must be "the result of a judicial determination to the effect that continuation [in the child's home] would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made." § 672(a)(1). While these statutory provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983, n11 they do show that the absence of a remedy to private [**\*361**] plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter. n12

n11 We have found an intent by Congress to foreclose remedies under § 1983 where the statute itself provides a comprehensive remedial scheme which leaves no room for additional private remedies under § 1983. *Smith v. Robinson*, 468 U.S. 992, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981). We need not consider this question today due to our conclusion that the Adoption Act does not create the federally enforceable right asserted by respondents.

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n12 The language of other sections of the Act also shows that Congress knew how to impose precise requirements on the States aside from the submission of a plan to be approved by the Secretary when it intended to. For example, 42 U.S.C. § 672(e) provides that "no Federal payment may be made under this part" for a child voluntarily placed in foster care for more than 180 days unless within that period there is a judicial determination that the placement is

503 U.S. 347, \*361; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*22; 118 L. Ed. 2d 1, \*\*\*14

in the best interest of the child. That the "reasonable efforts" clause is not similarly worded buttresses a conclusion that Congress had a different intent with respect to it.

The regulations promulgated by the Secretary to enforce the Adoption Act do not evidence a view that § 671(a) places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary. n13 The regulations provide that to meet the requirements of § 671(a)(15) the case plan for each [\*\*\*15] child must "include a description of the services offered and the services provided to prevent removal of the child from [\*\*23] the home and to reunify the family." 45 CFR § 1356.21(d)(4) (1991). Another regulation, entitled "requirements and submittal", provides that a state plan must specify "which preplacement preventive and reunification services are available to children and families in need." 1357.15(e)(1). n14 What is [\*362] significant is that the regulations are not specific, and do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government. Respondents contend that "neither [petitioners] nor amici supporting them present any legislative history to refute the evidence that Congress intended 42 U.S.C. § 671(a)(15) to be enforceable." Brief for Respondents 33. To the extent such history may be relevant, our examination of it leads us to conclude that Congress was concerned that the required reasonable efforts be made by the States, but also indicated that the Act left a great deal of discretion to them. n15

n13 Compare *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430-432, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987) (statute providing that tenants in low-income housing could only be charged 30% of their income as rent, in conjunction with regulations providing that "reasonable utilities" costs were included in the rental figure, created right under § 1983 to not be charged more than a "reasonable" amount for utilities).

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n14 The regulation, 45 CFR § 1357.15(e)(2) (1990), goes on to provide a list of which services may be included in the State's proposal:

"Twenty-four hour emergency caretaker, and home-maker services; day care; crisis counseling; indi-

vidual and family counseling; emergency shelters; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing children's removal from home; other services which the agency identifies as necessary and appropriate such as home-based family services, self-help groups, services to unmarried parents, provision of, or arrangements for, mental health, drug and alcohol abuse counseling, vocational counseling or vocational rehabilitation; and post adoption services."

n15 The Report of the Senate Committee on Finance describes how under the system before the Adoption Act States only received reimbursement for payments made with respect to children who were removed from their homes, and how the Act contains a number of provisions in order to "deemphasize the use of foster care," including reimbursing States for developing and administering adoption assistance programs and programs for "tracking" children in foster care, placing a cap on the amount of federal reimbursements a State may receive for foster care maintenance payments, and "specifically permitting expenditures for State . . . services to reunite families." S. Rep. No. 96-336 p. 12 (1979). This Senate Report shows that Congress had confidence in the ability and competency of State courts to discharge their duties under what is now § 672(a) of the Act. Id., at 16 ("The committee is aware of allegations that the judicial determination requirement can become a mere pro forma exercise in paper shuffling to obtain Federal funding. While this could occur in some instances, the committee is unwilling to accept as a general proposition that the judiciaries of the States would so lightly treat a responsibility placed upon them by Federal statute for the protection of children.").

The House Ways and Means Committee Report on the Adoption Act similarly recognizes that "the entire array of possible preventive services are not appropriate in all situations. The decision as to the appropriateness of specific services in specific situations will have to be made by the administering agency having immediate responsibility for the care of the child." H. R. Rep. No. 96-136, p. 47 (1979).

Remarks on the floor of both the House and the Senate further support these general intentions. See, e. g., 125 Cong. Rec. 22113 (1979) (remarks of Rep. Brodhead) ("What the bill attempts to do is to get the States to enact a series of reforms of their fos-

503 U.S. 347, \*362; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*24; 118 L. Ed. 2d 1, \*\*\*15

ter care laws, because in the past there has been too much of a tendency to use the foster care program. The reason there has been that tendency is because . . . it becomes a little more expensive for the State to use the protective services than foster care. Through this bill, we want to free up a little bit of money . . . so you will have an incentive to keep a family together"); *id.*, at 29939 (remarks of Sen. Cranston, sponsor of the Adoption Act) ("This requirement in the State plan under [§ 671(a)(15)] would be reinforced by the new requirement under [§ 672] that each State with a plan approved . . . may make foster care maintenance payments only for a child who has been removed from a home as a result of an explicit judicial determination that reasonable efforts to prevent the removal have been made, in addition to the judicial determination required by existing law that continuation in the home would be contrary to the welfare of the child").

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[\*363] Careful examination of the language relied upon by respondents, in [\*\*\*16] the context of the entire Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.

Having concluded that § 671(a)(15) does not create a federally enforceable right to "reasonable efforts" under § 1983, the conclusion of the Court of Appeals that the Adoption Act contains an implied right of action for private enforcement, *917 F.2d at 989*, may be disposed of quickly. Under the familiar test of *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), the burden is on respondents to demonstrate that Congress intended to make a private remedy available to enforce the reasonable [\*364] efforts clause of the Adoption Act. n16 The most important inquiry here as well is whether Congress intended to create the private remedy sought by the plaintiffs. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979) [\*\*26] ("What must ultimately be determined is whether Congress intended to create the private remedy asserted"). As discussed above, we think that Congress did not intend to create a private remedy for enforcement of the "reasonable efforts" clause.

n16 As established in *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), these factors

are:

"First, is the plaintiff one of the class for whose special benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.*, at 78 (internal quotation marks omitted; emphasis in original).

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We conclude that 42 U.S.C. § 671(a)(15) neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf.

The judgment of the Court of Appeals is therefore Reversed.

DISSENTBY: BLACKMUN

DISSENT: JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

The Adoption Assistance and Child Welfare Act of 1980 (Adoption Act) conditions federal funding for state child welfare, foster care, and adoption programs upon, *inter alia*, the State's express commitment to make, "in each case, reasonable efforts" to prevent the need for removing children from their homes and "reasonable efforts," where removal has occurred, to reunify the family. [\*\*\*17] § 671(a)(15). The Court holds today that the plaintiff children [\*365] in this case may not enforce the State's commitment in federal court either under 42 U.S.C. § 1983 or under the Act itself.

In my view, the Court's conclusion is plainly inconsistent with this Court's decision just two Terms ago in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990), in which we found enforceable under § 1983 a functionally identical provision of the Medicaid Act requiring "reasonable" reimbursements to health care providers. [\*\*28] More troubling still, the Court reaches its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under § 1983. I cannot acquiesce in this unexplained disregard for established law. Accordingly, I dissent.

503 U.S. 347, \*365; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*28; 118 L. Ed. 2d 1, \*\*\*17

I

A

Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities, secured by the Constitution and laws" of the United States. We recognized in *Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), that § 1983 provides a cause of action for violations of federal statutes, not just the Constitution. Since *Thiboutot*, we have recognized two general exceptions to this rule. First, no cause of action will lie where the statute in question does not "create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wilder*, 496 U.S. at 508 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987)). Second, § 1983 is unavailable where "Congress has foreclosed enforcement of the statute in the enactment itself." 496 U.S. at 508.

In determining the scope of the first exception -- whether a [\*\*29] federal statute creates an "enforceable right" -- the Court has developed and repeatedly applied a three-part test. We have asked (1) whether the statutory provision at issue "was intended to benefit the putative plaintiff." *Id.*, at 509 [\*366] (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989)). If so, then the provision creates an enforceable right unless (2) the provision "reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit." 496 U.S. at 509 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)), or unless (3) the plaintiff's interest is so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce." 496 U.S. at 509 (quoting *Golden State*, 493 U.S. at 106, and *Wright*, 479 U.S. at 431-432). See also *Dennis v. Higgins*, 498 U.S. 439, 448-449 (1991) (quoting and applying the three-part test as stated in *Golden State*). The Court today has little difficulty concluding that the plaintiff children in this case have no enforceable rights, because it does not mention -- much less [\*\*30] apply -- this firmly established analytic framework.

B

In *Wilder*, we held that under the [\*\*\*18] above three-part test, the Boren Amendment to the Medicaid Act creates an enforceable right. As does the Adoption Act, the Medicaid Act provides federal funding for state programs that meet certain federal standards and requires participating States to file a plan with the Secretary of Health and Human Services. Most relevant here, the

Medicaid Act, like the Adoption Act, requires that the State undertake a "reasonableness" commitment in its plan. With respect to the rate at which providers are to be reimbursed, the Boren Amendment requires that

"a State plan for medical assistance must

.....

"provide . . . for payment . . . [of services] provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State. . . ) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and [\*367] adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety [\*\*31] standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality." 42 U.S.C. § 1396a(a)13(A) (emphasis supplied).

In *Wilder*, we had no difficulty concluding that the reimbursement provision of the Boren Amendment "was intended to benefit" the plaintiff providers of Medicaid services. 496 U.S. at 510. We also concluded that the second part of the test was satisfied. The amendment, we held, does not simply express a "congressional preference" for reasonable and adequate reimbursement rates; rather, it imposes a "binding obligation" on the State to establish and maintain such rates. *Id.*, at 512. In so concluding, we emphasized two features of the Medicaid reimbursement scheme. First, we observed that the language of the provision is "cast in mandatory rather than precatory terms," stating that the plan "must" provide for reasonable and adequate reimbursement. *Ibid.* Second, we noted that the text of the statute expressly conditions federal funding on state compliance with the amendment and requires the Secretary to withhold funds from non-complying States. *Ibid.* In light [\*\*32] of these features of the Medicaid Act, we rejected the argument, advanced by the defendant state officials and by the United States as amicus curiae, that the only enforceable state obligation is the obligation to file a plan with the Secretary, to find that its rates are reasonable and adequate, and to make assurances to that effect in the plan. *Id.*, at 512-515. Rather, we concluded, participating States are required actually to provide reasonable and adequate rates, not just profess to the Secretary that they have done so. *Ibid.*

Finally, we rejected the State's argument that Medicaid providers' right to "reasonable and adequate" reimbursement [\*368] is "too vague and amorphous" for judicial enforcement. We acknowledged that the State has "sub-

no prob. here  
at all

503 U.S. 347, \*368; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*32; 118 L. Ed. 2d 1, \*\*\*18

stantial discretion" in choosing among various methods of calculating [\*\*\*19] reimbursement rates. *Id.*, at 519; see also *id.*, at 505-508. A State's discretion in determining how to calculate what rates are "reasonable and adequate," we concluded, "may affect the standard under which a court reviews" the state's reimbursement plan, but it does not make the right to reasonable reimbursement judicially unenforceable. *Id.*, at 519.

### C

These [\*\*33] principles, as we applied them in *Wilder*, require the conclusion that the Adoption Act's "reasonable efforts" clause n1 establishes a right enforceable under § 1983. Each of the three elements of our three-part test is satisfied. First, and most obvious, the plaintiff children in this case are clearly the intended beneficiaries of the requirement that the State make "reasonable efforts" to prevent unnecessary removal and to reunify temporarily removed children with their families.

n1 "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which -- . . . (3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, mandatory upon them; [and] . . . (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. § 671(a).

### [\*\*34]

Second, the "reasonable efforts" clause imposes a binding obligation on the State because it is "cast in mandatory rather than precatory terms," providing that a participating State "shall have a plan approved by the Secretary which . . . shall be in effect in all political subdivisions of the State, and, if administered by them, mandatory upon them." Further, the statute requires the plan to "provide that, in each case, reasonable efforts will be made." Moreover, as [\*\*369] in *Wilder*, the statutory text expressly conditions federal funding on state compliance with the plan requirement and requires the Secretary to reduce payments to a State, if "in the administration of [the State's] plan there is a substantial failure to comply with the provisions of the plan." 42 U.S.C. § 671(b). Under our holding in *Wilder*, these provisions of the Adoption Act impose a binding obligation on the State. Indeed, neither the petitioner state officials nor amicus United States dispute this point. Brief for Petitioners 17; Reply Brief for Petitioners 3, n. 2; Brief for United States as Amicus Curiae 13-14.

What petitioners and amicus United States do dispute is whether the [\*\*35] third element of the Golden State-Wilder-Dennis test has been satisfied: They argue that the "reasonable efforts" clause of the Adoption Act is too "vague and amorphous" to be judicially enforced. Aware that *Wilder* enforced an apparently similar "reasonableness" clause, they argue that this clause is categorically different.

According to petitioners, the Court would not have found the Boren Amendment's reasonableness clause enforceable had the statute not provided an "objective benchmark" against which "reasonable and adequate" reimbursement rates could be measured. Reasonable and adequate rates, the Boren Amendment provides, are those that meet the costs that would be incurred by "an 'efficiently and economically operated facility' [\*\*\*20] providing care in compliance with federal and state standards while at the same time ensuring 'reasonable access' to eligible participants." *Wilder*, 496 U.S. at 519 (quoting 42 U.S.C. § 1396a(a)(13)(A)). Petitioners claim that, given this benchmark, "reasonable and adequate" rates can be ascertained by "monetary calculations easily determined based on prevailing rates in the market." Brief for Petitioners 21. By contrast, they observe, [\*\*36] there is "no market for 'reasonable efforts' to keep or return a child home, and such 'reasonable efforts' cannot be calculated or quantified." *Ibid.*

[\*\*370] Petitioners misunderstand the sense in which the "benchmark" in *Wilder* is "objective." The Boren Amendment does not simply define "reasonable and adequate" rates as market rates. Rather, it defines a "reasonable and adequate" rate by referring to what would be provided by a hypothetical facility -- one that operates "efficiently and economically," "complies with federal and state standards," and "ensures 'reasonable access' to eligible participants." Whether particular existing facilities meet those criteria is not a purely empirical judgment that requires only simple "monetary calculations." Indeed, the Boren Amendment's specification of the words "reasonable and adequate" ultimately refers us to a second reasonableness clause: The "benchmark" facility, we are told, is one that "ensures 'reasonable access' to eligible participants." This second reasonableness clause is left undefined. Contrary to petitioners' suggestions, then, the "reasonable and adequate" rates provision of the Boren Amendment is not "objective" [\*\*37] in the sense of being mechanically measurable. The fact that this Court found the provision judicially enforceable demonstrates that an asserted right is not "vague and amorphous" simply because it cannot be easily "calculated or quantified."

Petitioners also argue that the right to "reasonable ef-

503 U.S. 347, \*370; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*37; 118 L. Ed. 2d 1, \*\*\*20

forts" is "vague and amorphous" because of substantial disagreement in the child-welfare community concerning appropriate strategies. Furthermore, they contend, because the choice of a particular strategy in a particular case necessarily will depend upon the facts of that case, a court-enforced right to reasonable efforts either will homogenize very different situations or else will fragment into a plurality of "rights" that vary from State to State. For both of these reasons, petitioners contend, Congress left the question of what efforts are "reasonable" to state juvenile courts, the recognized experts in such matters.

Here again, comparison with *Wilder* is instructive. The Court noted the lack of consensus concerning which of various [\*371] possible methods of calculating reimbursable costs would best promote efficient operation of health care facilities. See *Wilder*, 496 U.S. at 506-507. [\*\*38] The Court further noted that Congress chose a standard that leaves the States considerable autonomy in selecting the methods they will use to determine which reimbursement rates are "reasonable and adequate." *Id.*, at 506-508, 515. The result, of course, is that the "content" of the federal right to reasonable and adequate rates -- the method of calculating reimbursement and the chosen rate -- varies from State to State. And although federal judges are hardly expert either in selecting methods of [\*\*\*21] Medicaid cost reimbursement or in determining whether particular rates are "reasonable and adequate," neither the majority nor the dissent found that the right to reasonable and adequate reimbursement was so vague and amorphous as to be "beyond the competence of the judiciary to enforce." See *id.*, at 519-520; *id.*, at 524 (REHNQUIST, C.J., dissenting). State flexibility in determining what is "reasonable," we held,

"may affect the standard under which a court reviews whether the rates comply with the amendment, but it does not render the amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are some rates outside that range that [\*\*39] no State could ever find to be reasonable and adequate under the Act." *Id.*, at 520.

The same principles apply here. There may be a "range" of "efforts" to prevent unnecessary removals or secure beneficial reunifications that are "reasonable." *Id.*, at 520. It may also be that a court, in reviewing a State's strategies of compliance with the "reasonable efforts" clause, would owe substantial deference to the State's choice of strategies. That does not mean, however, that no State's efforts could ever be deemed "unreasonable." As in *Wilder*, the asserted right in [\*372] this case is simply not inherently "beyond the competence of the judiciary to enforce." *Ibid.*

Petitioners' argument that the "reasonable efforts" clause of the Adoption Act is so vague and amorphous as to be unenforceable assumes that in *Wright and Wilder* the Court was working at the outer limits of what is judicially cognizable: Any deviation from *Wright* or *Wilder*, petitioners imply, would go beyond the bounds of judicial competence. There is absolutely nothing to indicate that this is so. See *Wilder*, 496 U.S. at 520 (inquiry into reasonableness of reimbursement rates is "well [\*\*40] within the competence of the Judiciary") (emphasis supplied). Federal courts, in innumerable cases, have routinely enforced reasonableness clauses in federal statutes. See, e.g., *Virginia R. Co. v. System Fed'n No. 40*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937) (enforcing "every reasonable effort" provision of the Railway Labor Act and noting that "whether action taken or omitted is . . . reasonable [is an] everyday subject of inquiry by courts in framing and enforcing their decrees"). Petitioners have not shown that the Adoption Act's reasonableness clause is exceptional in this respect.

## II

The Court does not explain why the settled three-part test for determining the enforceability of an asserted right is not applied in this case. Moreover, the reasons the Court does offer to support its conclusion -- that the Adoption Act's "reasonable efforts" clause creates no enforceable right -- were raised and rejected in *Wilder*.

The Court acknowledges that the Adoption Act is "mandatory in its terms." *Ante*, at 358. It adopts, however, a narrow understanding of what is "mandatory." It reasons that the language of § 671(a), which provides that "in order for a State to be eligible for payments under [\*\*41] this part, it shall [\*\*\*22] have a plan approved by the Secretary," requires participating States only to submit and receive approval for a plan that contains the features listed in §§ 671(a)(1) to (16). According [\*\*373] to the Court, the beneficiaries of the Act enjoy at most a procedural right under § 671(a) -- the right to require a participating State to prepare and file a plan -- not a substantive right to require the State to live up to the commitments stated in that plan, such as the commitment to make "reasonable efforts" to prevent unnecessary removals and secure beneficial reunifications of families. Since the State of Illinois has filed a plan that the Secretary has approved, the Court reasons, the State has violated no right enforceable in federal court.

The Court's reasoning should sound familiar: The state officials in *Wilder* made exactly the same argument, and this Court rejected it. In *Wilder*, we noted that the Medicaid Act expressly conditions federal funding on state compliance with the provisions of an ap-



503 U.S. 347, \*375; 112 S. Ct. 1360;  
1992 U.S. LEXIS 1953, \*\*46; 118 L. Ed. 2d 1, \*\*\*23

reliance on enforcement mechanisms other than § 1983, therefore, does not support its conclusion that the "reasonable efforts" clause of the Adoption Act creates no enforceable right.

The Court, without acknowledgement, has departed from our precedents in yet another way. In our prior cases, the existence of other enforcement mechanisms has been relevant not to the question whether the statute at issue creates an enforceable right, but to whether the second exception to § 1983 enforcement applies - whether, that is, "Congress has foreclosed enforcement of the statute in the enactment itself." *Wilder*, 496 U.S. at 508 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 93 L. Ed. 2d 781, 107 S. Ct. 766 [\*376] (1987)). In determining whether this second exception to § 1983 enforcement applies, we have required the defendant not merely to point to the [\*\*\*24] existence of alternative means of enforcement, but to demonstrate "by express provision or other specific evidence from the statute itself that Congress intended to foreclose [§ 1983] enforcement." [\*\*\*47] 496 U.S. at 520-521. We have said repeatedly that we will not "lightly" conclude that Congress has so intended. *Id.*, at 520 (quoting *Wright*, 479 U.S. at 423-424, and *Smith v. Robinson*, 468 U.S. 992, 1012, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984)). In only two instances, where we concluded that "the statute itself provides a comprehensive remedial scheme which leaves no room for additional private remedies under § 1983," have we held that Congress has intended to foreclose § 1983 enforcement. See *Smith v. Robinson*, 468 U.S. 992, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984) ("carefully tailored" mixed system of enforcement beginning with local administrative review and culminating in a right to judicial review); *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981) (enforcement scheme authorizing EPA to bring civil suits, providing for criminal penalties, and including two citizen-suit provisions).

The Court does not find these demanding criteria sat-

isfied here. See ante, at 360 and n. 11. Instead, it simply circumvents them altogether: The Court holds that even if the funding cutoff provision in the Adoption Act is not an "express provision" that "provides a comprehensive remedial scheme" [\*\*48] leaving "no room for additional private remedies under § 1983," *Wilder*, 496 U.S. at 520, that provision nevertheless precludes § 1983 enforcement. In so holding, the Court has inverted the established presumption that a private remedy is available under § 1983 unless "Congress has affirmatively withdrawn the remedy." 496 U.S. at 509, n. 9 (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106-107, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989), and *Wright*, 479 U.S. at 423-424).

[\*377] III

In sum, the Court has failed, without explanation, to apply the framework our precedents have consistently deemed applicable; it has sought to support its conclusion by resurrecting arguments decisively rejected less than two years ago in *Wilder*; and it has contravened 22 years of precedent by suggesting that the existence of other "enforcement mechanisms" precludes § 1983 enforcement. At least for this case, it has changed the rules of the game without offering even minimal justification, and it has failed even to acknowledge that it is doing anything more extraordinary than "interpreting" the Adoption Act "by its own terms." Ante, at 360-361, n. 8. Readers of the Court's opinion will not be misled by this [\*\*\*49] hollow assurance. And, after all, we are dealing here with children. I would affirm the judgment of the Court of Appeals. n5 I dissent.

n5 Since I conclude that respondents have a cause of action under § 1983, I need not reach the question, decided in the affirmative by the Court of Appeals, whether petitioners may pursue a private action arising directly under the Adoption Act.

877 F. Supp. 1268 printed in FULL format.

JEANINE B., by her next friend Robert Blondis; ALINE H. by her next friend Wesley Scott; MAURICE R. by his next friend Wesley Scott; DOUGLAS R. by his next friend Wesley Scott; CAROLYN D. by her next friend Cynthia Lepkowski; JAMES B. by his next friend Mary Protz; MINDI D. by her next friend Sheila Smith; ALAN A. by his next friend Sheila Hill-Roberts; DARREN C. by his next friend Chris Velnetske; ALISSA S. by her next friend Ann Marie Abell; ROXANNE F. by her next friend Julia Vosper; PATRICIA S. by her next friend Oshiyemi Adelabu; JOCELYN Z. by her next friend Jane Moore; DERRICK Z. by his next friend Jane Moore; KAREN M. by her next friend Joan Zawikowski, individually and on behalf of all others similarly situated, Plaintiffs, v. TOMMY G. THOMPSON, in his official capacity as Governor of the State of Wisconsin; RICHARD LORANG, in his official capacity as Acting Secretary of the Department of Health and Social Services of the State of Wisconsin; F. THOMAS AMENT, in his official capacity as the County Executive of the County of Milwaukee; and THOMAS BROPHY, in his official capacity as Director of the Milwaukee County Department of Human Services, Defendants.

Civil Action No. 93-C-547

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
WISCONSIN

877 F. Supp. 1268; 1995 U.S. Dist. LEXIS 2768

March 2, 1995, Decided  
March 2, 1995, FILED

COUNSEL:    [\*\*1]    For Plaintiffs: Christopher Dunn, American Civil Liberties Union Children's Rights Project, New York, N.Y. Peter M. Koneazny, Esq., American Civil Liberties Union of Wisconsin Foundation, Milwaukee, WI.

For Defendants: John F. Jorgensen (Milwaukee Cty Defendants) Principal Ass't Corp. Counsel, Office of Corp. Counsel, Milwaukee, WI. Mary Woolsey Schlaefer (State Defs) Peter C. Anderson, Ass't Attorneys General, Madison, WI.

JUDGES: John W. Reynolds, Judge

OPINIONBY: John W. Reynolds

OPINION:    [\*1270]    DECISION AFTER ORAL ARGUMENT ON FEBRUARY 3, 1995 AND WRITTEN ORDER DATED FEBRUARY 16, 1995 DENYING IN PART AND GRANTING IN PART THE STATE DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

#### I. INTRODUCTION

In this civil rights case, children who allegedly are or should be in the Milwaukee County foster care system have sued the Governor of Wisconsin, the Secretary of the Wisconsin Department of Health and Social Services

("Wisconsin DHSS" or, jointly, "the State defendants"), the Milwaukee County Executive, and the Director of the Milwaukee County Department of Human Services ("Milwaukee County DHS" or, jointly, "the County defendants").n1 The plaintiff children claim that the defendants [\*\*2] run the Milwaukee foster care system in a manner which violates their rights, as created by the United States and Wisconsin Constitutions and by the Federal Adoption Assistance and Child Welfare Act, Child Abuse Prevention Act, Rehabilitation Act, and Americans with Disabilities Act. The children seek a court order designed to stop these alleged violations. They do not ask for money damages.

- - - - -Footnotes- - - - -

n1 All defendants have been sued in their official capacities. The court has substituted Richard Lorang for former Wisconsin Department of Health and Social Services Secretary Gerald Whitburn.

- - - - -End Footnotes- - - - -

The State defendants moved to dismiss the claims against them, primarily on the grounds that the county, and not the state, has direct responsibility for the foster children, and thus the State defendants argue that the children cannot allege that the State defendants caused the children's alleged deprivations. [\*1271] Nor do the State defendants believe that federal statutes give the children the right to sue them for the failures of the foster [\*\*3] care system in Milwaukee County. On February 3, 1995, this court heard oral argument on the motion to dismiss, on the plaintiffs' motion for class certification, and on the plaintiffs motion to pursue discovery against the State defendants. After hearing the arguments, the court ruled orally that the plaintiffs had sufficiently alleged that the State defendants had some responsibility toward the foster children in Milwaukee County, that federal statutes give rise to private rights of action for the children, and that the State defendants would remain in the suit to defend against most of the claims. The court dismissed one of the claims brought against the State defendants under the Adoption Assistance and Child Welfare Act, along with the claims brought against the State defendants under the Americans with Disabilities Act and the Rehabilitation Act. The court also granted the plaintiff children's motion to certify a class, and created two subclasses. Finally, the court ordered that discovery between the plaintiffs and the State defendants begin immediately, and that the trial would be held on May 16, 1995.

This decision elaborates upon the February 3, 1995, oral rulings and the [\*\*4] February 16, 1995, order reducing the oral rulings to writing. Section II summarizes the plaintiffs' lengthy complaint. Section III analyses the State defendants' motion to dismiss. Finally, Section IV elaborates on the court's class certification ruling.

II. THE COMPLAINT

A. Factual Allegations

The complaint makes several general allegations of systematic failures by the Milwaukee County DHS (Compl. PP 218-259), and illustrates these failures through the specific cases of fifteen plaintiffs. (Id. PP 58-217.)

The systematic failures alleged against Milwaukee County DHS include a long list of facts indicating a collapse of all stages of the foster care system. For instance, the complaint alleges that the defendants have failed to investigate adequately or at all reports of suspected abuse or neglect of children who are not yet in DHS custody. As specific allegations of failure to adequately investigate neglect and abuse, the complaint makes the following claims:

-- Plaintiff Aline H. and her brothers, Plaintiffs Maurice and Douglas R., were left in their home despite the fact that their sister was in DHS custody. After Aline had been missing from school for several months, a [\*\*5] Department social worker visited the home in March of 1988, and determined it to be a case of neglect. However, no one followed up with the case until May, when a Department worker went into the home and found it to be very dirty and unsanitary. At that time, the Department obtained custody of Aline but left three-year old Maurice and 18 month-old Douglas at home until July, when the Department worker returned and found conditions worse. (Compl. PP 73-78.)

-- In May of 1991, a Department worker responding to a neglect report found that Plaintiff Carolyn D. (then three years old) lived in a filthy home without adequate food or medical attention. Carolyn and her brother were left in their parents' home without adequate efforts to provide services to the family. When Carolyn's father died in July 1991, her mother moved them to another family's home, where the man had a history of substance abuse and domestic violence. A DHS worker visited the home in August 1991, but the Department did not remove Carolyn and her brother from their mother's custody until October 1991. (Id. PP 87-91.)

-- Plaintiff Alan A. (born in 1983) was placed in foster-care custody in December 1988 when his mother [\*\*6] disappeared. In November 1992, the Department returned Alan to his mother's home, but did not supervise the home or provide services to Alan or his family. The DHS worker responsible for Alan's case was notified in January 1993 that Alan's mother was missing family therapy appointments, but the worker took no action. In fact, Alan's mother was not arranging court-ordered therapy, had been evicted from two or three residences during the year. In February 1993, Alan's mother was arrested and has been in custody since her arrest. [\*1272] Alan was left in the care of his 16-year-old sister and his mother's live-in boyfriend. In March, the assigned Department caseworker, her supervisor, and the Children's Court guardian ad litem learned that the boyfriend had struck Alan with a belt on his right leg, and struck him on the back, leaving red marks on his leg, and a handprint on his back. They also learned that Alan's sister had a drug problem. The Department employees did nothing. Two days later, a Children's Court duty judge granted a pick-up order, but Alan was not taken into Department custody for four more days. (Id. at PP 130-145.)

-- Plaintiff Patricia S. was six years old in 1989 when [\*\*7] she was taken into custody after she and her mother "had been thrown out of the filthy, unfurnished attic of a drug house because [Patricia's mother] wanted to bring in men for money for drugs and the owner of the house wanted some of the proceeds." (Id. P 184, quoting a Department report.) At the time, DHS had custody of Patricia's two brothers and one sister, but had made no efforts to protect Patricia or to offer her mother services. (Id. P 185.)

The plaintiff children also assert that the state and county have failed to provide services to children and families to avert unnecessary entry of

children into foster care during the approximately six months between the time that a child is taken from a home and the time when Children's Court finds that the child has been abused or neglected. They claim that the system fails to identify and develop available and appropriate placements, and to keep useful and reliable computerized information to match a child with a foster home. Further, they assert that the system does not properly train and supervise foster parents.

The children also allege that the defendants have failed to take children out of inappropriate and harmful [\*\*8] foster homes, and to ensure that they receive necessary medical and dental care, and appropriate education. For instance:

-- Plaintiff Jeanine B. alleges that the county placed her with a family that was already responsible for twelve children. In 1989, when Jeanine was eight years old, her foster father struck her with a plastic container, necessitating stitches. The foster mother referred to Jeanine as a "whore." In July 1990, Jeanine's therapist warned that conditions in her foster home were unacceptable, but Milwaukee County DHS did not attempt to locate a foster home which was trained to meet her needs, or to find an adoptive home for her. Jeanine remained in the foster home for two years. (Compl. PP 61-62.)

-- Plaintiff James B. is a ten year-old boy who has allegedly lived with the same foster parents for most of his life. He receives "only marginal care in the home, which is chaotic." (Id. P 114.) Many different foster children have come in and out of the home, and one has died. James does not get regular medical or dental care. (Id.).

The complaint alleges that the foster system fails to keep sibling groups together. For example, Alissa S. has two siblings with whom she [\*\*9] allegedly has no contact because the children have been in separate foster homes. (Compl. P 172.)

The plaintiff children assert that the defendants have failed to determine the appropriateness of visits between birth parents and their children, and failed to supervise and arrange those visits. As examples of the lack of supervision or appropriateness of visits, the complaint alleges that:

-- Alan A.'s caseworker has refused to supervise his visits to his mother, who is currently in prison. Allegedly, Alan's mother has shown him her "track marks" from past drug use and has described incidents of oral sex between female inmates in the jail to Alan during these visits. (Compl. PP 147-148.)

-- Aline H. has been forced to see her mother despite her desire not to and her therapist's recommendation against it. (Id. P 82.)

-- James B.'s mother is mentally ill and has once kidnapped him from his foster care home and taken him out of state. Nevertheless, the Department has continued to arrange parental visits, and James' [\*1273] behavior after these visits has been aggressive and agitated. (Id. P 110-111.)

Further, the children claim that social workers have failed to make and implement individual [\*\*10] and appropriate case plans for children who enter foster care so that they may leave foster care custody within a reasonable period of time, that these social workers have failed to provide adequate

services to children and their families that would allow children to return home when that is the planning goal for the family, and that they have failed to assess the reasonableness of return-home goals. For example, the complaint alleges that:

-- Carolyn D.'s permanent plan has been to "return home", but her mother's home has not been assessed, visits have not been supervised, and the Department has not investigated whether her mother, who is living with a man with a substantial criminal record, is capable of providing an adequate home for Carolyn. (Compl. P 98.)

-- James B.'s mother is mentally ill and married to a man with a violent history, and has vacillated between a desire to regain custody of James, and a desire to give him up for adoption. The Department's plan for James remains "return home." (Id. PP 103-117.)

-- Alan A.'s permanency plan remains "return home" despite the fact that his mother is in prison, has an abusive boyfriend, and has a history of drug abuse. (Id. PP 147-149.) [\*\*11]

-- Darren C. was born when his mother was sixteen. They were both taken into foster care and are now in separate foster homes. His mother has taken classes on mothering, visits Darren, and expresses a desire to take custody of him upon gaining her independence. However, the Department has taken no steps to aid her in attempting to provide a home for Darren. (Id. PP 152-160.)

The children also maintain that the defendants have failed to even try to terminate parental rights for children who need to be adopted until an adoptive home can be identified, have failed to seek an adoptive home until parental rights have been terminated, and have failed to allow foster parents to adopt foster children within a reasonable amount of time. As examples of this systematic failure to take steps to get children adopted, the plaintiffs allege that:

-- In 1990, the Department's case plan goal for Jeanine B. was to have her parental rights terminated and free her for adoption. Her 1991, 1992, and 1993 plan goals were the same, yet the Department never tried to find adoptive parents for her, nor did it seek a court order to terminate parental rights despite two Milwaukee County DHS periodic reports [\*\*12] saying that there were no major obstacles for achieving the plan. (Compl. PP 62, 66.)

-- Maurice R.'s foster parent would like to adopt him and has taken steps to assure that he receives special education for his emotional problems. However, the Department has, as of April 1992, changed his plan from adoption to long-term foster care and has not permitted his foster mother to adopt him. (Id. P 80.)

-- Aline H. and Douglas R. are in a foster home together. Their foster mother would like to adopt them and the children have indicated their desire to be adopted. However, the only time a Department worker has visited the home was three years ago. The Department has chosen long-term foster care as the planning goal for these children. (Id. P 81.)

-- Mindi D.'s mother tried to give her away to a man in a furniture store when she was eleven months old, and has only seen her twice since Mindi was

put in foster care eleven years ago. Mindi's case plan goal has been to terminate parental rights and adoption. Yet the Department has taken no serious steps to implement this plan. For several years, her foster family wanted to adopt her, but her caseworker thought another couple would be better, [\*\*13] either because the foster parents are Caucasian and Mindi is African-American, or because Mindi's foster parents already have one adopted child. Yet the Department did not take steps to find an appropriate adoptive family for Mindi. Mindi now has behavioral problems and her foster parents no longer wish to adopt her. Her 1993 case plan has no mention of [\*1274] a permanent plan for her. (Id. PP 119-124.)

-- Alissa S. has been in foster care for over eight years since she was taken from her mother's home at age two due to lack of food, supervision, and medical attention, and suspected sexual abuse. For the first two years, the Department's permanency plan for Alissa was "return home," although the Department did not provide services which would make such a plan feasible and no basis for believing that it was realistic. In 1989, the Department changed Alissa' plan to termination of parental rights. In February 1991, a Children's Court judge found the Department had done little to implement the permanency plan and ordered a written update. The Department transferred Alissa' case to the adoption unit but has failed to locate an adoptive parent for Alissa. Her foster family has no interest [\*\*14] in adopting her, and the Department does not consider them a suitable adoptive family, but has allowed Alissa to live there for more than five years. (Id. PP 161-171.)

-- Jocelyn Z. was two years old, and her brother Derrick Z. was one when they were originally taken into foster care in 1987. An unsuccessful return home resulted in their mother signing a voluntary agreement relinquishing custody to the Department. The Department maintains a planning goal of "return home", yet has only made occasional telephone contact with the mother to assist her and has not found her to be taking meaningful steps to reassume responsibility for the children. Jocelyn and Derrick's foster parents would like to adopt them, and the children have the same wish. However, the Department has taken no steps to allow these children to be adopted. (Id. PP 192-205.)

The children also maintain that the system falls to adequately staff, train, and supervise Milwaukee County social workers, and assigns hundreds of cases to a computer for monitoring. For instance, allegedly, during at least part of her time in Milwaukee County DHS custody, Jeanine B. has not had a caseworker assigned to her. (Compl. P 64.) [\*\*15]

The defendants have also allegedly failed to maintain stability in the assignment of a child's caseworker and in foster family placements. For example, the plaintiffs allege that Jeanine B. has been in six different foster homes, and Roxanne F. has been in four.

Children with behavioral disabilities claim that the state and county have failed to provide necessary services, failed to train foster families, and failed to provide stability for them, and have not found permanent homes for children with behavioral problems solely because of those problems. As examples, the complaint alleges that:

-- Jeanine B. has not been assessed or treated for emotional disturbances, despite behavioral problems. (Compl. PP 59-60.)

-- The Department refuses to allow Maurice and Douglas R. to be adopted because of their serious behavioral problems, despite the fact that foster families wish to adopt them. (Id. P 83.)

-- Sixteen-year-old Karen M. was placed in a highly restrictive residential treatment center in 1992 to address her substance abuse problem. She completed the treatment program in late March 1993 but waited two months to be discharged because the Department has no available less restrictive [\*\*16] placement for her. In May of 1993, the Department returned Karen to her maternal grandmother's home because there was no appropriate placement for her. Her grandmother lacks the resources and training to provide Karen with a therapeutic setting. (Id. PP 214-215.)

Allegedly, county workers have also failed to provide complete, truthful, and accurate information to the courts during periodic reviews, and failed to follow recommendations of the courts. The complaint alleges that a Children's Court judge has even directed the Milwaukee County DHS to turn Carolyn D.'s case over to a private agency, but the Department has not done so. (Compl. P 98.)

The children also allege that state and county officials knew that the County foster care system failed many of its wards, and they failed to correct the situation. In support of this allegation, the complaint cites various officials' comments upon the Milwaukee [\*1275] County foster care system, including the testimony of the director of the Milwaukee County DHS, defendant Brophy, who stated before a judicial fact-finding tribunal in 1991:

What happens is that with that kind of caseload what the workers are largely in the situation of doing [\*\*17] now is that they are hopping from crisis to crisis to crisis. On a given day, if 10% of their caseload is in crisis, the worker could have anywhere from 10-12 families and kids that they may have to deal with. That means that the other 100 cases are left to languish. And it means that the orders of the court which can be very prescriptive relative to getting a mother into parent education classes, getting a mother into mental health assistance, helping a mother to get alcohol and drug assistance, maybe helping the child get some special programming, schooling, is simply not being carried out. . . .

. . .

On the real extreme end, [children] may go into a home, they may stay there for long periods of time. Their behavior may deteriorate. And they may home hop to a point where in a child's life they could be in six to eight to ten foster homes before . . . they reach age 18 and then just leave the to system the adult world. And even in some rare cases but still too many, they may be abused and neglected in their own home, removed, put in a foster home and abused and neglected in that home and have to end up going into an institutional environment. . . .

(Id. P 256.) Despite this [\*\*18] and other alleged evidence that county and state officials knew that the system "irreparably damages and fails to provide mandated services and protection to these vulnerable children," (id. P 259), the defendants have allegedly failed and refused to take remedial action.

#### B. Allegations of Responsibility

The plaintiffs claim that the County defendants "are directly responsible for the administration of this system and for the damage that is being inflicted on children as a result of these continuing and widespread violations of the law. (Compl. P 253.)

The complaint also alleges that the State defendants are responsible for ensuring that the Milwaukee County child-welfare system follow the mandates of applicable law; that they failed to adopt rules and guidelines for the county to follow; and that they failed to provide necessary supervision in counties in which legal requirements are being violated and children are being harmed. Id. P 253.) The plaintiffs allege that the Wisconsin DHSS has failed to provide the Milwaukee County child-welfare system with the funding, support, and supervision that it needs to perform its duties adequately. (Id. P 9.) It further alleges that the [\*\*19] state has taken federal dollars which were made available to the state as reimbursement for Milwaukee foster care costs and diverted these funds to non-child welfare programs. (Id. P 253.)

C. Causes of Action Asserted

Plaintiffs allege various constitutional and statutory claims against the State and County defendants under 42 U.S.C. @ 1983, and also allege pendant state law claims. First, they allege that all of the defendants have deprived the plaintiff children of rights conferred upon them by the First, Ninth and Fourteenth Amendments to the United States Constitution. They next allege the deprivation of rights conferred upon them by the Federal Adoption Assistance and Child Welfare Act and the Federal Child Abuse Prevention and Treatment Act. They also allege that those plaintiff children who are handicapped or disabled have been deprived of their rights under the Americans with Disabilities Act and the Rehabilitation Act of 1973. Further, the plaintiffs allege that the defendants have deprived them of rights conferred upon them by the State's Children's Code, state regulations, and the Wisconsin Constitution. (Id. PP 260-264.)

D. Injuries [\*\*20] Alleged

The plaintiffs go on to allege that, as a result of the defendants actions, the plaintiff children, the other approximately 4000 children n2 in the custody of Milwaukee County [\*1276] DHS, and children who the Department knows or should know are abused or neglected, are being irreparably harmed and deprived of the opportunity for safe and healthy childhoods. (Id. P 259.)

- - - - -Footnotes- - - - -

n2 The complaint estimated the number at 5000, but the class certification motion estimated the number at 4000.

- - - - -End Footnotes- - - - -

E. Relief Requested

The plaintiffs seek class certification so that they can represent the class, and they ask the court to enter "declaratory and injunctive relief necessary and appropriate to remedy the defendants' violations of the plaintiffs' rights" under the United States Constitution, Federal laws and Wisconsin State laws. (Id. P 265.)

## III. STATE DEFENDANTS' MOTION TO DISMISS

The Governor and the Secretary of the Wisconsin DHSS have moved to dismiss plaintiffs' claims against them on the grounds that none of the allegations [\*\*21] state claims against them, and that some of the allegations are barred by the Eleventh Amendment of the United States Constitution. Parts A and B of this Section of the decision briefly explore the standards for motions to dismiss and the Eleventh Amendment issue. Part C discusses each constitutional and federal claim brought under Section 1983.

## A. The Standard for Dismissal

In considering a motion to dismiss, this court must accept as true all well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 72, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); *Yeksigian v. Nappi*, 900 F.2d 101, 102 (7th Cir. 1990). The court may dismiss a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon*, 467 U.S. at 73. Although all reasonable inferences are to be drawn in favor of the plaintiff, the complaint must [\*\*22] set forth factual allegations sufficient to establish the elements that are crucial to recovery under plaintiff's claim. *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648, 654 (7th Cir. 1984).

## B. Defendants' Eleventh Amendment Arguments are Mooted by Plaintiffs' Clarifications

The Eleventh Amendment to the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Eleventh Amendment jurisprudence flows more from caselaw than from the language of the Amendment. The Amendment has been interpreted to prohibit a federal court from ordering state officials to conform their conduct state law. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). In their complaint, the plaintiffs lump the State defendants and County defendants together when listing the causes of action "against the defendants," including causes of action brought under [\*\*23] state statutes. Thus, the State defendants naturally thought that the complaint attempted to bring state law claims against the State defendants. But in their briefs, the plaintiffs have clarified their position to explain that they do not bring state law claims against the State defendants.

Generally, suits against state officials acting in their official capacities are barred because they are not different from suits against the state itself, and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1988) tells us that states may not be sued under @ 1983 because they are not proper "persons" to be sued under the state and they receive Eleventh Amendment immunity. The exception to the rule is that state officials can be sued in their official capacities for prospective injunctive or declaratory relief and monetary damages ancillary to either. *Id.* at n. 10; *Kentucky v. Graham*, 473 U.S. 159, 169 n. 18, 87 L. Ed. 2d 114, 105 S. Ct. 3099

(1985). Thus, the State defendants are correctly included as "persons" under the plaintiffs' [\*\*24] claims for prospective injunctive relief in this case.

These clarifications make the defendants' motion to dismiss pursuant to the Eleventh [\*1277] Amendment to the United States Constitution moot, and for that reason, the motion shall be DENIED.

C. Constitutional and Statutory Claims Brought Under Section 1983

Section 1983 imposes liability on a person who, acting under color of state law, "subjects or causes to be subjected" a plaintiff to a deprivation of a right created by the Constitution or federal law. The plaintiff children claim that the State defendants, in addition to the County defendants, have deprived them of their rights created by the Fourteenth Amendment to the Constitution, the Adoption Assistance and Child Welfare Act, the Child Abuse Prevention Act, the Americans with Disabilities Act, and the Rehabilitation Act.

1. Constitutional Claims Against the State Defendants

As their first cause of action, the plaintiff children who are in the foster-care custody in Milwaukee County n3 allege that the State defendants have breached affirmative constitutional duties arising from their custodial circumstances and judicially inferred under the Due Process Clause of the Fourteenth [\*\*25] Amendment of the United States Constitution. The State defendants acknowledge that the plaintiffs may have colorable constitutional claims against the County defendants. In fact, although the Constitution does not generally require governments to act affirmatively to provide services and care, certain affirmative duties arise from the Constitution when a "special relationship" exists between the plaintiff and the government. That special relationship is when the plaintiff is in the government custody. See *Deshaney v. Winnebago County Dep't. of Soc. Serv.*, 489 U.S. 189, 200-201, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) (a state's unwillingness or inability to protect child from father's serious and continuous abuse did not violate child's substantive due process rights because child not in state custody); *Youngberg v. Romeo*, 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982) (involuntary commitment to a state institution for the mentally impaired gives rise to constitutional rights to services and care from the state).n4 In *Youngberg*, the Supreme Court held [\*\*26] that the Due Process Clause of the Fourteenth Amendment guarantees those who are brought into the custody of the state the right to safe conditions of confinement, freedom from undue bodily restraint, and, for those who need it, "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." 457 U.S. at 319. The *Youngberg* court held that liability may be imposed when the decisions regarding the safety and freedom of those in custody are not based upon the exercise of professional judgment. *Id.*

- - - - -Footnotes- - - - -

n3 The children in the class who are not in foster-care custody but who allegedly "may be or have been abused or neglected and are or should be known to [the defendants]" (Compl. P 1), acknowledge in their brief that they do not and cannot assert breaches of affirmative constitutional duties. See *Deshaney v. Winnebago County Dep't. of Soc. Serv.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

n4 The DeShaney Court explained:

The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause. . . .

489 U.S. 189, 200 (citations omitted).

- - - - -End Footnotes- - - - -  
[\*\*27]

While the Supreme Court has never decided the issue, the Seventh Circuit has ruled that a child placed in foster care--at least one involuntarily placed in foster care--has a relationship with the government that gives rise to Youngberg's affirmative duties. See, e.g., *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (foster children have substantive due process right to be free from harm while in foster care).n5 This court will not rule on [\*1278] the parameters of the constitutional duties imposed upon the County and State defendants in this case, for they have not been briefed or argued. Instead, the focus thus far in this case has been on whether the State defendants are liable for some or all of the Constitutional transgressions of the County defendants, who have primary foster care custody of the children. The plaintiffs rest their constitutional claims against the State defendants on the theory that the Governor and the Secretary of the Wisconsin DHSS have "supervisory liability" for constitutional violations committed by the County defendants. To support this claim, the children allege that the State defendants are responsible for the policies and practices [\*28] carried out by Milwaukee County DHS. The children point to the state governmental structure, to state and federal statutes requiring the State DHSS to devise and oversee foster care policies, and to federal funding statutes which give money to the State of Wisconsin on the condition that State officials fulfill certain obligations toward Wisconsin foster children, including supervising foster care programs.

- - - - -Footnotes- - - - -

n5 See also *Norfleet v. Arkansas Dep't. of Human Servs.*, 989 F.2d 289, 291-93 (8th Cir. 1993); *Yvonne L. v. New Mexico Dept. of Human Servs.*, 959 F.2d 883, 890-93 (10th Cir. 1992); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir.), cert. denied, 498 U.S. 867, 112 L. Ed. 2d 145, 111 S. Ct. 182 (1990) (right to be free from infliction of unnecessary harm); accord *Doe v. New York City Dep't. of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981); cert. denied, 464 U.S. 864 (1983); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987), cert. denied, 489 U.S. 1065, 103 L. Ed. 2d 808, 109 S. Ct. 1337 (1989); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1008-10 (N.D. Ill. 1989) (substantive due process right to safe custody).

- - - - -End Footnotes- - - - -  
[\*\*29]

Although there is no respondeat superior liability under Section 1983, supervisory liability satisfies the causation requirement of Section 1983 when supervisory officials who have not been directly involved in the deprivation itself fail to take action which they are required to take to stop the violations of their subordinates in a manner which amounts to deliberate indifference to the rights of persons with whom the subordinates come in contact, or when they create policies and practices pursuant to which the constitutional deprivation was carried out. *City of Canton v. Harris*, 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989) (municipality can be liable for failure to train municipal employees); *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1977).<sup>n6</sup> The allegations of the complaint which the plaintiffs assert give rise to a claim for the State defendants' supervisory liability include: (1) the Secretary of Wisconsin DHSS "is responsible for the policies, practices, and operation of social services [<sup>\*\*30</sup>] agencies in the state and for ensuring compliance by those agencies with applicable provisions of state and federal law" (Id. P 50); (2) the Governor "is responsible for ensuring that government agencies in the state operate in "compliance with applicable provisions of state and federal law" (Id. P 49); (3) the State defendants have long known of the systematic failures of Milwaukee foster care (Id. P 253); and (4) despite knowing of the continuing irreparable damage being caused to the plaintiff children damaged by this failure to provide mandated services and protection, the defendants (including the State defendants) have failed and refused to take necessary action. (Id. P 259.) The plaintiffs have also alleged that the State defendants have taken federal dollars which were made available to the state as reimbursement for Milwaukee foster care costs and diverted these funds to non-child welfare programs--an allegation that implies a deliberate breach of responsibility. (Id. P 253.) The State defendants have conceded that Milwaukee County is an entity of the State of Wisconsin, and that the state conducts a review of the Milwaukee County foster care system every three years, [<sup>\*\*31</sup>] in conjunction with the federal government.

- - - - -Footnotes- - - - -

<sup>n6</sup> See also, *Pembaur v. Cincinnati*, 475 U.S. 469, 483, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (supervisory liability may attach where supervisory officials are responsible for establishing employment policy).

- - - - -End Footnotes- - - - -

Supervisory liability under Section 1983 most often applies within a jurisdiction (a municipality is liable when it authorizes the use of excessive force by its police officers, for instance). But the plaintiffs in this matter have made allegations of grossly inadequate services on a County level, and have alleged that the State defendants knew of these inadequacies, had the authority to ameliorate [<sup>\*1279</sup>] or to attempt to ameliorate them, refused to exercise that authority, and in fact made the inadequacies worse by diverting funds earmarked for the County foster care system. With the plaintiffs alleging systematic and widespread constitutional violations, the State defendants shall not be allowed to wash their [<sup>\*\*32</sup>] hands of their alleged responsibilities. See *Jensen v. State Bd. of Tax Comm'rs*, 763 F.2d 272, 281 (7th Cir. 1985) (when a state's actions utterly obstruct a county's attempts to meet its constitutional duties, such conduct alone might violate the Constitution).

In addition to the factual allegations of responsibility, the plaintiffs have pointed to the Wisconsin Children's Code and the structure of federal funding statutes which condition funding on supervisory actions in the area of foster care to support the theory that the State defendants owe a duty to supervise the County's foster care system. While this decision has already noted that the Pennhurst doctrine bars the plaintiffs from bringing claims against the State defendants under the Wisconsin Children's Code, the plaintiffs may use the statute to explain the structure of responsibility for foster care in Wisconsin to show supervisory responsibility for civil rights violations brought under the United States Constitution, even though the terms of the statute itself cannot be enforced against the State defendants in this court.

The Wisconsin Children's Code, Section 48.48, describes the authority [\*\*33] of Wisconsin DHSS under the chapter:

The [Wisconsin DHSS] shall have authority:

(1) to promote the enforcement of the laws relating to delinquent children, nonmarital children and children in need of protection or services including developmentally disabled children and to take the initiative in all matters involving the interests of such children where adequate provision therefor is not made. This duty shall be discharged in cooperation with the courts, county departments, licensed child welfare agencies and with parents and other individuals interested in the welfare of children.

(2) To assist in extending and strengthening child welfare services with appropriate federal agencies and in conformity with the federal social security act and in cooperation with parents, other individuals and other agencies so that all children needing such services are reached.

-- (3) To accept legal custody of children transferred to it by the court under s. 48.355 and guardianship of children when appointed by the court, and to provide special treatment and care when directed by the court. . . .

(4) To provide appropriate care and training for children in its legal custody or under its supervision. [\*\*34] . . .

The Children's Code also gives Wisconsin DHSS the authority to promote its enforcement, Wis. Stat. @ 48.48(1); the authority to promulgate rules governing permanency planning for children in foster care under supervision of state, county or independent child welfare agencies id. @ 48.38(6); the authority to promulgate rules establishing standards for the operation of county departments, as well as child welfare agencies, day care centers, foster homes, group homes, and shelter care facilities, id., @ 48.67(1); and requires that the counties report to Wisconsin DHSS on cases of suspected child abuse or neglect. Id. @ 48.981(3)(c)(8).

In addition to chapter 48, chapter 46 of the Wisconsin statutes sets out the responsibilities for the Wisconsin DHSS for social services generally. Wis. Stat. @ 46.206(1)(a) requires Wisconsin DHSS to "supervise the administration of social services" and to "submit to the federal authorities state plans for the administration of social services. . . ." The chapter requires Wisconsin DHSS to "develop standards for the development and delivery of social services under [the Children's Code]." Wis. Stat. @ 46.26(1). Further, Wis. Stat. 46.03(7) [\*\*35] requires the Wisconsin DHSS to "take the initiative in all matters

involving the interests of" children adjudged to be in need of protective services "where adequate provision therefor has not already been made, including the establishment and enforcement of standards for services provided [under the Children's Code]." Wis. Stat. 46.16(1) requires the Wisconsin [\*1280] DHSS to investigate and supervise shelter care facilities for children. Wisconsin DHSS may also "license and revoke licenses of and exercise supervision over all child welfare agencies" and the placement of children in foster homes, inspect each agency's records, and visit all foster homes in which children are placed. Wis. Stat. 46.16(2). Finally, the chapter allows the Wisconsin DHSS to audit county records and review contracts made between county departments and public or voluntary agencies for services. Wis. Stat. @@ 46.206(1)(c), 46.215(2)(c).

In 1980, this court found that the Wisconsin Children's Code demonstrated that Wisconsin "DHSS had a duty under the law to act in conjunction with local agencies to fulfill the intent of the legislature." *Roe v. Borup*, 500 F. Supp. 127 (E.D. Wis. 1980). [\*\*36] n7 In that case, the plaintiffs alleged that the county and state defendants had taken a minor child away from her parents without constitutionally adequate process. *Id.* at 130. The plaintiffs alleged that the Wisconsin DHSS had failed to promulgate rules and guidelines to prevent the denial of procedural due process rights by counties seeking to remove children from the custody of their natural parents, necessarily implying that the state regulations permitted counties to effect the unconstitutional deprivation of the parents' custodial rights.

- - - - -Footnotes- - - - -

n7 Other courts have also looked to state law to determine the relationship between actors in civil rights actions. See *Soderbeck v. Burnett County, Wis.*, 752 F.2d 285, 293 (7th Cir. 1985) (looking to Wisconsin state law to determine accountability for County sheriff); *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986) (looking to North Carolina state law to determine the relationship between the State Secretary and local authorities); *Jensen v. State Bd. Of Tax Comm'rs of State of Ind.*, 763 F.2d 272, 280-81 (7th Cir. 1985) (county could not argue that state of Indiana was directly responsible for the existence--and therefore the elimination--of unconstitutional conditions in county jail because no proof of agency relationship between county and state).

- - - - -End Footnotes- - - - -

[\*\*37]

Further, the plaintiff children have pointed to the federal Adoption Assistance and Child Welfare Act and the Child Abuse Prevention and Treatment Acts to support their allegations that the State defendants receive federal monies for the foster care program, and are supposed to turn some of that money over to Milwaukee County to implement the foster care program within the federal constitutional, statutory, and regulatory mandates. These statutes shall be discussed more fully in the following Parts if this decision. For purposes of the Section 1983 claims brought pursuant to the Constitution, it suffices to say that by taking federal money, the State defendants have assumed the responsibility for the foster care programs administered in Wisconsin--even if they would prefer to pass the responsibility on to the County.

Finally, the courts of Wisconsin have long held that counties are "creature[s] of the state and exist in large measure to help handle the state's burdens of political organization and civil administration." *State v. Mutter*,

23 Wis. 2d 407, 413, 127 N.W.2d 15 (1964). The county is created by the state, "not by virtue of its [\*\*38] own will or consent, but as a result of the superimposed will of the state." *Kyncl v. Kenosha County*, 37 Wis. 2d 547, 554, 155 N.W.2d 583 (1968) (contrasting cities, which are created for the local convenience of the inhabitants) (quoting *State v. Schinz*, 194 Wis. 397, 400-01, 216 N.W. 509 (1927)). In rejecting an analogy to the federal-state relationship (an analogy that the State defendants in this case made in a "slippery-slope" argument that if this court allowed the plaintiffs to sue the State defendants for supervisory liability, it would have to allow them to sue federal officials as well), the Supreme Court of the United States has said:

Political subdivisions of States--counties, cities, or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of the state governmental functions. . . . These governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted [\*\*39] to them," and the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State."

[\*1281] *Reynolds v. Sims*, 377 U.S. 533, 575, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1963) (citations omitted).n8

- - - - -Footnotes- - - - -

n8 However, the Seventh Circuit has found that Indiana counties are not so financially intertwined with States as to be able to assert Eleventh Amendment immunity from damages suits. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 732 (1994) (citing cases).

- - - - -End Footnotes- - - - -

Thus, nothing in the legal nature of the county-state relationship recognized by the Courts of Wisconsin or the federal and state statutes governing the foster care system sustains the State defendants' burden on its motion to dismiss. In other words, the State defendants have failed to prove to that the allegations of the complaint could not possibly support a @ 1983 claim against [\*\*40] the State defendants for violating the Milwaukee County foster children's Fourteenth Amendment rights. Although the direct provider of foster care services in Milwaukee County is the Milwaukee County DHS,n9 the claims against the State defendants shall not be dismissed given the nature and breadth of the allegations of state responsibility for constitutional violations and the structure of foster care in the State of Wisconsin. The motion to dismiss the complaint's allegations of constitutional deprivations against the State defendants is DENIED.

- - - - -Footnotes- - - - -

n9 Chapter 46 indicates that, in a county, such as Milwaukee County, with a population of 500,000 or more "the administration of welfare services is vested in a county department of social services." In fact, Wis. Stat. @ 48.57 defines the broad powers and duties of county departments in providing child welfare services in Milwaukee County:

(1) Each county shall administer and expend such amounts as may be necessary out of any moneys which may be appropriated for child welfare purposes by the county board of supervisors or donated by individuals or private organizations.

In addition, the County has the authority to, inter alia, investigate instances in which children may be in need of protection and offer services to the caretakers of the children; to accept legal custody of children transferred to the county by the court under @ 48.355; and to provide appropriate protection and services for children in its care.

- - - - -End Footnotes- - - - -  
[\*\*41]

2. Adoption Assistance and Child Welfare Act Claims

The plaintiffs also allege that the State and County defendants have violated their civil rights by violating the Adoption Assistance and Child Welfare Act (the "Adoption Assistance Act"), which is found in parts IV-B n10 and IV-E n11 of the Social Security Act. The Adoption Assistance Act creates a cooperative federal-state program under which the federal government provides those states which opt to participate with funding for child welfare programs. Part IV-B of the Adoption Assistance Act provides federal funds to states to assist them in developing a broad range of child-welfare service programs, including foster care. Part IV-E establishes a separate program with separate appropriations through which Congress provides funds to states to cover child-specific foster care and adoption expenses incurred by the states.

- - - - -Footnotes- - - - -  
n10 Entitled "Child Welfare Services" and codified in 42 U.S.C. @@ 620-28.  
n11 Entitled "Federal Payments for Foster Care and Adoption Assistance," and codified at 42 U.S.C. @@ 670-679(a).

- - - - -End Footnotes- - - - -  
[\*\*42]

The State defendants posit that the plaintiffs do not have a private right of action under the Adoption Assistance Act to remedy their complaints about the foster care system in Milwaukee County. Federal funding statutes such as the Adoption Assistance Act create enforceable rights under Section 1983 if the statutes themselves created enforceable rights, privileges or immunities. *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990). In 1981, the Supreme Court issued its keystone decision addressing the conditions under which a federal funding statute creates enforceable rights in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). Factors to examine include: (1) whether "the provision in question was intended to benefit the putative plaintiff[s]"; (2) whether the provision reveals a congressional preference or a binding obligation; and (3) whether the plaintiff asserts an interest which is so "vague and amorphous" that it is "beyond the competence [\*1282] of the judiciary to enforce." *Wilder*, 496 U.S. at 509. Once the plaintiffs have pointed to a substantive provision of rights, privileges, or immunities, the defendants bear the burden of establishing that "Congress intended to preclude reliance on @ 1983 as a remedy for the

deprivation of a federally secured right." Wright, 479 U.S. at 423-34 (quoting Smith v. Robinson, 468 U.S. 992, 1012, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1983)). Courts "do not lightly conclude" such preclusion. Id.

In this case, the plaintiffs' complaint alleges that all of the defendants have deprived them of the following asserted "rights" under the Adoption Assistance Act:

- . implementation of a pre-placement services program designed to help children remain with or be reunited with their families
- . timely written case plans that contain specified elements and implementation and review of those plans
- . planning and services that will assure "proper placement"; "appropriate services" [\*\*44] in the "least restrictive most family-like setting"
- . placement in foster homes that conform to nationally recommended standards; "proper care" while in custody
- . regular judicial or administrative reviews
- . dispositional hearings within eighteen months of entering custody
- . services in a child-welfare system with an adequate information system.

(Compl. P 261.) The briefs and arguments have clarified that the plaintiffs bring their Adoption Assistance Act claims under Section 671(a) of Part IV-E and Section 627 of Part IV-B.n12 The court shall next address the State defendants' claims that these sections do not create enforceable rights.

- - - - -Footnotes- - - - -

n12 In their briefs, the plaintiffs mentioned that they alleged a claim under Section 677 of Title IV-E as well. They did not pursue this claim at oral argument, and the court shall DISMISS that claim at this time.

- - - - -End Footnotes- - - - -

a. Claims under Title IV-E of the Adoption Assistance Act

First, the plaintiff children claim that defendants have violated the provisions of the Adoption Assistance [\*\*45] Act located in Section 671(a) of part IV-E of the Social Security Act. Section 671(a) requires that the state submit to the federal government a plan containing certain elements and mandates for the foster care system within the state. For example, the plan must mandate that "reasonable efforts will be made . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home . . . ." 42 U.S.C. @ 671(a)(15). The state plan must also mandate a case review system, and require that foster homes or other facilities conform to national standards. Id. at @ 671(a)(10) & (16).

Until 1992, some federal courts, including the Seventh Circuit, construed @ 671(a)'s list of required plan elements to create private rights of action for children to enforce at least some of the specific mandated components of the

plan. See, e.g., Artist M. v. Johnson, 917 F.2d 980, 986-89 (7th Cir. 1990) rev'd, Suter, 503 U.S. 347, 112 S. Ct. 1360.n13, 118 L. Ed. 2d 1 For example the Seventh Circuit construed [\*\*46] the Act's requirement that states' plans provide that "reasonable efforts" will be made to keep children in their homes or to return them as soon as possible, to mean that a child could sue the state under Section 1983 for failure to make such "reasonable efforts." Artist M., 917 F.2d at 986-89 (construing @ 671(a) (15) to provide a private right of action.) However, in 1992, the Supreme Court reversed the Seventh Circuit's decision in Artist M., concluding that the reasonable efforts requirement of @ 671(a) (15) was too vague to be judicially enforceable. Suter v. Artist M., 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992). The Supreme Court also announced a new approach to federal funding statutes requiring plans, stating that the only private right arising from such statutes is a right to the [\*1283] plan itself, and not to the implementation of the plans' required provisions.

-Footnotes-

n13 See, also, Lynch v. Dukakis, 719 F.2d 504, 509-14 (1st Cir. 1983); L.J. v. Massinga, 838 F.2d 118, 122-23 (4th Cir. 1988), cert. denied, 489 U.S. 1065 (1989).

-End Footnotes-

[\*\*47]

Since that time, the Seventh Circuit has expounded upon the Suter decision's applicability to other provisions in @ 671(a), finding that under the Suter analysis of @ 671(a) (15), other @ 671(a) provisions do not create enforceable rights beyond the right to a qualifying state plan. Clifton v. Schafer, 969 F.2d 278, 283-85 (7th Cir. 1992); Procopio, 994 F.2d 325. Recently, the Seventh Circuit explained that Suter had closed the door entirely to a Section 1983 action brought under a federal statute which merely conditions a "state's receipt of federal funds on the adoption of a plan satisfying certain criteria." Miller v. Whitburn, 10 F.3d 1315, 1319 (7th Cir. 1993). However, the Seventh Circuit left the door slightly (although somewhat confusingly) ajar by stating that when a statute and its accompanying regulations set forth detailed factors to be considered in determining whether a state has complied with a portion of the statute, the beneficiaries of the statute may bring a Section 1983 cause of action. Id.

After these Seventh Circuit decisions were decided, Congress answered [\*\*48] the Supreme Court's Suter decision by passing an amendment to the Social Security Act (of which the Adoption Assistance Act is a part) in October of 1994. The amendment states that in all pending and future actions:

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. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 471(a) (15) [42 U.S.C. @ 671(a) (15)] of the Act is not enforceable in a private right of action.

42 U.S.C. 1320a-2 (amended October 20, 1994). [\*\*49] In light of this amendment, this court finds (and the parties' agree) that the narrow holding of Suter remains intact, and the plaintiffs' claims under 42 U.S.C. @ 671(a)(15) must be dismissed because the "reasonable efforts" language in that section is too "vague and amorphous." But the court must "rewind the clock" and look to cases prior to Suter to determine the enforceability of other provisions under the Adoption Assistance Act. More broadly, the amendment overrules the general theory in Suter that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan. Instead, the previous tests of Wilder and Pennhurst apply to the question of whether or not the particulars of a state plan can be enforced by its intended beneficiaries.

In Wilder, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510, the Supreme Court held that health care providers had an enforceable right to reasonable and adequate reimbursement rates by the state under the Boren Amendment to the Medicaid Act. The amendment required [\*\*50] reimbursements at rates that a "State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," 42 U.S.C. @ 1386(a)(13)(A). After finding that the providers were the intended beneficiaries of the amendment, the court held that Congress had imposed a binding obligation on states, giving rise to enforceable rights. Id. at 509-512. The Court said that Congress had worded the amendment in "mandatory rather than precatory" language, and provided that funding would be expressly conditioned on compliance with the amendment. Id. at 512.

Applying the first of the Wilder factors to this case, it is clear and undisputed that the children bringing this lawsuit are the intended beneficiaries of the Adoption Assistance Act. As for the second factor, Congress imposed a binding obligation by explicitly tying the creation of certain features of a state plan to federal funding. The scheme and the language of @ 671(a) [\*\*51] are mandatory, [\*1284] and the theory of Suter--that when Congress sets out plan requirements the only enforceable right is to the plan itself, and not to its implementation--has been rejected by Congress itself--the body whose intentions must be interpreted. The second prong of Wilder is met. Finally, with the exception of @ 671(a)(15), the provisions of @ 671(a) are not too "vague and amorphous" that it is "beyond the competence of the judiciary to enforce." Wilder, 496 U.S. at 509. Section 671(a)(16), for example, requires that the state provide for the development of a case plan for each foster child and for a case review system meeting certain statutory requirements. Sections 671(a)(2), (3), (7) & (13) require reviews, monitoring, and collaboration between the state, local, and federal agencies. Section 671(a)(10) & (11) require that the state designate a state authority to establish, maintain, and review standards for foster family homes and child care institutions which are "reasonably in accord with recommended standards of national organizations concerned with the standard for such institutions or homes." These provisions [\*\*52] are not vague, not amorphous, and certainly not beyond a court's ability to understand and to enforce.

The conclusion that Section 671(a) offers enforceable rights was widely recognized prior to Suter. See L.J. v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988), cert. denied, 488 U.S. 1018, 102 L. Ed. 2d 805, 109 S. Ct. 816 (1989); Lynch v. Dukakis, 719 F.2d 504, 509-12 (1st Cir. 1983); LaShawn A. v. Dixon,

762 F. Supp. 959, 987-89 (D.D.C. 1991), aff'd in part on other grounds, 990 F.2d 1319 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 691 (1994). Although the Seventh Circuit's Artist M. holding that @ 671(a)(15) was enforceable was overruled by Suter, the Seventh Circuit's reasoning was vindicated by Congress. The motion to dismiss the claim under 671(a)(15) is GRANTED and the motion to dismiss the claims under other provisions of @ 671(a) is DENIED.

b. Claims under Title IV-B of the Adoption Assistance Act

The plaintiffs also claim violations of the Adoption Assistance [\*\*53] Act under Sections 627(a)(2) and 627(b)(3) of Title IV-B of the Social Security Act. Neither the Supreme Court nor the Seventh Circuit has passed upon the enforceability of these sections under Section 1983.

Section 627(a)(2) provides, in relevant part, that if Congress allocates in excess of \$ 141,000,000 under Part IV-B of the Social Security Act, a state may not qualify for funding over-and-above the amount it would be eligible for if the appropriation were only \$ 141,000,000 unless the state:

(2) has implemented and is operating to the satisfaction of the Secretary--

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 475(5) [42 USCS @ 675(5) n14]) for each child receiving foster care under the supervision of the State; and

(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

42 U.S.C. @ 627 [\*\*54] (a). Subsection (b) of the statute warns that if Congress appropriates \$ 325,000,000 or more under the Adoption Assistance Act for two consecutive fiscal years, each state shall have its allotment reduced to 1979 levels unless the state:

(1) has completed an inventory of the type specified in subsection (a)(1);

(2) has implemented and is operating the program and systems specified in subsection (a)(2); and

[\*1285] (3) has implemented a pre-placement preventive service program designed to help children remain with their families.

42 U.S.C. @ 627(b).

- - - - -Footnotes- - - - -

n14 The Act defines "case review system" to require individual case plans, reviews, and dispositional hearings. 42 U.S.C. @ 675(5).

- - - - -End Footnotes- - - - -

Prior to the Congressional rejection of the analysis of Suter, the State defendants argued that the claim brought pursuant to this statute must be dismissed because, under the theory of Suter, the language of Section 627(a)--"to the satisfaction of the Secretary"--only [\*\*55] mandates that the Secretary be satisfied, and does not mandate that funded states create and maintain information systems, case review systems, and service programs designed to return children to their families when appropriate, or allow for adoption. However precarious this argument may have been prior to the amendment, it must be swept away now, in favor of the three-factor Wilder analysis.

Again, the first prong of the Wilder test is indisputably met--@ 627 was meant to benefit the child-plaintiffs in this matter. Applying the second prong of the Wilder test is not quite as simple. That Congress used mandatory not precatory language is very apparent, for Congress made it clear that if Wisconsin falls to implement and operate a satisfactory information system, case review system, and service program for family preservation and adoption placements, Wisconsin will lose any extra federal funding to which it might otherwise be entitled. The defendants argue, however, that even if the language is mandatory, the funding scheme gives rise to an inference that Congress was merely espousing its preferences for state action in this statute. For example, the defendants point out [\*\*56] that states do not lose their funding altogether if they fail to implement the enumerated procedures. In fact, if Congress has appropriated less than \$ 141,000,000, the states do not even get their share reduced if they do not have case review systems and informational systems in place. Further, the defendants say, extra funding might easily amount to only a very small portion of the amount necessary to implement the listed services, and therefore the Congress could not possibly have meant to mandate those services. Not so. Congress made it clear that if Wisconsin wants to receive extra money, it must create and provide certain services. See *Pennhurst*, 451 U.S. at 24 ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.")

Further, the plaintiffs' claims under Section 627 assert interests which are not so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce." *Wilder* 498 U.S. at 509. It is well within the court's ability to determine whether the Wisconsin DHSS has created a statewide [\*\*57] information system from which the status, demographic characteristics, location, length of time in the system, and goals for the placement of every child in foster care, can readily be determined; whether a case review system is in place for each child receiving foster care under the supervision of the state; and whether there is a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship. As a final consideration, neither by word nor by the creation of an enforcement system has Congress indicated that it precludes the use of a private enforcement of @ 627.

Therefore, the plaintiff children shall be allowed to proceed against the State defendants under @ 627 of the Adoption Assistance Act, and the motion to dismiss those claims shall be DENIED.

### 3. Child Abuse Prevention and Treatment Act Claims

The plaintiffs also sue under the federal Child Abuse Prevention and Treatment Act ("CAPTA"), which focuses upon the protection of all of our nation's children, including those who have come in contact with the foster care system. See 42 U.S.C. @@ 5101 [\*\*58] et. seq. CAPTA establishes the National Center for Child Abuse and Neglect, an Advisory Board on Child Abuse and Neglect, an Inter-Agency Task Force on Child Abuse and Neglect, and a National Clearinghouse for information relating to child abuse. 42 U.S.C. @@ 5101-5104. It also provides for ongoing grants and technical assistance to eligible states for child abuse and neglect [\*\*1286] prevention and treatment programs, as well as grants to states for programs relating to the investigation and prosecution of child abuse cases. 42 U.S.C. @ 5106(a)-(c). CAPTA sets out certain requirements for each grant. For instance, in order to be eligible for grants to assist in "developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs," states must:

provide that upon receipt of a report of known or suspected instance of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child and of any other child [\*\*59] under the same care who may be in danger of abuse or neglect.

Id. @ 5106a(b)(2). Further, the statute requires any state receiving funds to "demonstrate that there are in effect throughout the State," procedures, personnel, facilities, and programs and services "as may be necessary or appropriate to ensure that the state will deal effectively with child abuse and neglect cases in the State." Id. @ 5106a(b)(3). The section goes on, however, to allow the appropriation of grant moneys to states who are not "eligible" but who are making good faith efforts to conform. See Id. @ 5106a(c).

The plaintiffs alleged that the defendants violated CAPTA @ 5106(b) because "many children are left . . . in dangerous . . . situations" resulting from "inadequate child abuse investigation or the failure to offer services." (Compl. P 211.) They allege that Milwaukee County has insufficient staff, and that the "Milwaukee DHS routinely fails to follow applicable law and reasonable professional standards with regard to the investigation of child abuse and neglect reports and the provision of services in connection with those reports." See Id. PP 219-20. For instance, the Milwaukee County DHS [\*\*60] allegedly knew or should have known that Aline H. and Douglas and Maurice R. were in danger of physical and sexual abuse but "failed to protect these children from the abuse they suffered, which has resulted in serious emotional trauma for these children." (Compl. P 73). Also, despite having three of Patricia S.'s siblings in its custody, Milwaukee County DHS left the then six-year old in a dangerous situation, what a Department report described as a "filthy, unfurnished attic of a drug house [into which Patricia's mother] wanted to bring in men for drugs." (Id. PP 184-85.)

Although the plaintiffs have cited no cases holding that CAPTA creates enforceable rights, they rely upon an analogy to *Wilder*, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510. Like the statute in *Wilder*, CAPTA expressly conditions receipt of federal funding upon compliance with its provisions. Id. at 512; 42 U.S.C. @ 1396(c). Congress used mandatory language when it said that "in order for a State to qualify for a grant under subsection (a) [of this [\*\*61] section], such State shall. . . provide that upon receipt of a report . . . and upon a finding of abuse or neglect, immediate steps shall be taken

to protect . . . ." 42 U.S.C. @ 5106a(b) (emphasis added). Further, this language is not so vague and amorphous as to be nonjusticiable. Therefore, the plaintiffs shall be allowed to proceed with their civil rights claim under 42 U.S.C. @ 5106a(b), and the State defendants' motion to dismiss this claims shall be DENIED.

#### 4. Rehabilitation Act & Americans with Disabilities Act Claims

The Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, by reason of such disability, be . . . denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. @ 12132. Similarly, @ 524 of the Rehabilitation Act mandates in relevant part that "no otherwise qualified [handicapped individual] . . . shall, solely by reason of her or his [handicap], . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal [\*\*62] financial assistance." 29 U.S.C. @ 794.

The plaintiffs have failed to state claims under the ADA and Rehabilitation Act because they have not sufficiently alleged that any of the individual plaintiffs are disabled as defined under those acts. The failure to so allege is fatal to the complaint's claims [\*1287] against the State defendants, which shall be DISMISSED for failure to state a prima facie case.

#### IV. CLASS CERTIFICATION

The plaintiffs have filed a motion to certify this matter as a class action, with the class being defined as:

- (1) the approximately 4000 children who, as the result of an allegation of abuse or neglect, of suspected abuse or neglect, or of voluntary placement by their parents, are in the legal and/or physical custody of the Milwaukee County Department of Human Services ["DHS"] and
- (2) the thousands of children who are not in the Department's legal or physical custody but have been the victims of neglect or abuse of which the Department knows or should know or are at risk of neglect or abuse of which the Department knows or should know.

A party seeking class action certification must first meet the prerequisites identified [\*\*63] in Fed. R. Civ. P. 23(a). That section provides that one or more members of a class may sue on behalf of the class if the class is so numerous that joinder of all members of the class is impractical, if questions of fact or law are common to the class members, if the claims of the proposed class representatives are typical of those of the class, and if the class representatives will protect the interests of the class fairly and adequately. Fed. R. Civ. P. 23(a).

With thousands of potential class members, the plaintiffs have met the requirement of numerosity: See, e.g., Boles v. Earl, 601 F. Supp. 737, 745 (E.D. Wis. 1985). The defendants have not disputed this fact.

Additionally, while the members of the purported class do not share every question of law or fact, they all challenge the operating practices of the Milwaukee County foster-care system, and generally allege that the Milwaukee County foster-care program is systematically depriving children of their legal rights. Related to the requirement of commonality is the requirement that the

named parties be typical of the claims or defenses of the class. See Eggleston v. Chicago Journeymen Plumbers' Local Union 130, 657 F.2d 890, 895 (7th Cir. 1981). [\*\*64] Both elements require a commonality of grievances so that the case is both manageable and not plagued with internal conflicts of interests among class members.

The State defendants have expressed a concern that the breadth of the plaintiffs' claims may result in inherent conflicts among the interests of the class members, likely to preclude certification of a single class.n15 The State defendants do not, however, request a denial of class certification, or request an order directing separate actions alleging separate theories of relief. Instead, they request that the court define various subclasses, although they do not suggest the definitions of those classes.

- - - - -Footnotes- - - - -

n15 For instance, the proposed class includes children claiming a right to removal from their biological families, as well as children claiming a right to remain with their biological families. It also lumps plaintiffs who seek "preplacement preventative services" for keeping the family together, with those who complain that the county fails to "free" children for adoption by commencing proceedings for the termination of foster children's natural parent's parental rights.

- - - - -End Footnotes- - - - -

[\*\*65]

Because the plaintiffs seek solely injunctive relief to remedy violations in a foster-care system in which the named plaintiffs and the putative class members are similarly enmeshed, the court will create only two subclasses at this time. Those subclasses will follow the natural division already apparent in the plaintiffs' proposed definition of the putative class: those children who are in Milwaukee County DHS foster care custody and those children for whom the Department has received reports of neglect or abuse but who are not in Milwaukee County DHS foster care custody.

The affidavits indicate that the representative parties will fairly and adequately protect the interests of the class under Fed. R. Civ. P. 23(a)(4). The plaintiffs are represented by attorneys of the Children's Rights Project of the American Civil Liberties Union--an organization with considerable experience in complex, child-welfare litigation. Plaintiffs' counsel are more than adequate, and have already shown their ability to prosecute this action vigorously on behalf of the putative class. Moreover, each of the named plaintiff [\*1288] children has an adult "next friend" serving to protect their interests in the lawsuit. [\*\*66] Most of these next friends are attorneys who have been court-appointed counsel for the named plaintiffs in proceedings before the Milwaukee County Children's Court, social workers who work with those attorneys, or, in the case of four of the named plaintiffs, prominent members of the Milwaukee community who have a demonstrated interests in children's issues. n16

- - - - -Footnotes- - - - -

n16 See Affs. of Next Friends, attached as Exs. 13-24 of Pls. Br. in Support of Class Cert.

- - - - -End Footnotes- - - - -

An action that satisfies the four prerequisites of Rule 23(a) must then fall into one of the three categories of actions described in section (b) of the Rule. The plaintiff children seek to proceed under the second category, which applies to cases in which:

the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). Civil rights cases seeking broad declaratory or injunctive relief for a large and amorphous class, such as the one in this case, fall squarely into the category of class actions authorized by this section. See 1 H. Newberg, Newberg on Class Actions @ 4.11, at 291 (2d ed. 1985); Notes of Advisory Committee on Rules, 1966 Amendments, 39 F.R.D. 69, 102 (1966).

For all of the foregoing reasons, this court will certify the class and create two subclasses defined as follows:

- (1) children who are in foster care custody in Milwaukee County and who come into foster care custody in Milwaukee County; and
- (2) children who are not in foster care custody in Milwaukee County, but about whom the County Department of Human Services has received reports of abuse or neglect, and children who become the object of such reports.

FOR THE FOREGOING REASONS, IT WAS THEREFORE ORDERED ON FEBRUARY 3, 1995 AND FEBRUARY 16, 1995: that the State defendants' motion to dismiss was GRANTED IN PART AND DENIED IN PART as follows:

- 1. The State defendants' motion to dismiss the constitutional claims against them was DENIED.
- 2. The State defendants' motion to dismiss the plaintiffs' claims under 42 U.S.C. @ 671(a) was GRANTED as to @ 671(a)(15) and DENIED as to all other parts.
- 3. The State defendants' motion to dismiss the plaintiffs' claims under 42 U.S.C. @ 677 was GRANTED.
- 4. The State defendants' motion to dismiss the plaintiffs' claims under 42 U.S.C. @ 627 was DENIED.
- 5. The State defendants' motion to dismiss the plaintiffs' claims under 42 U.S.C. @ 5106a(b) was DENIED.
- 6. The State defendants' motion to dismiss the plaintiffs' claims under the Rehabilitation Act and the Americans with Disabilities Act was GRANTED as to the State defendants.

IT WAS FURTHER ORDERED that the plaintiffs' motion to certify the class is GRANTED, and two subclasses was be certified as follows:

- (1) children who are in foster care custody in Milwaukee County and who come into foster care custody in Milwaukee County; and
- (2) children who are not in foster care custody in Milwaukee County, but about whom the County Department of Human Services has received reports of abuse or neglect, and children who become the object of such reports.

Dated at Milwaukee, Wisconsin, this 2d day of March, 1995.

UNITED STATES DISTRICT COURT [\*\*69]

By John W. Reynolds

Judge

1ST CASE of Level 1 printed in FULL format.

WILLIE MAE HARRIS, et al., Plaintiffs, v. GOVERNOR FOB JAMES, et al., Defendants.

CV-94-A-1422-N

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

883 F. Supp. 1511; 1995 U.S. Dist. LEXIS 5600

April 26, 1995, Decided
April 26, 1995, FILED, ENTERED

COUNSEL: [\*\*1] For WILLIE MAE HARRIS, LINDA PATTON, TAENIKA PATTON, JOHN PATTON, TOMMY GORDON, BERTHA, J., individually and on behalf of all others similarly situated, plaintiffs: J. Richard Cohen; Southern Poverty Law Center, Montgomery, AL. Lawrence F. Gardella, Legal Services Corporation of Alabama, Montgomery, AL.

For FOB JAMES, Governor, DAVID TONEY, Commissioner of the Alabama Medicaid Agency, defendants: Henry Clay Barnett, Jr., Herman H. Hamilton, Jr., Capell, Howard, Knabe & Cobbs, Montgomery, AL. James H. Evans, Office of the Attorney General, Montgomery, AL. Charles H. Durham, III, Asst. Attorney Gen., Alabama Medicaid Agency, Montgomery, AL.

JUDGES: Judge W. Harold Albritton, III. Mag. Judge John L. Carroll

OPINIONBY: W. Harold Albritton, III

OPINION: [\*1512] MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This cause is now before the Court on the Motion to Dismiss filed by the Defendants n1 on November 28, 1994. For reasons that follow, the Court finds that Defendants' Motion to Dismiss is due to be DENIED.

-Footnotes-

n1 Plaintiffs named two defendants in their suit: James Folsom, then Governor of the State of Alabama, and David Toney, the Commissioner of the Alabama Medicaid Agency (hereinafter referred to collectively as "Defendants"). Each defendant is named in his official capacity only. After Plaintiffs filed this suit, Alabama elected a new Governor, Fob James; therefore, he has been substituted as a defendant.

-End Footnotes-

[\*\*2]

II. FACTS AND PROCEDURAL HISTORY

On November 2, 1994, Plaintiffs n2 filed this civil action pursuant to 42 U.S.C. @ 1983 seeking to enforce their rights under the Social Security Act. Plaintiffs, who are Medicaid recipients, seek injunctive relief that requires

the State of Alabama to ensure necessary medical transportation to them and to all Medicaid recipients, as Plaintiffs allege is mandated by federal law.

-Footnotes-

n2 The Court will refer to Willie Mae Harris, Linda Patton, Tanika Patton, John Patton, Tommy Gordon, and Bertha J. collectively as "Plaintiffs." They filed this suit on behalf of themselves and all others similarly situated.

-End Footnotes-

Plaintiffs allege that Alabama's failure to offer non-emergency transportation to and from Medicaid providers and its failure to ensure that such transportation is available has forced the Plaintiffs to delay or forgo needed medical services and has subjected the Plaintiffs to a deterioration of their medical conditions. Plaintiffs allege that Defendants have failed to [\*\*3] develop, implement, and maintain an adequate state plan that ensures non-emergency transportation for recipients and offers such transportation. Plaintiffs contend that 42 U.S.C. @ 1396, 1396a-u, the Medicaid subchapter of the Social Security Act, and regulations issued thereunder, require such transportation and that the state's failure to provide it violates their rights.

Specifically, Plaintiffs point to 42 CFR @ 431.53, which provides:

Assurance of transportation.

A State plan must

(a) Specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers; and

(b) Describe the methods that the agency will use to meet this requirement.

Plaintiffs ask this Court to (1) certify the suit as a 23(b)(2) class action, (2) declare that the Alabama state plan for administering Medicaid violates rights guaranteed to the Plaintiffs by 42 U.S.C. @ 1396a and the regulations adopted thereunder, (3) order Defendants to develop, implement, and maintain a state plan for transportation that will protect Plaintiffs' rights as guaranteed by 42 U.S.C. @ 1396a and the regulations adopted thereunder, (4) award reasonable attorneys' fees and [\*\*4] costs, and (5) order any other relief as the Court deems necessary and just.

On November 28, 1994, Defendants filed a Motion to Dismiss in which they stated numerous grounds for dismissal. The motion was not supported by a brief nor did it sufficiently explain the purported bases for dismissal. After Plaintiffs objected to Defendants' failure to explain the grounds for their motion, this Court set a briefing schedule for the motion. In response, the parties have submitted numerous briefs and letters in support of and in opposition to the Motion to Dismiss.

[\*1513] Since this case involves an interpretation of Medicaid statutes and regulations administered by the United States Department of Health and Human Services ("HHS"), the court entered an order on December 22, 1994 inviting HHS to lend its expertise to the court by participating amicus curiae. See, Rosado v. Wyman, 397 U.S. 397, 407, 25 L. Ed. 2d 442, 90 S. Ct. 1207 [FN9] (1970). On

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February 15, 1995, the Department declined the invitation to do so.

### III. STANDARD OF REVIEW

A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the [\*\*5] allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); see also *Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986) (citation omitted) ("We may not . . . [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief.") The court will accept as true all well-pleaded factual allegations and view them in a light most favorable to the non-moving party. *Hishon*, 467 U.S. at 73. Moreover, the court is aware that the threshold that a complaint must meet to survive a motion to dismiss for failure to state a claim is "exceedingly low." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (citation omitted).

### IV. DISCUSSION

Defendants base their Motion to Dismiss on many arguments. The most important of these is Defendants' contention that no specific non-emergency transportation benefits are mandated by federal statute. They argue that the statute itself does not require transportation, so that the regulation referring to transportation goes beyond the congressional mandate. Therefore, Defendants [\*\*6] contend, the regulation does not create a right which is enforceable under @ 1983. They argue further that although the Medicaid regulations that implement the statute recognize the need for transportation, those regulations fail to spell out any specific parameters or requirements regarding transportation. Defendants contend that the issue has been left non-specific so that each state may best deal with this issue as it sees fit. Consequently, Defendants argue that Plaintiffs have not asserted a valid cause of action under 42 U.S.C. @ 1983.

Plaintiffs contend that the Motion to Dismiss is due to be denied. They argue that this court is bound by the holding in *Smith v. Vowell*, 379 F. Supp. 139 (W.D. Tex. 1974), aff'd, 504 F.2d 759 (5th Cir. 1974) and that this holding disposes of many of the arguments that Defendants have made. Plaintiffs assert that any state participating in the Medicaid program must provide a state plan for compliance with federal law and that as part of this plan the state Medicaid agency must specify that it will ensure necessary transportation to recipients to and from health care providers and describe how the state will meet the requirement. Plaintiffs [\*\*7] acknowledge that states retain flexibility in designing their state plans, but they contend that specific, binding federal regulations require states to ensure non-emergency medical transportation.

The issue before the court is whether the complaint, accepting its factual allegations as true, states a claim for which relief may be obtained under 42 U.S.C. @ 1983.

#### A. Medicaid

By enacting Title XIX of the Social Security Act of 1965, 42 U.S.C. @ 1396 et seq., Congress established a federal program called Medicaid which "provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502, 110 L. Ed. 2d

883 F. Supp. 1511, \*1513; 1995 U.S. Dist. LEXIS 5600, \*\*7

455, 110 S. Ct. 2510 (1990). The Eleventh Circuit has explained that

Medicaid is a cooperative venture of the state and federal governments. A state which chooses to participate in Medicaid submits a state plan for the funding of medical services for the needy which is approved by the federal government. The federal government then subsidizes a certain portion of the financial obligations which the state has agreed to bear. A state participating in Medicaid must [\*1514] comply with the [\*\*8] applicable statute, Title XIX of the Social Security Act of 1965, as amended 42 U.S.C. @ 1396, et seq., and the applicable regulations.

Silver v. Baggiano, 804 F.2d 1211, 1215 (11th Cir. 1986) (emphasis added).

#### B. 42 U.S.C. @ 1983

Plaintiffs assert correctly that this court has original jurisdiction over this case because it arises under federal law. See, 42 U.S.C. @ 1331. Plaintiffs allege that the Defendants, acting in their official capacities as state actors, have violated federal law and caused Plaintiffs to be deprived of rights secured to them by 42 U.S.C. @ 1396a and 42 C.F.R. @@ 431.53 and 441.62. Plaintiffs seek redress for this violation of their rights by bringing suit under 42 U.S.C. @ 1983.

#### 1. Enforcing a Statutory Right Under Section 1983

By its terms, Section 1983 establishes a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The full text of Section 1983 provides that:

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of [\*\*9] the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. @ 1983. As the plain language of Section 1983 indicates, the remedy encompasses violations of federal laws as well as violations of rights secured by the Constitution of the United States. The Supreme Court has held on numerous occasions that the coverage of Section 1983 must be construed broadly. *Golden State Transit Corp. v. City of Los Angeles, Ca.*, 493 U.S. 103, 105, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989).

The Eleventh Circuit has noted that, "Section 1983 is the exclusive statutory cause of action available to a plaintiff seeking compliance with the Social Security Act on the part of a participating state." *Silver*, 804 F.2d at 1215.

Defendants argue, however, that the regulation regarding transportation does not create a right which may be enforced under this statute.

#### a. Early Cases

In *Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), the [\*\*10] Supreme Court held that the remedy that Section 1983 provides encompasses violations of federal statutory as well as constitutional law. *Id.*

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at 4. Subsequent Supreme Court opinions have carved out and defined exceptions to this general rule. See, e.g., *Suter v. Artist M.*, 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992); *Wilder*, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510; *Golden State*, 493 U.S. 103, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989); *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981).

The Supreme Court has articulated two exceptions under which statutory violations are not actionable under Section 1983.

A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself.

*Wilder*, 496 U.S. at 508 (internal quotations and citations omitted). Accord, *Wright*, [\*\*11] 479 U.S. at 423.

Due to the importance of this issue, this Court offers the following overview of the relevant Supreme Court cases that led to these exceptions.

Shortly after it decided *Thiboutot*, the Supreme Court addressed the availability of Section 1983 to redress alleged violations of the Developmentally Disabled Assistance and Bill of Rights Act ("DDA"). *Pennhurst*, 451 U.S. at 5. The Supreme Court described the DDA as "a federal-state grant program whereby the Federal Government [\*1515] provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled." *Id.* at 11. The DDA included a "bill of rights provision" wherein Congress made "findings respecting the rights of persons with developmental disabilities." 42 U.S.C. § 6010.

In *Pennhurst*, the Supreme Court held that Congress did not intend the Congressional findings to create rights and obligations enforceable under Section 1983. *Id.* at 15-27. The Court emphasized that legislation enacted pursuant to the spending power is in the nature of a contract between the states and the federal government.

The legitimacy of Congress' power to [\*\*12] legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

*Id.* at 17 (citations omitted). The Court framed the crucial inquiry in that case as "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25.

Consequently, the Supreme Court concluded that because the relevant section of the DDA did nothing more than express a congressional preference for certain kinds of treatment and make a general statement of "findings," the section was "too thin a reed to support the rights and obligations read into it." *Id.* at

19. After examining the legislative history, the Court concluded that the section was intended to be "hortatory, not mandatory." [\*\*13] Id. at 24. The court found the relevant language to be congressional encouragement rather than the imposition of binding obligations on the states. Id. at 27.

As for the other sections of the DDA that the Supreme Court found did impose binding obligations on the state, the court distinguished Thiboutot by noting that the plaintiffs in Pennhurst were claiming only that the state plan had not provided adequate assurances to the Secretary, whereas the Thiboutot plaintiffs were claiming that state law prevented them from receiving federal funds to which they were entitled. Id. at 28. Thus, because the plaintiffs in Pennhurst were not the intended beneficiaries of the obligation on the State they could not sue under Section 1983 to enforce that obligation. Although the Supreme Court in Pennhurst did not clearly articulate the complete analytical paradigm for determining whether Section 1983 provides a remedy for violation of rights created by a federal statute, it did provide some of the key concepts.

In Wright, the next important case on use of Section 1983 to remedy violations of rights created by federal statute, tenants living in low-income housing [\*\*14] projects brought suit under Section 1983 alleging that the owners of the projects had over-billed the tenants for their utilities and violated the rent ceiling in the Brooke Amendment to the Housing Act of 1937. After recognizing that Thiboutot held that Section 1983 was available to enforce violations of federal statutes by agents of the State, the Court noted that two exceptions to this general rule existed. Wright, 479 U.S. at 423. The first exception arises out of Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981) and provides that Section 1983 does not provide a remedy where Congress has foreclosed private enforcement of the statutorily create right in the same legislation that creates the right. Wright, 479 U.S. at 423. The Court describes the second exception by noting that in Pennhurst, a Section 1983 action did not lie

because the statutory provisions were thought to be only statements of 'findings' indicating no more than a congressional [\*1516] preference---at most a 'nudge in the preferred direction,' and not intended to rise to the level of an enforceable right.

Wright, 479 [\*\*15] U.S. at 423. After explaining these exceptions, the Court found that the administrative enforcement scheme did not foreclose private enforcement under Section 1983. The Court then turned to the question of whether the Brooke Amendment and the regulations give the tenants any specific or definable rights to utilities.

The Court noted that the Brooke Amendment clearly established a mandatory limitation on the amount of rent that could be charged and that the HUD interim regulations expressly required that a reasonable amount for utilities be included in the rent that the owner charged the tenant. A majority of the Justices concluded that "HUD's view is entitled to deference as a valid interpretation of the statute, and Congress in the course of amending that provision has not disagreed with it." Id. at 430. Thus, the regulations at issue which defined the term rent in the relevant statute by including a reasonable allowance for utilities had "the force of law." Id. at 431. In this case, the Supreme Court decreed that a requirement in a HUD regulation that rent include a "reasonable" allowance for utilities was not too amorphous or vague to confer on tenants an enforceable right [\*\*16] within the meaning of Section 1983. The

Court concluded by saying that in its view

the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under Pennhurst and @ 1983, rights that are not, as [the owner] suggests, beyond the competence of the judiciary to enforce.

Wright, 479 U.S. at 432.

In Wright, the dissent challenges the majority by noting that the regulation in question seems to exceed the authority of the amendment to the statute. The dissent's dissatisfaction is best summarized in the following paragraph.

In my view [the tenants] do not also have a statutory entitlement enforceable in federal courts by virtue of 42 U.S.C. @ 1983. Neither the Brooke Amendment's language, nor its legislative history, nor its interpretation by HUD supports the conclusion that Congress intended to create an entitlement to reasonable utilities when it enacted the statute; and even if agency regulations, standing alone, could create such a right, the temporary regulations relied upon by [the tenants] in this case are not susceptible of judicial enforcement.

Wright, 479 [\*\*17] U.S. at 441 (O'Connor dissent; emphasis added). However, a majority of the Justices found it appropriate to rely on the temporary regulations.

The next case decided by the Supreme Court that discusses in detail the availability of suit under Section 1983 for violations of federal statutes is Golden State, 493 U.S. 103, 107 L. Ed. 2d 420, 110 S. Ct. 444. This case addressed whether the National Labor Relations Act granted a taxicab franchisee rights enforceable under Section 1983. This case begins by noting that the remedy provided by Section 1983 encompasses violations of rights created by federal statutes as well as violations of rights created by the federal constitution. The Court notes that

[a] determination that @ 1983 is available to remedy a statutory or constitutional violation involves a two-step inquiry. First the plaintiff must assert the violation of a federal right. Section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law. In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express [\*\*18] a congressional preference for certain kinds of treatment." The interest the plaintiff asserts must not be "too vague or amorphous" to be "beyond the competence of the judiciary to enforce." We have also asked whether the provision in question was intend[ed] to benefit" the putative plaintiff.

Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under @ 1983."

[\*1517] Golden State, 493 U.S. at 106 (citations omitted). It is interesting to note that the Court reversed the order in which it discusses the applicability of the two exceptions to the Thiboutot holding. Obviously, the "creates an enforceable right" part of the analysis is now of much greater import. The reordering of the considerations is not the only evidence of this change in emphasis. The "creates an enforceable right" analysis now involves

analysis of the following sub-issues: does the statute create a binding obligation on the state; is it intended to benefit the putative plaintiffs; and is the interest too vague or amorphous so as to be beyond the competence of the judiciary to enforce.

The next case in this line, Wilder, [\*\*19] 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510, is very important to the determination of the present suit as it is also a Medicaid Act case. In 1990, the Supreme Court addressed whether a health care provider may bring an action under Section 1983 to challenge the method by which a State reimburses health care providers under the Medicaid Act as amended by the Boren Amendment. The Boren Amendment requires reimbursement according to rates that a State finds are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. The Court applied the test as it had been stated in Golden State. After concluding that it was obvious that under the Act health care providers were intended beneficiaries, the Court emphasized that the statute and regulations were phrased in mandatory rather than precatory terms. The Court analogized to Wright and distinguished Pennhurst to conclude that the interest created was not too vague or amorphous such that it is beyond the competence of the judiciary to enforce. Ultimately, the Court concluded that this portion of the statute was enforceable by the providers in an action under Section [\*\*20] 1983.

The Eleventh Circuit has utilized the Wilder/Wright paradigm. In a case addressing the availability of Section 1983 to enforce a right created by the Medicaid Act, the Eleventh Circuit explained the relevant body of cases by stating that

Supreme Court precedent establishes that, subject to certain exceptions discussed below, violations of the Social Security Act can be remedied in a @ 1983 action. In Maine v. Thiboutot, the Court construed @ 1983 as authorizing suits to redress violations by state officials of rights created by federal statutes. Section 1983 is the exclusive statutory cause of action available to a plaintiff seeking compliance with the Social Security Act on the part of a participating state.

The Court, however, has recognized two exceptions to the application of @ 1983 to statutory violations. First, if Congress has foreclosed private enforcement of the statute in question in the enactment of the statute itself, then @ 1983 is unavailable to enforce federal rights under that statute. For example, when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent [\*\*21] to preclude the remedy of suits under @ 1983. Second, if Congress has not created enforceable rights in the relevant statutory provision, there is no cause of action available under @ 1983. By its terms, @ 1983 does not create substantive rights; it provides a remedy against state officials for deprivations of rights established elsewhere under federal law.

Silver, 804 F.2d at 1215-16 (emphasis added; internal quotations and citations omitted). n3

- - - - -Footnotes- - - - -

n3 After articulating the applicable exceptions, the Silver court focused on the second step in the aforementioned analysis and explored whether @

1396a(a)(23) creates rights enforceable by health care providers. Ultimately, the court remanded the case without expressing an opinion on the question of whether the plaintiff could maintain an action under @ 1983 for alleged violations of that section. Silver, 804 F.2d at 1218. Thus, this case does not dispose of the issues presently before this court; rather it only illuminates the basic analytical framework that the Eleventh Circuit has discussed as the appropriate way to determine whether a cause of action exists under Section 1983.

- - - - -End Footnotes- - - - -  
[\*\*22]

After the aforementioned cases, a court would determine whether Section 1983 provides a private cause of action for violations of a particular federal statute by ascertaining [\*1518] answers to the following questions: (1) was the provision in question intended to benefit the plaintiff; (2) does the statutory provision in question create binding obligations on the defendant governmental unit rather than merely expressing a congressional preference; (3) is the interest that the plaintiff asserts specific enough to be enforced judicially rather than being too vague and amorphous for such enforcement. If the plaintiff demonstrates that the answer to each of these questions is yes, then Section 1983 can be used to seek a remedy, unless the defendant can show that Congress foreclosed Section 1983 enforcement by providing a comprehensive enforcement mechanism for the protection of the federal right. Mere availability of administrative protection is not sufficient. Rather, the statutory framework must be such that allowing the plaintiff to bring a Section 1983 action would be inconsistent with Congress' carefully tailored scheme.

b. A New Approach?

The most recent case from the Supreme Court addressing the availability of Section 1983 as a remedy for violations of federal law is Suter v. Artist M., 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992). This case concerned whether the "reasonable efforts" clause of the Adoption Assistance and Child Welfare Act created rights enforceable in a Section 1983 suit. Specifically, the Adoption Act provided that for a state to receive payment, it must have a plan approved by the Secretary of Health and Human Services, and the plan must provide, among other things, that "in each case, reasonable efforts will be made" to prevent the need to remove a child from his home or to make it possible for a removed child to return to his home. Although this case cites as authority for its holding such cases as Wilder, Wright, Golden State, and Thiboutot, many call the decision inconsistent with such cases. n4 On the other hand, a majority of courts have subsequently reconciled Suter with the Supreme Court's earlier cases. See, e.g., Martin v. Voinovich, 840 F. Supp. 1175, 1194-95 (S.D. Ohio 1993) (collecting cases). n5

- - - - -Footnotes- - - - -

n4 Even Justice Blackmun expressed such a view in his dissenting opinion in Suter. [\*\*24]

n5 Martin explains that although the [enumerated] decisions have attempted to harmonize Wilder and Suter, they have not all followed the same approach in doing so. The Seventh Circuit distinguishes the Wilder and Suter cases on the basis that in Wilder

the plaintiffs asserted the right to a plan that did not violate federal law, whereas the Suter plaintiffs alleged an isolated violation of a concededly legal plan. Other courts have focused on the Suter Court's finding that there was no congressional guidance on how to measure "reasonable efforts," and that the term imposed only a generalized duty. Courts have also recognized that Suter emphasized the requirement that the federal statute must unambiguously delineate the States' obligations in order to give the States' [sic] notice of what is required for participation in the funding.

Martin, 840 F. Supp. at 1194 (citations omitted).

- - - - -End Footnotes- - - - -

Suter begins by noting that Thiboutot established that Section 1983 does provide a remedy for violations of federal statutes and that the Supreme Court [\*\*25] has subsequently recognized that Section 1983 is not available where Congress has foreclosed such enforcement or where the statute did not create enforceable rights, privileges, immunities. Having established these general principles, the Court next discusses one of the rationales for its determination in Pennhurst that a particular statutory violation could not be remedied through a suit under Section 1983. This rationale focuses on the fact that the legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the "contract" into which it enters when it agrees to participate in a federally funded program governed by rules in a statute. The court concludes that a State cannot knowingly accept if it is unaware of the conditions of participation in a government program or if it is unable to ascertain what is expected of it. Suter, 112 S. Ct. at 1366. The Court emphasizes that in Pennhurst the state did not have adequate notice because the statutory section in question spoke in terms intended to be hortatory, not mandatory.

In Suter, the Court states that the key issue before it is "did Congress, [\*\*26] in enacting the Adoption Act, unambiguously confer [\*1519] upon the child beneficiaries of the Act a right to enforce the requirement that the State make reasonable efforts to prevent a child from being removed from his home, and once removed to reunify the child with his family?" Id. at 1367. The Court quickly decides that the language in the statute is mandatory in its terms. However, the Court finds that the language of the statute and the regulations promulgated by the Secretary to enforce the Adoption Act do not evidence a requirement on a state receiving funds under the Adoption Act to do more than the state in question had done--namely, provide a plan. Thus after examining the relevant language in the context of the entire Act, including the relevant regulations promulgated under the Act, the Court holds that the language in question did not create enforceable rights to something more than a plan such that private individuals could file suit under Section 1983 for failure to provide services, even if such a failure was inconsistent with the plan.

The Suter opinion relies on three points to distinguish Wilder. First, the statute and regulations at issue in Suter offered [\*\*27] no guidance as to how "reasonable efforts" are to be measured. Suter, 112 S. Ct. at 1368. Second, the way in which a State was to comply with this directive and with the other provisions of the Act was, within broad limits, left to the State's discretion. Id. And third, the statutory provisions provided a sufficiently comprehensive enforcement method to show that the absence of a remedy to private plaintiffs under Section 1983 does not make the reasonable efforts clause a dead letter. All of these bring new considerations to the analysis of the appropriateness

of claims for violations of statutorily created rights under Section 1983.

c. Congress Reacts to Suter

In 1994, Congress, apparently dissatisfied by the Supreme Court's interpretation in Suter of the scope of Section 1983, and the effect it might have on enforcement of the Social Security Act, enacted 42 U.S.C. @ 1320a-2. n6 This section purports to address the "effect of failure to carry out State plan" and provides that

in an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring [\*\*28] a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

42 U.S.C. @ 1320a-2 (1994) (emphasis added). Thus, Congress has rejected the Supreme Court's interpretation in Suter and has mandated that courts continue to apply a pre-Suter approach.

- - - - -Footnotes- - - - -

n6 The Court notes that 42 U.S.C. @ 1320a-10 contains identical language to 42 U.S.C. @ 1320a-2.

- - - - -End Footnotes- - - - -

d. Present Approach

As of the date of this opinion, the only reported decision that addresses the impact [\*\*29] of 42 U.S.C. @ 1320a-2 is Jeanine B. v. Thompson, 877 F. Supp. 1268, 1995 U.S. Dist. LEXIS 2768, 1995 WL 95085 (E.D. Wis. 1995). The case, a class action brought on behalf of children in the foster care system, seeks injunctive relief to remedy alleged violations of rights created by the state and federal constitutions and various federal statutes. In Jeanine B., the court addressed the appropriateness of the motion to dismiss filed by the numerous state officials responsible for administering the foster care system in which the plaintiffs have been placed. Specifically, the children alleged that the defendants had violated their civil rights by violating the Adoption Assistance and Child Welfare Act ("Adoption Assistance Act"). Like Medicaid, the Adoption Assistance Act creates a cooperative federal-state program under which the federal government provides [\*1520] those states which choose to participate with funding for specified programs.

Apparently relying on Suter, Defendants argued that the children could not use Section 1983 to seek enforcement of the requirements of the Adoption Assistance Act. The court held that in light of 42 U.S.C. @ 1320a-2 only the narrow holding of Suter remains [\*\*30] intact, and thus, Suter stands only for the proposition that 42 U.S.C. @ 671(a)(15) is too vague and amorphous to

883 F. Supp. 1511, \*1520; 1995 U.S. Dist. LEXIS 5600, \*\*30

provide a cause of action under Section 1983. Jeanine B., 877 F. Supp. 1268, 1995 U.S. Dist. LEXIS 2768, 1995 WL 95085 at \*16. The court further explained that it "must 'rewind the clock' and look to cases prior to Suter to determine the enforceability of other provisions. . . ." Id. Moreover, the court determined that 42 U.S.C. @ 1320a-2

overrules the general theory in Suter that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan. Instead the previous tests of Wilder and Pennhurst apply to the question whether or not the particulars of a state plan can be enforced by its intended beneficiaries.

Id.

This court concurs with the above interpretation of the impact of 42 U.S.C. @ 1320a-2. Therefore, this court finds that in light of this amendment Suter is limited in its application to cases involving 42 U.S.C. @ 671(a)(15). To the extent that the rest of the Suter opinion adds to or changes the analysis established by prior cases such as Wilder, this Court will not apply it to this [\*\*31] case. Thus, in discerning whether the provisions of the Medicaid Act and its regulations create a right enforceable under Section 1983, the Court will apply the test as it existed prior to the determination of Suter as previously described in this opinion.

## 2. The Particular Provisions at Issue

As previously mentioned, Subchapter XIX of the Social Security Act governs grants to states for medical assistance programs. Specifically, the subchapter appropriates funds

for the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and the aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each such fiscal year a sum sufficient to carry out the purposes of this subchapter.

42 U.S.C. @ 1396. Sums appropriated under this section are used for making payments to States which have submitted, [\*\*32] and had approved by the Secretary, plans for medical assistance. Id. Requirements for the contents of State plans for medical assistance are provided in 42 U.S.C. @ 1396a(a). The relevant portion of this section for purposes of this case is found in 42 U.S.C. @ 1396a(a)(4)(A). According to this section, a State plan for medical assistance must provide

such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods, and including provision for utilization of professional medical personnel in the administration and, where administered locally, supervision of administration of the plan) as are found by the Secretary to be necessary for the proper and efficient operation of the plan[.]

42 U.S.C. @ 1396a(a)(4)(A) (emphasis added).

Through regulations promulgated under this section and by authority of 42 U.S.C. @ 1302, n7 the Secretary has provided which methods of administration are necessary for the proper and efficient operation of the plan. [\*1521] See, 42 C.F.R. @@ 431.1 et seq. This part of the Code of Federal Regulations

establishes State plan requirements for the designation, organization, and general administrative activities of a State agency responsible for operating the State Medicaid program, directly or through supervision of local agencies.

42 C.F.R. @ 431.1 (emphasis added). In particular, Subpart B sets forth State plan requirements that pertain to the proper and efficient administration of such a plan. See, 42 C.F.R. @ 431.40(a)(2). The provision at issue in this case n8 is contained within Subpart B and is denominated 42 C.F.R. @ 431.53. This provision states that

[a] State plan must

(a) Specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers; and

(b) describe the methods that the agency will use to meet this requirement.

42 U.S.C. @ 431.53 (emphasis added). Although it is not immediately apparent from the text of this regulation that it is meant to describe a method of administration that the Secretary found necessary for the proper and efficient operation of the plan, it is clear that is exactly what it is. A small reference number is noted immediately after the text of this regulation: "Sec. 1902(a)(4) of the Act." From the content of the surrounding regulations, it is clear that the Act referred to here is Section XIX of the Social Security Act of 1965. The text of Public Law 89-97, which is the 1965 amendments to the Social Security Act, reveals that Sec. 1902(a)(4) was codified as 42 U.S.C. 1396a(a)(4)(A). Clearly, this regulation was issued pursuant to Section 1396a(a)(4)(A), the statutory requirement that a state plan must provide such methods of administration as are found by the Secretary to be necessary for the proper and efficient operation of the plan. Moreover, it is likely that the regulation is very old since it refers to the public law cite rather than the United States Code cite.

- - - - -Footnotes- - - - -

n7 Congress has charged the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services with the responsibility of making and publishing such rules and regulations as may be necessary to the efficient administration of the functions with which each is charged under Chapter VII of the Social Security Act. 42 U.S.C. @ 1302 [\*35]

n8 Plaintiffs also rely on 42 C.F.R. @ 441.62 which states that an agency must offer to the family or recipient, and provide if the recipient requests, necessary assistance with transportation as required under @ 431.53 of this chapter and necessary assistance with scheduling appointments for services. This section does not reveal the section of the statute from which it originates.

It is contained in a part of the CFR which sets forth State plan requirements and limits on FFP services defined in part 440 of this subchapter. The subpart of the CFR states that it implements sections 1902(a)(43) and 1905(a)(4)(B) of the Social Security Act. Thus, this regulation is also firmly grounded in the statute. The parties have not focused their argument on the meaning of this CFR section.

- - - - -End Footnotes- - - - -

It is important to note that nearly all of these Supreme Court cases, as well as cases from lower courts, examine the statute and the regulations together in determining whether or not the statute creates a right enforceable under Section 1983. See, e.g., Suter, 112 S. Ct. at 1369; Wright, 479 U.S. at 431-32; [\*\*36] Loschiavo v. City of Dearborn, Mich., 33 F.3d 548, 551-52 (6th Cir. 1994), cert. denied, 130 L. Ed. 2d 1067, 115 S. Ct. 1099 (1995); West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11, 18 (3rd Cir. 1989), aff'd, 499 U.S. 83, 113 L. Ed. 2d 68, 111 S. Ct. 1138 (1991); Samuels v. District of Columbia, 248 U.S. App. D.C. 128, 770 F.2d 184, 199-200 (D.C. Cir. 1985). To the extent that the Defendants argue that the regulations upon which Plaintiffs rely cannot establish any right enforceable under Section 1983, they are incorrect. A court may consider regulations promulgated to effectuate a statute. The regulations in question are clearly consistent with the authority granted to the Secretary by the statute. Moreover, if the regulations and statute together are specific enough to survive an application of the analysis developed by the Supreme Court in the Pennhurst/Wright/Golden State/Wilder line of cases, then the Plaintiffs may seek redress for alleged violations of rights created by the statute and regulation in a Section 1983 suit, so long as the statute does not foreclose private enforcement by its own terms.

3. Application of the Paradigm

Read in the light of the relevant [\*\*37] regulations, it is clear the statutory provision and the regulations at issue in this case are intended to benefit people such as the Plaintiffs. The statute requires states to provide [1522] all that the Secretary deems necessary for the proper and efficient administration of the state's plan. The regulations make clear that the intent of such a requirement is to facilitate the provision of services to the recipients. The Secretary has found that provision of transportation to and from providers is a method of administration necessary for the proper and efficient operation of a plan to provide medical services to qualified recipients. Plaintiffs are alleged to be recipients of Medicaid who have been harmed by their inability to get to providers of medical services. Defendants do not dispute that the Plaintiffs are intended beneficiaries of the statute and regulation sections at issue. Thus, this Court is satisfied that the sections were intended to benefit the Plaintiffs.

The relevant statute and regulations are written in indisputably mandatory language. There can be no doubt that the relevant portions of the statute and regulations express an intent to create a binding obligation on the [\*\*38] states rather than merely to express a congressional preference. In other cases, courts have found the use of words like "must" to be a congressional indication that the provision is meant to be mandatory rather than precatory. Unlike the state in Pennhurst, Alabama cannot claim that there was no knowing acceptance of its transportation obligations on the grounds that it was unaware that receipt of federal Medicaid matching funds was conditioned on the provision of

necessary transportation, or that it was unable to ascertain what was expected of it. The statute and regulations do not merely voice congressional findings; they impose obligations. Moreover, the regulations requiring such transportation are very old and as long ago as 1974 the Circuit Court of Appeals approved a reading of such regulations that included non-emergency transportation. See *Smith v. Vowell*, 379 F. Supp. 139 (W.D. Tex. 1974), aff'd, 504 F.2d 759 (5th Cir. 1974). Alabama could have declined to renew its "contract" long before now if it was not willing or able to provide non-emergency transportation as required by its participation in the Medicaid program.

Whether the interest that the Plaintiffs [\*\*39] seek to assert is specifically defined so as to be judicially enforceable under Section 1983 is the area in which courts have the most difficulty applying the Supreme Court's test. While it could be argued that the congressional mandate articulated in the relevant sections of the statute and regulations is vague and amorphous, it is no more vague and amorphous than other provisions that courts have found themselves able to enforce. See, e.g., *Wilder*, 496 U.S. at 512; *Wright*, 479 U.S. at 420. In fact, in *Smith v. Vowell*, a court found itself capable of enforcing a judicial remedy for nearly identical language in a federal regulation. This Court cannot conclude that the provision is beyond its competence to enforce.

In light of the foregoing, the Court finds that Plaintiffs have made allegations necessary to establish that 42 U.S.C. @ 1396a(a)(4)(A) and 42 C.F.R. @@ 431.53 & 441.62 create enforceable rights. Consequently, this action may be brought under Section 1983 unless Congress has foreclosed private enforcement of the statute in question by enacting the statute itself. Defendants have not shown that Congress specifically foreclosed a remedy under Section 1983 by enacting [\*\*40] the provisions in question. Moreover, *Wilder* held that Congress did not intend to foreclose the use of Section 1983 as a means of enforcing the Medicaid Act. *Wilder*, 496 U.S. at 522. Thus, this court is satisfied that Plaintiffs may proceed with this action under Section 1983.

#### C. *Smith v. Vowell*

Plaintiffs direct this court's attention to several cases that have held that non-emergency transportation is required under the statute and regulations at issue in this case. See, e.g., *Morgan v. Cohen*, 665 F. Supp. 1164, 1175 (E.D. Penn. 1987); *Fant v. Stumbo*, 552 F. Supp. 617, 618-19 (W.D. Ky. 1982); *Smith v. Vowell*, 379 F. Supp. 139. The most important of these cases is *Smith v. Vowell*, which involved an action brought by a Texas welfare recipient on behalf of himself and others similarly situated seeking injunctive and declaratory relief. The recipient claimed that Texas had failed to comply with the Social Security Act and its regulations by failing to [\*1523] provide medically necessary transportation for Medicaid recipients. Although the recipients brought suit under Section 1983, Texas did not challenge jurisdiction.

The specific regulation at issue in [\*\*41] the *Vowell* case was set forth in 45 C.F.R. @ 249.10 which provided that

(a) State Plan Requirements. A state plan for medical assistance under Title XIX of the Social Security Act must: (5) . . . specify that there will be provision for assuring necessary transportation of recipients to and from providers of services and describe the methods that will be used.

45 C.F.R. @ 249.10(a)(5). n9 In considering the statutory authority for the

regulation, the court noted that "it is clear that the Secretary of HEW has determined the instant regulation to be 'necessary to the efficient administration' of for the obvious (and common sense) reason that 'needy will not be able to obtain necessary and timely medical care if they are without the means of getting to the providers of the service.'" 379 F. Supp. at 150. Holding that this regulation had the full authority of the statute itself, the court found that this requirement unambiguously mandated that states participating in Medicaid provide recipients with transportation above and beyond the emergency ambulance transportation that the Texas plan provided, and that right was enforced under 42 U.S.C. @ 1983.

-Footnotes-

n9 The Court notes that the content of this regulation is substantially identical to the regulations at issue in this case.

-End Footnotes-

[\*\*42]

Defendants urge this court to re-examine the issues decided by Smith v. Vowell because of changes in conditions over the 20 years since that case was decided. The Plaintiffs contend that this court is bound by the holding of Smith v. Vowell because it was affirmed by the former Fifth Circuit Court of Appeals, the decisions of which are binding on this court. n10 Plaintiffs are correct. This trial court is not free to disregard that cases holdings. Even though Smith v. Vowell does not address some of the jurisdictional issues raised by the present case, it is still binding precedent. To the extent that Smith v. Vowell addresses issues in the present case, this court must follow it. It was affirmed by the Fifth Circuit, and the opinions of the Fifth Circuit from that time period are binding on this court. See, Harris v. Menendez, 817 F.2d 737, 739 & n.4 (11th Cir. 1987) Harris v. Menendez, 817 F.2d 737, 739 & n.4 (11th Cir. 1987) (holding a summary affirmance of district court to be binding under Bonner).

-Footnotes-

n10 In Bonner v. City of Prichard, Ala. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit held as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

-End Footnotes-

[\*\*43]

D. Other Issues

Defendants offer two other reasons which they contend support their Motion to Dismiss. First, Defendants contend that the fact that the Secretary of Health and Human Services has approved Alabama's Medicaid Plan forecloses this suit challenging it as insufficient. Second, Defendants argue that Plaintiffs must exhaust their administrative remedies prior to filing suit under Section 1983 and that their failure to do so is grounds for dismissal.

Neither of these arguments is an appropriate basis for dismissal. Approval of a state plan by the Secretary does not foreclose a plaintiff's ability to challenge the appropriateness of that plan. See, Haynes Ambulance Service,

Inc. v. Alabama, 36 F.3d 1074, 1077 (11th Cir. 1994); Alabama Hosp. Ass'n v. Beasley, 702 F.2d 955, 961 (11th Cir. 1983). Moreover, the Supreme Court held that plaintiffs need not exhaust their state administrative remedies prior to bringing suit under Section 1983. See Patsy v. Board of Regents, 457 U.S. 496, 516, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). Accord, Alacare Inc.-North v. Baggiano, 785 F.2d 963, 967-969 (11th Cir. 1986). n11 Nor must a plaintiff exhaust federal administrative [\*\*44] remedies prior to bringing suit under Section 1983. See, e.g., Wilder, 496 U.S. at 523; [\*1524] Smith v. Vowell, 379 F. Supp. at 146-47 & n.26. Both of these arguments were made and rejected in Smith v. Vowell. Clearly, these contentions are not appropriate bases for this court to dismiss this case.

-Footnotes-

n11 The case on which the Defendants rely, Wagner v. Sheltz, 471 F. Supp. 903 (D. Conn. 1979), was decided prior to Patsy and Alacare cases, and to the extent that it is inconsistent with these cases it has no weight in this circuit.

-End Footnotes-

V. CONCLUSION

Defendants also argue that if the Plaintiffs ultimately succeed in compelling provision of non-emergency transportation to and from medical providers, this will have a devastating effect on the already underfunded state Medicaid program. The Defendants surely realize that this argument is more properly addressed to the legislative and executive branches of government, and not to the court. The court's only function is to determine whether federal [\*\*45] law, as enacted by congress and implemented by the Secretary of HHS, requires such transportation and, if so, whether the State has failed to meet that requirement. By denying Defendants' Motion to Dismiss, this court holds that the Plaintiffs have a right to have those issues determined in a suit brought under 42 U.S.C. @ 1983.

For the reasons stated above, it is the ORDER of this court that Defendants' Motion to Dismiss is DENIED. Defendants are DIRECTED to file their Answer to the Complaint by May 5, 1995.

Additionally, Plaintiffs' Motion for Summary Judgment, filed on March 14, 1995, will be deemed submitted to this Court on May 24, 1995, without oral argument. If either party desires oral argument, such party should so notify the Court and opposing counsel by May 24, 1995. If, after considering the parties' submissions the Court finds oral argument is necessary, a hearing will be scheduled, and the parties will be notified of the date of the hearing. Affidavits, briefs, depositions, or other documents which Defendants wish to file in opposition to said motion shall be filed on or before May 17, 1995. Plaintiffs will have until May 24, 1995 to file any reply they wish [\*\*46] to file. If a document, including a deposition, is to be considered on the issue of summary judgment, a party must specifically designate which parts of the document are deemed to be relevant.

Finally, Defendants are directed to file any response to Plaintiffs' Motion for Class Certification on or before May 5, 1995. Plaintiffs shall have until May 12, 1995 to file a reply, at which time the motion will be taken under submission for determination.

883 F. Supp. 1511, \*1524; 1995 U.S. Dist. LEXIS 5600, \*\*46

DONE this 26th day of April, 1995.

W. HAROLD ALBRITTON

UNITED STATES DISTRICT JUDGE

69 F.3d 556 printed in FULL format.

LASHAWN A., ET AL., APPELLEES v. MARION S. BARRY, JR., AS  
MAYOR OF THE DISTRICT OF COLUMBIA, ET AL., APPELLANTS

No. 94-7044

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

69 F.3d 556; 1995 U.S. App. LEXIS 30959

April 19, 1995, Argued  
October 31, 1995, Decided

PRIOR HISTORY: [\*1] Appeal from the United States District Court for the District of Columbia. (No. 89cv01754).

COUNSEL: Donna M. Murasky, Assistant Corporation Counsel, argued the cause for appellants. With her on the briefs were Garland Pinkston, Acting Corporation Counsel, and Charles L. Reischel, Deputy Corporation Counsel.

Christopher T. Dunn argued the cause for appellees. With him on the brief were Marcia R. Lowry, Elizabeth Symonds and Arthur B. Spitzer.

JUDGES: Before: WILLIAMS, HENDERSON and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS. Dissenting opinion filed by Circuit Judge RANDOLPH.

OPINIONBY: WILLIAMS

OPINION: WILLIAMS, Circuit Judge: This case appears before us for the second time, with the defendants--the mayor and other officials of the District of Columbia--asking for relief from a consent decree pursuant to which the district court is exercising broad supervisory authority over the District's child welfare system. Because the district court has not re-examined the validity of the federal claims underlying its jurisdiction since the Supreme Court issued a decision that seems to undermine the statutory support for federal jurisdiction (though not the constitutional [\*2] basis of certain claims), we remand the case to the district court to perform that re-examination. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966).

\* \* \*

Plaintiffs, a class of children who either are in foster care under the supervision of the D.C. Department of Human Services ("DHS"), or have been reported to be abused or neglected but are not yet in DHS care, sought injunctive relief based on alleged violations of federal statutory and constitutional law, as well as of local law.

The district court agreed for the most part with plaintiffs. *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991). It found explicitly that the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. @@ 620-27 and @@ 670-79, afforded plaintiffs rights actionable under 42 U.S.C. @ 1983 (1988), and held implicitly that the Child Abuse Prevention and Treatment Act, 42 U.S.C. @@ 5101-06, did so as well. See 762 F. Supp. at 988-89. It detailed widespread

violations of those statutes. Id. at 968-87. The court proceeded to find that children in foster care under the supervision of the District enjoyed a liberty interest under the U.S. Constitution, id. at 991-92, with a [\*3] concomitant right to such services as were "essential to preventing harm" to the children, id. at 993. Compliance with this norm was to be measured by the "professional judgment standard", drawn from *Youngberg v. Romeo*, 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). Under that standard, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. at 323 (quoted at 762 F. Supp. at 994). Finally, the court held that various practices of the District violated that standard, as well as the two pertinent federal statutes and various provisions of local law. 762 F. Supp. at 996-98. It did not find a private right of action for the children under D.C. law, although its discussion of possible entitlements protected under the due process clause may have assumed such rights. Id. at 993-94.

In response to this merits determination, the parties negotiated a broad consent decree, which in its current form occupies 90 single-spaced pages and constitutes a rather comprehensive manual for the conduct of [\*4] the District's child welfare activities. The agreement reserved defendants' right to appeal the district court's liability ruling and addressed the possibility that the court's merits opinion might be "vacated" in whole or in part. Section XXII(C) provides:

In the event that the court's Memorandum Opinion of April 18, 1991, is vacated on appeal in its entirety, this Order and any subsequent implementation plan or plans shall be null and void. In the event that the court's Memorandum Opinion of April 18, 1991, is vacated on appeal in part, the portions of this Order or any subsequent implementation plan or plans that are directly based on that part of the Memorandum Opinion that is vacated shall be null and void.

In their first appeal, defendants challenged the findings of constitutional violations. They also claimed that, in light of the intervening Supreme Court decision in *Suter v. Artist M.*, 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992), holding that @@ 671(a)(9) & (a)(15) of the Adoption Assistance Act are not enforceable in a @ 1983 action, the federal statutes on which the district court had relied were not enforceable by private plaintiffs. This court found it unnecessary "to confront [\*5] these constitutional and federal statutory issues, for the district court judgment is completely supportable on the grounds of local law", which, we said, creates a private cause of action both "for children in foster care and for children reported to have been abused or neglected but not yet in the District's custody." *LaShawn A. ex rel. Moore v. Kelly*, 301 U.S. App. D.C. 49, 990 F.2d 1319, 1322, 1325 (D.C. Cir. 1993). Because the consent decree had been drafted to conform to federal as well as local law, we remanded to the district court "with instructions to fashion an equally comprehensive order based entirely on District of Columbia law, if possible. If there are any portions of the consent decree that depend entirely on a federal statute, the district court should consider the impact of [Suter] on those provisions before it includes them in the revised consent decree." Id. at 1326.

On remand, the district court declared, despite our having explicitly sidestepped the issue of liability under federal law, that we had "clearly affirmed this Court's Memorandum Opinion." *LaShawn A. v. Kelly*, Civ. No.

89-1754, Order at 1 (D.D.C. Nov. 12, 1993) (citing our decision, 990 F.2d at 1326 ("Because [\*6] the district court's judgment is independently supportable by District of Columbia law, we affirm the court's decision in favor of the children in this case.")). On that basis, it rejected defendants' argument that @ XXII(C) of the consent decree required modification of the decree. Id. at 2. It did not in any way address whether other circumstances--such as the Suter decision itself--might require modification of the decree or re-examination of the court's jurisdiction under *United Mine Workers v. Gibbs*. After modifying certain provisions of the consent decree to remove terms that the parties evidently agreed were in violation of District law, it rejected defendants' contention that some provisions still violated local law. It acknowledged that the decree "exceeds the specific mandates of local law", but found the excess "a necessary and appropriate use of [the court's] equitable authority" in light of defendants' "widespread local law violations". *LaShawn A. v. Kelly*, Civ. No. 89-1754, Order at 1 (D.D.C. Jan. 27, 1994). See also Order of Nov. 12, 1993 at 2 ("To the extent that portions of the remedial order exceed the terms of local law, the Court invokes its equitable [\*7] authority in approving the consent decree.").

\* \* \*

Defendants now return to us, questioning whether the district court has jurisdiction to enforce a wide-ranging institutional reform order against the government of the District of Columbia based entirely on District of Columbia law. We regard the defendants' claim as basically posing a question under step 2 of *Gibbs*, namely, whether, given power at the outset in a generalized sense to decide the plaintiffs' state law claims, the district court should, despite *Suter*, exercise that power in the form of continuing to enforce a massive institutional reform decree of the sort it had originally adopted.

#### Law of the Case Considerations

Plaintiffs respond that the jurisdictional question has already been decided, by the panel in the first appeal, so that defendants' claim is barred by law-of-the-case doctrine. That doctrine embodies the general rule that

a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases. When there are multiple appeals taken in the course of a single piece of litigation, [\*8] law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court.

*Crocker v. Piedmont Aviation, Inc.*, 311 U.S. App. D.C. 1, 49 F.3d 735, 739 (D.C. Cir. 1995). The doctrine normally applies to issues decided explicitly or "by necessary implication". Id.

These conventional requirements have certainly been fulfilled in this case. The prior panel's decision necessarily implied that a remedial order supported entirely by local law could properly be entered. The court explicitly recognized that its affirmance rested "entirely on the basis of local law", *LaShawn A. v. Kelly*, 990 F.2d at 1326, and implicitly held that an order devoid of federal support would present no jurisdictional problem. We said that our "authority to decide the case entirely on pendent state grounds is incontrovertible", id., citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 722, 16 L. Ed. 2d 218, 86

S. Ct. 1130 (1966), for the proposition that a federal court presented with federal and local law claims may, "even though the federal ground be not established ... nevertheless retain and dispose of the case upon the non-federal ground", id. (emphasis deleted). As to the [\*9] second step required by Gibbs, the decision whether under the conditions prevailing the district court should exercise power over the pendent local-law claim by continuing enforcement of a 90-page child welfare code, the prior panel passed sub silentio. Its remand to the district court for entry of an order based entirely on local law necessarily implied that the answer to this question was "yes".

Law of the case, however, is a prudential doctrine that "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." Messenger v. Anderson, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912) (Holmes, J.) (citations omitted). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance". Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) (emphasis added). The Court in Christianson noted, however, that "as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" Id. (citation omitted).

In Christianson itself, the Court rejected defendant's [\*10] theory that the Seventh Circuit's determination that it lacked jurisdiction bound the Federal Circuit to that view, on transfer from the Seventh. Once the Federal Circuit decided that the Seventh's view was " 'clearly wrong' it [the Federal Circuit] was obliged to decline jurisdiction," id. at 817, thus applying the conventional exception for clear error. In any event, law of the case in the lower courts could not constrain the Supreme Court's own review. "Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review." Id. In a footnote dictum, however, the Court said,

There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue--jurisdictional or nonjurisdictional--delays, and therefore threatens to deny, justice. But cf. Potomac Passengers Assn. v. Chesapeake & Ohio R. Co., ... 171 U.S. App. D.C. 359, 520 F.2d 91, 95 n.22 [ (D.C. Cir. 1975) ].

486 U.S. at 816 n.5.

As the "But cf." cite suggests, our holding in Potomac [\*11] Passengers directly contradicted the Christianson dictum. In Potomac Passengers this court found that it had erroneously decided a jurisdictional issue in a prior appeal and proceeded to correct the mistake. Though apologizing for the earlier mistake, the court insisted on the need for correctness as to issues of subject matter jurisdiction: "When an appellate court makes so fundamental an error as that of sustaining federal subject matter jurisdiction where none exists, we think the court must exercise its discretion to correct that mistake." 520 F.2d at 95 n.22. Potomac Passengers has been widely cited for the proposition that jurisdictional questions are relatively unrestrained by law of the case. n1

n1 See, e.g., *Green v. Dept. of Commerce*, 199 U.S. App. D.C. 352, 618 F.2d 836, 839 & n.9 (D.C. Cir. 1980); *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 204 U.S. App. D.C. 259, 636 F.2d 531, 532-33 & nn.2-4 (D.C. Cir. 1980); *Acton Corp. v. Borden*, 670 F.2d 377, 380 n.2 (1st Cir. 1982); *Crane Co. v. American Standard*, 603 F.2d 244, 247 (2d Cir. 1979); *EEOC v. Neches Butane Products Co.*, 704 F.2d 144, 147 n.2 (5th Cir. 1983); *Amen v. City of Dearborn*, 718 F.2d 789, 794 (6th Cir. 1983); *Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051, 1056 (7th Cir. 1986).

- - - - -End Footnotes- - - - -  
[\*12]

Courts have applied Christianson's discussion of law of the case doctrine relating to jurisdictional questions only in cases involving the propriety of transfers. n2 See, e.g., *Ukiah Adventist Hospital v. FTC*, 299 U.S. App. D.C. 54, 981 F.2d 543, 546 n.4 (D.C. Cir. 1992) ("Review of a transfer order [including jurisdictional grounds] in a transferee court is exceedingly limited.") (dictum citing Christianson); *Wang Laboratories v. Applied Computer Sciences*, 958 F.2d 355, 358 (Fed. Cir. 1992) (accepting case transferred by First Circuit, the court reasoned that "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end"); *Moses v. Business Card Express*, 929 F.2d 1131, 1137 (6th Cir. 1991) (upholding, under Christianson, district court's decision to apply law-of-the-case principles to transfer decision made pursuant to forum selection clause; technically venue rather than jurisdictional issue). While courts have sometimes applied law of the case to jurisdictional questions, in doing so they have neither relied on the Christianson dictum nor even expressly considered whether jurisdictional issues called for special treatment. See [\*13] *McKesson Corp. v. Islamic Republic of Iran*, 311 U.S. App. D.C. 197, 52 F.3d 346, 351 (D.C. Cir. 1995); *In the Matter of Memorial Estates*, 950 F.2d 1364, 1367 (7th Cir. 1991); *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1151 (2d Cir. 1988); *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769 (9th Cir. 1986) (pre-Christianson). And two of the circuits that once applied law of the case to a jurisdictional issue without discussion, the Ninth and the Second, later refused to do so when they zeroed in on the special character of jurisdictional matters. In *Matek v. Murat*, 862 F.2d 720, 724 n.1 (9th Cir. 1988), decided several months after Christianson, the Ninth Circuit held that a district court was not barred by law of the case from reconsidering its own non-final orders. The court cited *Potomac Passengers* for the proposition that "subject matter jurisdiction, because of its intrinsic importance to the judicial power of the federal courts, is particularly suitable for reconsideration." *Id.* And the Second Circuit applied the same principle in *DiLaura v. Power Authority*, 982 F.2d 73, 77 (2d Cir. 1992), noting that "subject matter jurisdiction is particularly [\*14] suited for reconsideration", although, to be sure, as Judge Winter noted in a separate opinion, the issue was in fact moot because what might have been law of the case for the district court could not have prevented review by the court of appeals, see *id.* at 81. Wright & Miller have noted that "questions of subject matter jurisdiction are particularly apt to be free of law of the case principles", citing *Potomac Passengers*. Wright & Miller, *Federal Practice and Procedure* @ 4478 at 799 n.32 (1981) (under the heading "Suitable to Reconsider"). "In addition to the great importance that is generally attributed to jurisdictional limits, such questions may at times involve matters of discretion that inherently require reexamination as a case progresses", *id.* (emphasis added),

the latter phrase being apparently an allusion to step 2 of Gibbs. The 1995 Supplement to Wright & Miller does not modify that passage, 1995 Supplement at 739-40 n.32, citing Christianson under the separate category of "Propriety of Transfer: Transferor reconsideration", id. at 730 n.26.

- - - - -Footnotes- - - - -

n2 The lone exception seems to be a case involving personal, not subject matter, jurisdiction. In the Matter of Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279, 1292 (7th Cir. 1992).

- - - - -End Footnotes- - - - -

[\*15]

The dissent attempts to elevate law of the circuit doctrine (which supposedly has no exceptions) above law of the case doctrine (which concededly does). Dissent at 1-4. Plaintiffs, although they argued law-of-the-case vigorously, never suggested this distinction, perhaps because they thought there was none--that at the court of appeals level exceptions to law of the case were necessarily the same as exceptions to law of the circuit. Nor did our own precedent on the subject, Potomac Passengers, perceive such a distinction.

Among jurisdictional issues, the ones most strongly inviting a relaxed application of law of the case are those that the prior decision never explicitly confronted. In Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) ("Pennhurst II"), the Court certainly acted as if such an exception to ordinary law of the case doctrine existed. In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981) ("Pennhurst I"), the Court itself cast doubt on the federal basis for a consent decree enforced against state officials, see id. at 18-27, and remanded the case to the Court of Appeals to determine the validity of the federal claims. [\*16] The Court also remanded state law claims to determine "whether state law provides an independent and adequate ground which can support the court's remedial order." Id. at 31. The remand order thus necessarily implied that a federal court would have jurisdiction to enter the order on state law grounds alone.

On remand, the Court of Appeals acted on the implied permission Pennhurst I had given and found that the Pennsylvania statute provided "adequate support for [the order] independent of federal law". Halderman v. Pennhurst State School & Hospital, 673 F.2d 647, 656 (3d Cir. 1982). Again the Supreme Court reversed, holding that the Eleventh Amendment denies federal courts jurisdiction to order state officials to conform their conduct to state law. 465 U.S. at 117-21. It brushed aside several earlier implicit rulings to the contrary in other cases, announcing that stare decisis principles did not bind its reconsideration of the jurisdictional issue. ("When questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." Id. at 119.) [\*17]

Pennhurst II is not, of course, identical to the current issue. First, the direct bar of the Eleventh Amendment is plainly of greater force than the discretionary jurisdictional limit of Gibbs step 2. Second, though the Court alluded to implicit holdings to the contrary in other cases, it did not acknowledge the necessary implication of Pennhurst I that there was federal

jurisdiction for an injunction resting solely on state law, and thus an obvious ground for applying law-of-the-case. Especially given the merely "prudential" character of law-of-the-case restrictions, and the doctrine's grounding in concerns of judicial economy, see, e.g., Crocker, 49 F.3d at 739-40, however, the Court's action strongly suggests that law-of-the-case considerations give way more readily to jurisdictional concerns, at least where the initial decision has failed to address the issue explicitly.

We thus turn to consider whether a Gibbs step 2 inquiry is jurisdictional. When a federal court is presented with a combination of federal and state claims, it must pursue the two-step analysis outlined in Gibbs. 383 U.S. at 725-27. n3 The first step requires the court to evaluate the [\*18] substantiality of the federal claim and whether the state and federal claims "derive from a common nucleus of operative fact". Id. at 725. If these requirements are met, then "there is power in the federal courts to hear the whole". In our first pass at this case, we got that far and stopped. Finding that there had been (prior to Suter) a substantial federal claim, we asserted "incontrovertible" authority "to decide the case entirely on pendent state grounds". 990 F.2d at 1326.

- - - - -Footnotes- - - - -

n3 Because this litigation was commenced before December 1, 1990, the new supplemental jurisdiction statute, 28 U.S.C. @ 1367 (Supp. V 1993), does not apply.

- - - - -End Footnotes- - - - -

But Gibbs makes clear that that should not be the end of the inquiry. The Supreme Court has spoken of Gibbs step 2 in terms that mark it as a jurisdictional inquiry, in the sense that it requires continuous re-examination as the litigation and surrounding legal context develop. As Gibbs itself says:

That power need not be exercised in every case in [\*19] which it is found to exist.... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.... The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has properly been assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited.

383 U.S. at 726-27 (emphasis added). And more recently the Court stated in Carnegie-Mellon University v. Cohill, 484 U.S. 343, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988):

Under Gibbs, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought [\*20] in that court involving pendent state-law claims. When

the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Id. at 350 (emphasis added). n4

-----Footnotes-----

n4 Cf. *Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (en banc) (holding that mere consent of local officials, without viable federal claim, could not justify continued enforcement of decree against city) ("the court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder") (emphasis added).

-----End Footnotes-----

Lower federal courts of appeals, including this circuit, have followed the Supreme Court's lead and treated the [\*21] *Gibbs* step 2 inquiry as jurisdictional--and accordingly have raised the issue on their own. The Seventh Circuit raised a *Gibbs* step 2 issue sua sponte in *Maguire v. Marquette University*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987). After dismissing plaintiff's federal claim before trial, the district court had proceeded to review a pendent state law claim on the merits. Although defendant did not raise a *Gibbs* step 2 issue on appeal, the Seventh Circuit declared that "because the rule is jurisdictional, we are obligated to raise it ourselves." Id. at 1218 n.4 (emphasis added). The court then vacated the district court's dismissal of the pendent claim on the merits. This court has likewise treated *Gibbs* step 2 analysis as jurisdictional and raised the issue sua sponte. In *Minker v. Baltimore Annual Conference of United Methodist Church*, 282 U.S. App. D.C. 314, 894 F.2d 1354, 1361 (D.C. Cir. 1990), the district court had previously dismissed both federal statutory and state contract claims under the Free Exercise Clause of the First Amendment. This court held that the district court had correctly dismissed the federal statutory claims, but had incorrectly dismissed the state contract [\*22] claims on First Amendment grounds. Without prompting, the court proceeded to hold that because the district court had properly dismissed the federal claim before trial, under *Gibbs* step 2 it should also dismiss the pendent state law claim unless it found diversity of citizenship. Id.

The dissent dispatches *Maguire* and *Minker* by characterizing them as applications of a newly coined *Gibbs* step one-and-a-half--cases where the federal claim survives step 1 but is dismissed before trial. Dissent at 10. Thus, in its view, the Seventh Circuit's and our treatment of that situation as jurisdictional can't possibly mean that *Gibbs* step 2 is jurisdictional. But until the dissent, no one has perceived this circumstance as involving a special kind of *Gibbs* step; it is simply an instance of *Gibbs* step 2 so clear that any continued assertion of jurisdiction by the district court would be an abuse of discretion. See *Gibbs*, 383 U.S. at 726.

In sum, the key issue here--the application of *Gibbs* step 2--(1) is jurisdictional, and thus is subject to continuous reexamination throughout the enforcement of a consent decree (even without a party's raising it) and (2)

[\*23] was never explicitly addressed in our prior decision. Our non-discussion of the finding of continued jurisdiction suggests that it consumed few or no judicial resources. Taking our cue from the Supreme Court in Pennhurst II, therefore, we conclude that the interest in limiting federal courts to the exercise of their proper jurisdiction outweighs the marginal contribution to stability and judicial economy that could be achieved by giving finality to our prior sub silentio treatment of the Gibbs step 2 issue.

Gibbs Step 2 Analysis

As we said before, the first part of the Gibbs test is satisfied once a federal court is determined to have power over state claims because of a substantial related federal claim. That part is indeed satisfied here. Step 2 of the Gibbs test requires a weighing of factors to determine whether, although power exists, it should be exercised in favor of jurisdiction. These factors include judicial economy, convenience and fairness to litigants, avoidance of needless decisions of state law (in order to promote comity and obtain a "surer-footed reading of applicable law"), the timing of the dismissal of the federal claims, the predominance [\*24] of state versus federal issues, and the potential for jury confusion. United Mine Workers v. Gibbs, 383 U.S. 715, 726-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). The initial decision lies in the discretion of the district court, subject to review for abuse of discretion in the court of appeals. Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 310 U.S. App. D.C. 409, 48 F.3d 1260, 1265-66 (D.C. Cir. 1995).

Two circumstances weigh heavily against allowing pendent jurisdiction: federal claims have either dropped out or are greatly weakened, and the local claims lead to extensive entanglement in local government operations.

First, the elimination or weakening of federal claims obviously weighs against exercise of pendent jurisdiction. n5 Gibbs itself said: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. Courts have held that pendent state claims should be dismissed if the federal claim drops out quite late, even after trial. See, e.g., Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 564 (2d Cir. 1991) ("The judicial economy factor should not be the controlling factor, and it may [\*25] be appropriate for a court to relinquish jurisdiction over pendent claims even where the court has invested considerable time in their resolution."); Powell v. Gardner, 891 F.2d 1039, 1047 (2d Cir. 1989) (holding that even after a trial on the merits, district court properly dismissed pendent state law claims after directing a verdict in favor of defendant on federal claim).

- - - - -Footnotes- - - - -

n5 We do not hold that the disappearance of federal claims from a case automatically deprives a federal court of jurisdiction over all types of pendent claims, which would be contrary to Rosado v. Wyman, 397 U.S. 397, 404-05, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970). The disappearance or weakening of federal claims are simply factors to be considered in step 2 of a Gibbs analysis. We do not understand why the dissent flogs us with "conflicting directly with Rosado." Dissent at 12-13.

- - - - -End Footnotes- - - - -

Similarly, predominance of local law issues weighs against exercise of pendent jurisdiction. In Gibbs, the Supreme Court noted "if it appears that the state issues substantially [\*26] predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state law claims may be dismissed without prejudice". 383 U.S. at 726 (emphasis added). As Gibbs suggests, considerations of comity weigh especially heavily in cases involving massive consent decrees controlling government bodies. Even before Pennhurst, federal courts were concerned about controlling state agencies through exercise of pendent jurisdiction under Gibbs step 2. In Evans v. Buchanan, 468 F. Supp. 944, 956 (D. Del. 1979), for example, the court refused to exercise pendent jurisdiction under Gibbs to redesign a state school district tax, citing "the intricacies of the state-law issue" and "questions of comity raised by the remedies proposed." n6

- - - - -Footnotes- - - - -

n6 See also Catalano v. Dept. of Hospitals, 299 F. Supp. 166, 175 (S.D.N.Y. 1969) (refusing to exercise pendent jurisdiction under Gibbs to determine whether income exemption regulation conformed to state law, since issue "presents a question of state legislative intent and delegation of powers to an administrative body, which more appropriately lies within the ambit of the state court's expertise with respect to its own laws").

- - - - -End Footnotes- - - - -

[\*27]

Although injunctions against District of Columbia officials based on District law are not outright banned under the Eleventh Amendment, which applies only to states, n7 Pennhurst II does suggest that, in general, injunctions against nonfederal officials based on nonfederal law should be disfavored. Indeed, we have consistently stressed the respect due the courts of the District of Columbia in applying District law. In applying jurisdictional aspects of exhaustion doctrine, for example, we have noted that "the federal courts owe to the District of Columbia the comity extended to a state". Committee of Blind Vendors of the District of Columbia v. District of Columbia, 307 U.S. App. D.C. 263, 28 F.3d 130, 134 (D.C. Cir. 1994). Moreover, we have followed this principle in applying Gibbs step 2. In Financial General Bankshares, Inc. v. Metzger, 220 U.S. App. D.C. 219, 680 F.2d 768, 772 (D.C. Cir. 1982), we held that the district court had abused its discretion in exercising pendent jurisdiction over novel and unsettled questions of D.C. law (fiduciary duty issues). And in Grano v. Barry, 236 U.S. App. D.C. 72, 733 F.2d 164 (D.C. Cir. 1984), we underlined the importance of avoiding unnecessary federal court invasions of local self-government. [\*28] One part of an injunction had become moot and the other rested solely on a mistaken belief that local officials' violation of local law ipso facto violated the federal Constitution. After explaining that local law violations were not automatically federal violations and that rights created by local law should normally be vindicated in local courts, we turned to the possibility of pendent jurisdiction and rejected it:

In general, "principles of comity and the desirability of a "surer-footed reading of applicable law' support the determination of state claims in state court." [Citing Gibbs and a D.C. Circuit case.] 3 Determination by the state court is especially important where the case involves "novel and unsettled" issues of state law.... Here, the law in question is new, its meaning

ambiguous and sharply disputed. Moreover, the district court should not retain jurisdiction because this case directly implicates the processes by which a locality governs itself. Appellees' remedy, if any, lies in the courts of the District of Columbia.

--

3. Although the District of Columbia is constitutionally distinct from the states, it may nevertheless be treated as [\*29] a state for present purposes....

Id. at 169 (emphasis added). Similarly, in *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993), while the court found the first step of Gibbs satisfied in a case under the Fourteenth Amendment, the Adoption Assistance and Child Welfare Act, and the Child Abuse Prevention and Treatment Act, and while it for unexpressed reasons did not regard the Pennhurst II bar as insurmountable, id. at 325, it cautioned the district court about devoting federal judicial resources to enforcement of a decree under a pendent state law claim--even where the state legislature had explicitly imposed the precise terms of the decree on the state welfare agency. Noting the "decidedly minor" interest of federal courts in remedying violations of state law, id. at 325-26, the court vacated the decree and remanded the case to the district court, with instructions to weigh the "constitutional, statutory, and institutional factors that bear upon the task of crafting a suitable equitable decree". Id. n8

- - - - -Footnotes- - - - -

n7 We note that the First Circuit has interpreted the term "state", as used in the Eleventh Amendment, to include more than just the 50 obvious ones, ruling that Puerto Rico is covered by the Eleventh Amendment "in the same manner, and to the same extent, as if [it] were a State." See *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991). But we decline to follow the First Circuit's approach here. [\*30]

n8 See also *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc). Although *Evans* involved a pure "municipal corporation", the city of Chicago, the court recognized the force of comity principles even as to political entities not covered by the Eleventh Amendment. When making inquiries into jurisdictional support for a consent decree, "courts are bound by principles of federalism (and by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance." Id. at 479.

The dissent appears to suppose that we rely on the Eleventh Amendment. Dissent at 16-18. If for some reason the paragraphs above leave any doubt on the subject, No, we do not; we rely primarily on circuit precedent affording a similar (and doubtless weaker) comity to the District of Columbia, with support from other circuits recognizing the role of comity where it was not (or was perceived as not) mandated by Pennhurst II.

- - - - -End Footnotes- - - - -

It is true that we have upheld an injunction against District officials based solely on pendent District [\*31] law grounds. See District of Columbia Common Cause v. District of Columbia, 858 F.2d 1, 10 (D.C. Cir. 1988). But there our application of Gibbs step 2 found only that the district court had not abused its discretion by ordering an injunction against the District of Columbia prohibiting it from spending public funds to oppose citizens' initiatives. Such a limited, prohibitory injunction offends the principle of comity to a far lesser extent than the wide-ranging, positive institutional reform injunction here.

So far, we have considered the two factors of a vanishing federal claim and an intrusive remedy based on local law grounds separately. But the two factors are closely related. Gibbs sets out a multi-factor balancing test, and presumably a factor pointing in one direction could offset one pointing in the other, and a strong factor pointing in one direction would reinforce a weak factor pointing in the same direction. So, for instance, the greater the intrusion on local government, the more substantial the federal claim should be. It seems at least doubtful that an intrusion such as the consent decree here could be supported where the Supreme Court has found two of the [\*32] federal statutory provisions inadequate to ground a @ 1983 claim--unless the remaining statutory clauses can be successfully distinguished.

Because the district court failed to consider the impact of Gibbs step 2 factors--particularly considerations of comity--on its exercise of jurisdiction, we remand the case with instructions on how to proceed. Cf. Webb v. Bladen, 480 F.2d 306, 309-10 (4th Cir. 1973) (remanding case for Gibbs step 2 analysis where the district court failed to recognize that it had discretion under Gibbs to hear pendent claims and erroneously thought it was required to dismiss state claims for lack of jurisdiction).

Further Considerations on Remand

Any specific provision of the consent decree that can be grounded in what the court concludes is a winning federal claim should of course be preserved. n9 The parties here have not briefed the precise impact of Suter on each of the various sections of the federal statutes at issue. Accordingly, we remand the case to the district court to make that inquiry in the first instance, in order to determine which, if any, federal grounds survive that could support an injunction. We note that at a minimum, [\*33] the "reasonable efforts" clause of the Adoption Assistance Act, @ 671(a)(15), relied on heavily by the district court, see 762 F. Supp. at 961, 970, 980, 986, and @ 671(a)(9), related to its findings at id. at 986, are no longer enforceable under the express holding of Suter. See 503 U.S. at 359 n.10, 364.

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n9 We express no opinion as to the merits of the district court's original finding that the post-custody children have valid constitutional claims under the dictum of DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 201 n.9, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) ("Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."). If the district court does reach the issue on remand and adheres to its ruling, it should consider the possibility of



forth a program which is both constitutionally adequate and constitutionally required.' ") (citations omitted). [\*36]

\* \* \*

The district court will confront a number of other issues on remand that the parties have adequately briefed and on which we offer the following guidance.

First, plaintiffs suggest that @ XXII(C) forecloses termination of the consent decree, because it calls for termination only on the occurrence of an event--vacation of the district court's original merits opinion in its entirety--that has not taken place. There are a number of flaws in this contention. First, @ XXII(C) clearly contemplates partial relief calibrated to partial failure of the grounds on which the district court acted. The consent decree thus does not represent a "compromise [on] genuine uncertainties", *Evans v. City of Chicago*, 10 F.3d 474, 478-79 (7th Cir. 1993) (en banc), but rather a knuckling under to the district court's legal conclusions, contingent on those conclusions being upheld on appeal. The decree specifies that "portions of this Order ... that are directly based on [any] part of the Memorandum Opinion that is vacated shall be null and void." In a literal sense, of course, even the partial condition never had any serious possibility of being fulfilled, for appellate courts rarely vacate [\*37] district court opinions as opposed to judgments. But the parties plainly did not bargain for so hypertechnical a reading. Rather, since the provisions of the consent decree were negotiated as responses to specific findings of violations, the parties clearly anticipated that any undermining of those findings would require that the District be freed of the affected provisions. In effect, @ XXII(C) is congruent with the lessons of *Pennhurst II*--that major changes in federal law may have the effect of undermining the jurisdictional basis of a continuing decree that is based only on local law. Accordingly, @ XXII(C) cannot be read to preclude a consideration of Suter's impact on the decree's legal foundation.

Resting heavily on their contrary reading of @ XXII(C), plaintiffs object that defendants failed to move below for modification of the consent decree. Although the defendants did not specifically invoke Fed. R. Civ. P. 60(b)(5), authorizing relief when "it is no longer equitable that the judgment should have prospective application", they indisputably sought relief on the grounds that Suter had eroded the basis for the decree, see Defendants' Memorandum on Remand [\*38] at 4 & n.1 (Oct. 20, 1993), and the district court's orders recognize as much, see, e.g., Order of Nov. 12, 1993, at 1 (referring to defendants' requests that it "vacate or substantially modify the remedial order"). n10 Even apart from @ XXII(C), modification of a consent decree under Rule 60(b)(5) would proceed under "a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Rufo*, 112 S. Ct. at 759 (citations omitted). See also *Evans*, 10 F.3d at 480, 477 (finding that any continued enforcement of a consent decree entered into by the City of Chicago had become " 'inequitable' within the meaning of Rule 60(b)(5)" where the federal grounds had all been found wanting and continuing supervision would burden the district court and entangle it in the operations of "another sovereign"); *Sweeton v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (en banc) (similar).

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n10 Even if the defendants had not sought relief on these grounds, we would still be required to investigate the basis of the district court's jurisdiction on our own initiative. See Minker v. Baltimore Annual Conference of United Methodist Church, 282 U.S. App. D.C. 314, 894 F.2d 1354, 1361 (D.C. Cir. 1990); Maguire v. Marquette University, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987).

- - - - -End Footnotes- - - - -  
[\*39]

Second, plaintiffs contend that insofar as Suter may draw in question the district court's conclusion that the two federal statutes create rights enforceable under @ 1983, Congress has reversed it. They point to the following 1994 enactment:

In 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. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; Provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section [671(a)(15)] of the Act is not enforceable in a private right of action.

Social Security Act Amendments of 1994, Pub. L. No. 103-432, @ 211, 108 Stat. 4398, 4460 (Oct. 31, 1994) (to be codified at 42 U.S.C. @ 1320a-2); see also Improving America's [\*40] Schools Act of 1994, Pub. L. No. 103-382, @ 555, 108 Stat. 3518, 4057-58 (Oct. 20, 1994) (enacting the same language). Defendants respond that this instruction about "how to go about construing legislation enacted by other Congresses ... impermissibly intrudes on the judicial power." Reply Br. at 22. We see no need to evaluate defendants' constitutional argument, because we cannot see that the "instruction" bears on the interpretive issues before the district court.

Contrary to the assumptions of plaintiffs' (and the dissent's) arguments, Suter did not find provisions of the Adoption Assistance Act unenforceable "because of ... inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. @ 1320a-2. Rather, as we read Suter, its holding was based on the combination of (1) the Pennhurst I requirement of a clear statement for any conditions on state receipt of federal grants, see 503 U.S. at 356, (2) the absence of "statutory guidance ... as to how "reasonable efforts" are to be measured", id. at 360, and (3) the establishment of an alternative enforcement mechanism, see id. at 360-61. The discussion [\*41] of the section's being embedded in the requirements for a state plan, id. at 358, seems largely a way station to the point that alternative means of enforcement are provided. The Suter Court's principal concern was the Act's vagueness. In discussing the "reasonable efforts" clause, @ 671(a)(15) (state must make "reasonable efforts" to prevent need for removing child from his home and to return child to home after removal), the Court noted: "How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." 503 U.S. at 360 (emphasis added).

This interpretation of Suter corresponds with the ordinary inquiry as to whether to infer a private right of action from a statutory scheme, see, e.g., Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), and has been endorsed by other circuits as well. See, e.g., Marshall v. Switzer, 10 F.3d 925, 929 (2d Cir. 1993) ("The significant point in Suter was not that the statute in question only required a state to submit a plan to the federal agency but that the statute provided no guidance for measuring 'reasonable efforts.'"); Wood v. Tompkins, 33 F.3d 600, 605-06 [\*42] n.14 (6th Cir. 1994) ("The [Suter] Court noted that other sections of the Adoption Act, in contrast to @ 671(a)(15), did indeed impose precise requirements on the states in addition to requiring the mere submission of a plan.... The holding is simply that the one particular provision that was at issue is too amorphous to confer enforceable rights."). Likewise, in Doe v. District of Columbia, Civ. No. 93-0092, slip op. at 17 (D.D.C. Feb. 25, 1994), the court found that a provision that had originally been relied on in this case, 42 U.S.C. @ 5106a(b)(2) (a provision of the Child Abuse Prevention and Treatment Act), "invests only 'generalized duties' upon the states and does not 'unambiguously confer' an enforceable right to bring a private action against the government." The court at no point relied on Congress's having specified that the requirement should be embodied in a State plan. n11 Of course neither the Social Security Act of 1994 nor the identical language of the Improving America's Schools Act of 1994 did anything to supply more precise standards for the Adoption Assistance Act, or to alter the clear statement requirement or the Adoption Assistance Act's non-judicial [\*43] enforcement provisions; it thus changed none of the factors on which the Suter Court's reasoning depended.

- - - - -Footnotes- - - - -

n11 We note that two district courts interpreting @ 211 have deferred to the congressional view that inclusion in a plan was central to Suter's analysis--see Jeanine B. v. Thompson, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995); Harris v. James, 883 F. Supp. 1511, 1995 WL 248796, \* 10 (M.D. Ala. 1995)--but we disagree.

- - - - -End Footnotes- - - - -

Congress may have been misled by the language of Suter's footnote 10, which says, after setting forth the language of @ 671(a)(9), "As this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents anymore than does the 'reasonable efforts' clause of @ 671(a)(15)." 503 U.S. at 359 n.10. In conjunction with the opinion's text, discussed above, we read the footnote to state essentially that the combination of factors noted above applies with equal force to @ 671(a)(9).

The legislative [\*44] history of the identical 1994 provisions suggests that Congress may also have been confused by Suter's statement that "the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features." 503 U.S. at 358. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 863 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1552 (quoting above sentence). The point of the sentence, however, is simply to distinguish what the statute specifically requires of states (adoption of a plan approved by the Secretary) from what--for the reasons given elsewhere in the opinion--it does not require. It certainly does not announce a general rule that mandatory

inclusion in a plan demonstrates intent not to create an enforceable right.

The legislative history has another formulation of congressional purpose, but it is no more helpful than the reference to state plans. The Conference report stated that

The intent of this provision is 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 [\*45] Security Act are able to seek redress in the federal courts to the extent that they were able to prior to the decision in *Suter v. Artist M.*, while also making clear that there is no intent to overturn or reject the determination in *Suter* that the reasonable efforts clause to Title IV-E does not provide a basis for a private right of action.

H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994), reprinted in 1994 U.S.C.C.A.N. 2901, 3257 (emphasis added). But the Court decided *Suter* by applying previously established judicial criteria to a specific instance ( @ 671(a)(15)) of a general question (whether Congress intended to create an enforceable right). The dissent in *Suter*, cited by the dissent here, was not correct in claiming that the *Suter* majority had "changed the rules of the game." 503 U.S. at 377 (Blackmun, J., dissenting). Even if Congress could wipe *Suter* from the books, we think that lower courts addressing the same issue would have no basis for assuming that, if once again confronted with a *Suter*-like issue, the Supreme Court would not do just what it did in *Suter*. Thus, unless @ 211 (which, as we have said, it did not), courts should find equally vague provisions of similar acts equally unenforceable for the reasons that the Court found convincing in *Suter*.

Nor does the second sentence of the 1994 amendments assist plaintiffs. It reads:

This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; Provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section [671(a)(15)] of [the Act] is not enforceable in a private right of action.

(Emphasis added.) But Congress identified no "grounds" applied in *Suter* that were "not applied in prior Supreme Court decisions respecting ... enforceability." Thus the sentence has no effect on the interpretive issues raised by the Adoption Assistance Act.

\* \* \*

After what may seem a long journey, the core of our conclusion is no more than that we take seriously the Supreme [\*47] Court's statement in *Gibbs* that "the issue whether pendent jurisdiction has properly been assumed is one which remains open throughout the litigation." 383 U.S. at 727. When a Supreme Court decision such as *Suter* flatly removes some of the supports of pendent jurisdiction, and at a minimum enfeebles most of the others, the "open" issue must be reexamined. To that end, we remand the case to the district court.

So ordered.

DISSENTBY: RANDOLPH

DISSENT: RANDOLPH, Circuit Judge, dissenting: To paraphrase Edward R. Murrow, anyone who isn't confused by the majority opinion doesn't really understand it.

After six years of litigation, after a trial and a decision of this court sustaining the district court's jurisdiction, after further proceedings on remand, after an order finding the District of Columbia in contempt and the appointment of a receiver, after all this--voila--my two colleagues spot a "jurisdictional" flaw in the case, a flaw everyone else must have overlooked. Of course, they have discovered no such thing. The supposed defect identified in the majority opinion is not of the jurisdictional variety, and the issue the majority opinion addresses is hardly new--this court [\*48] decided it two years ago when the District first appealed. LaShawn A. ex rel. Moore v. Kelly, 301 U.S. App. D.C. 49, 990 F.2d 1319 (D.C. Cir. 1993) ("LaShawn I"). The District sought rehearing from that decision. The court denied the petition. The District suggested rehearing en banc. It did not get the votes. Now my colleagues, forgetting that two judges do not an en banc court make, reverse the first panel's ruling. That is, to say the least, an extraordinary result, and so are the reasons given for it. The majority opinion tosses aside settled law, turns its back on Supreme Court decisions, disregards the controlling precedents of this court, rewrites the holdings of other courts, and badly misreads a federal statute. n1

- - - - -Footnotes- - - - -

n1 For those unacquainted with this class action, I offer a brief history in an addendum to this opinion.

- - - - -End Footnotes- - - - -

I

Inconsistency is the antithesis of the rule of law. For judges, the most basic principle of jurisprudence is that "we must act alike in all cases of like nature." n2 This is an old idea, [\*49] and it has given rise to two time-honored doctrines of importance to this case. First, the same issue presented in a later case in the same court should lead to the same result. Second, the same issue presented a second time in the same case in the same court should lead to the same result. For three-judge panels in the federal courts of appeals, the first proposition reflects a variant of stare decisis, which I shall call the law-of-the-circuit doctrine. The second embodies the law-of-the-case doctrine. The majority opinion violates both.

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n2 Ward v. James, [1966] 1 Q.B. 273, 294 (C.A.) (quoting Lord Mansfield in John Wilkes' case, Rex v. Wilkes, 98 Eng. Rep. 327, 335 (1770)). See Henry J. Friendly, Indiscretion About Discretion, 31 EMORY L.J. 747, 758 (1982).

- - - - -End Footnotes- - - - -

The law-of-the-circuit doctrine is derived from legislation and from the structure of the federal courts of appeals. Courts of appeals sit in panels, or divisions, of "not more than three judges" pursuant [\*50] to the authority granted in 28 U.S.C. @ 46(c). The "decision of a division" is "the decision of the court." Revision Notes to 28 U.S.C. @ 46 (citing *Textile Mills Security Corp. v. Commissioner of Internal Revenue*, 314 U.S. 326, 62 S. Ct. 272, 86 L. Ed. 249 (1941)); see *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 298 U.S. App. D.C. 8, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc), cert. denied, 123 L. Ed. 2d 147, 113 S. Ct. 1579 (1993). Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit. 314 U.S. at 335. One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court. E.g., *United States v. Caldwell*, 178 U.S. App. D.C. 20, 543 F.2d 1333, 1370 n.19 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087, 47 L. Ed. 2d 97, 96 S. Ct. 877 (1976). That power may be exercised only by the full court, either through an en banc decision, id., or pursuant to the more informal, and dubious, practice adopted in *Irons v. Diamond*, 216 U.S. App. D.C. 107, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). While the law-of-the-case doctrine allows for certain exceptions--although not, to be sure, the one the majority invents today--the law-of-the-circuit doctrine does not. Thus, in circuits such as ours, [\*51] where both doctrines are at work, the more exacting law-of-the-circuit doctrine supplants the law-of-the-case doctrine when panels hear multiple appeals from a single case. See, e.g., *United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984) (explaining that when a prior panel in the same circuit has decided an issue, law-of-the-circuit doctrine supplants law-of-the-case doctrine and precludes reconsideration of that decision in a subsequent appeal, even if the second panel believes the first was wrong), cert. denied, 469 U.S. 1158, 83 L. Ed. 2d 920, 105 S. Ct. 906 (1985); cf. *Laffey v. Northwest Airlines, Inc.*, 238 U.S. App. D.C. 400, 740 F.2d 1071, 1077 (D.C. Cir. 1984) (holding that both the law of the case and the law of the circuit precluded a panel from reconsidering issues resolved in a prior appeal in the same case), cert. denied, 469 U.S. 1181, 83 L. Ed. 2d 951, 105 S. Ct. 939 (1985).

Until today, the law-of-the-circuit doctrine was completely settled, thoroughly understood and uniformly honored--by the two judges in the majority and the other judges of this court. See, e.g., *Ayuda v. Thornburgh*, 287 U.S. App. D.C. 44, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring); *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 274 U.S. App. D.C. 202, 863 F.2d [\*52] 891, 930 (D.C. Cir. 1988) (Williams, J., concurring in denial of rehearing en banc), cert. dismissed, 501 U.S. 1283 (1991). Likewise, the district judges in this circuit have rightly assumed that a decision of one panel of this court represents the law of the circuit. See, e.g., *Feeling v. Kelly*, 152 F.R.D. 670, 673 (D.D.C. 1994) (relying upon *LaShawn I* to sustain the district court's pendent jurisdiction).

Now things have changed. My two colleagues must admit--and do admit, although rather grudgingly--that they are today overruling the panel's decision in *LaShawn I*. This is beyond dispute. The question the majority opinion addresses is a question *LaShawn I* answered and answered in a way directly contrary to the majority's disposition. *LaShawn I* explained that the District of Columbia's statutory and regulatory scheme was "appropriately before us under our pendent jurisdiction," 990 F.2d at 1324; held that federal judicial authority to decide the case on pendent grounds was "incontrovertible," id. at 1326; and affirmed the district court's exercise of that authority by confirming its decision "entirely on the basis of local law," id. To put the [\*53] matter starkly,

the first panel--consisting of then-Chief Judge Mikva, Judge Sentelle and myself--directed the district judge not to consider federal claims and to revise the decree accordingly; a majority of the second panel--consisting of Judge Williams and Judge Henderson--now directs the district judge to consider federal claims and modify the decree accordingly. This is more than mere inconsistency. It is flat contradiction, and--because we are one court--it is self-contradiction.

## II

Perhaps I should end on this note. But so much else is wrong with what the majority has written that I think it appropriate to say more. Apart from the law-of-the-circuit doctrine, the law of the case foreclosed reopening the question my colleagues address, and the clear dictates of the Supreme Court, the Congress, and the Constitution should have steered them away from the conclusions they reach.

## A

"When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." Crocker v. Piedmont Aviation, Inc., 311 U.S. App. D.C. 1, 49 F.3d 735, 739 (D.C. Cir. 1995), [\*54] cert. denied, 133 L. Ed. 2d 118, 1995 U.S. LEXIS 6125, 64 U.S.L.W. 3244, 116 S. Ct. 180 (U.S. 1995); see also Northwestern Ind. Tel. Co. v. FCC, 277 U.S. App. D.C. 30, 872 F.2d 465, 471 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035, 107 L. Ed. 2d 773, 110 S. Ct. 757 (1990). The Supreme Court has instructed the lower courts to be "loathe" to reconsider issues already decided "in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." "Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) (quoting Arizona v. California, 460 U.S. 605, 618 n.8, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983)). My colleagues identify no such "extraordinary circumstance" here. They can point to no intervening change in controlling legal authority. See McKesson Corp. v. Islamic Republic of Iran, 311 U.S. App. D.C. 197, 52 F.3d 346, 350 (D.C. Cir. 1995). They do not claim that LaShawn I was "clearly erroneous" or that it "would work a manifest injustice." See Christianson, 486 U.S. at 817.

Instead, my colleagues invent for themselves an exception to the law-of-the-case doctrine under which a subsequent panel is free to reexamine any "jurisdictional" question decided, but not extensively discussed, by an earlier panel in an earlier appeal [\*55] of the same case. This invention is no doubt convenient as my colleagues struggle to reach the result they want here. Unfortunately, it also contradicts both the Supreme Court's 1988 decision in Christianson v. Colt Industries Operating Corp. and our own very recent decision in Crocker v. Piedmont Aviation, Inc.

First, those decisions make clear that it is of no moment that the three-judge panel in LaShawn I devoted little space to the topic that now grabs the attention of two of my other colleagues. As the Supreme Court held in Christianson, the law-of-the-case doctrine turns "on whether a court previously decided upon a rule of law ... not whether, or how well, it explained the decision." 486 U.S. at 817 (internal quotation marks omitted). And in Crocker, 49 F.3d at 739, we held that the law-of-the-case doctrine applies to questions

decided "explicitly or by necessary implication." The majority admits as much (maj. op. at 5), but then argues that the issues "most strongly inviting a relaxed application of law of the case are those that the prior decision never explicitly confronted" (maj. op. at 9). This is doubly wrong. It misstates LaShawn I and it misstates [\*56] the law. While LaShawn I did not provide a detailed analysis of *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), doubtless because the District did not rest its appeal on any supposed lack of pendent jurisdiction, the law-of-the-case doctrine depends not on how extensively the earlier panel discussed the particular issue, but on whether it decided it, as LaShawn I assuredly did.

Second, the Supreme Court in *Christianson* specifically rejected the "jurisdictional question" exception the majority manufactures for this case. The Court there said that the law-of-the-case doctrine prohibits a federal court from revisiting another federal court's decision to transfer a case to it so long as the transferee court finds the transfer decision "plausible." 486 U.S. at 819. The Court explained:

There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue--jurisdictional or nonjurisdictional--delays, and therefore threatens to deny, justice.

Id. at 816-17 n.5. In reaching that conclusion, the Court rejected *Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co.*, 171 U.S. App. D.C. 359, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975), in which this court first suggested that the law-of-the-case doctrine might not preclude reconsideration of jurisdictional questions. Id. The majority acknowledges the Supreme Court's rejection of *Potomac Passengers*, but then inexplicably ignores it. It is true, as the majority states, that *Potomac Passengers* was "widely cited for the proposition that jurisdictional questions are relatively unrestrained by law of the case" (maj. op. at 7), but that was before *Christianson*. In the seven years since *Christianson*, only two federal courts have even mentioned *Potomac Passengers*, and then only to bolster the unremarkable conclusion that a district court is free to reconsider its own non-final jurisdictional decisions. *Matek v. Murat*, 862 F.2d 720, 724 n.1 (9th Cir. 1988); *Travelers Indem. Co. v. Household Int'l, Inc.*, 775 F. Supp. 518, 530 (D. Conn. 1991). n3 The majority cites no case since *Christianson* in which a federal appellate court has reversed a jurisdictional decision made by a prior merits panel. Today, of course, this court and other courts of appeals routinely apply law-of-the-case [\*58] preclusion to questions of jurisdiction, see, e.g., *McKesson Corp.*, 52 F.3d at 350; *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1151 (2d Cir. 1988), cert. denied, 493 U.S. 871, 107 L. Ed. 2d 154, 110 S. Ct. 200 (1989), and do so even when the first decision regarding jurisdiction is less than explicit. See, e.g., *In re Memorial Estates, Inc.*, 950 F.2d 1364, 1367 (7th Cir. 1991), cert. denied, 504 U.S. 986 (1992).

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n3 *DiLaura v. Power Authority of the State of New York*, 982 F.2d 73, 76-77 (2d Cir. 1992), the only other post-*Christianson* decision the majority cites in support of its law-of-the-case exception, also concerns only the authority of a district court to alter its non-final decisions.

- - - - -End Footnotes- - - - -

So where does the majority derive the inspiration for its invention? Hunting far and wide for something, anything, to counteract the force of Christianson and Crocker, the majority comes up with a strange source of support--Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) [\*59] ("Pennhurst II"). No matter that Pennhurst II decided nothing about the law-of-the-case doctrine, in fact did not even mention it. It is enough for the majority that the Supreme Court said in Pennhurst II that it does not consider itself bound by decisions on questions of jurisdiction made sub silentio in previous cases "when a subsequent case finally brings the jurisdictional issue" to the Court. 465 U.S. at 119 (internal quotation marks and citation omitted). But that plainly has nothing to do with this appeal. The cited portion of Pennhurst II dealt with the stare decisis effect of decisions in other cases, not the effect of earlier decisions by the same appellate court in the same case.

It would take a mighty leap to get from Pennhurst II to the majority's newly-coined rule that an appellate court may freely revisit jurisdictional questions it decided in an earlier appeal of the same case. My colleagues make the attempt, but predictably fall well short. While acknowledging that the Supreme Court never addressed the law-of-the-case doctrine in Pennhurst II (maj. op. at 10), they declare--here comes the jump--that the Court "acted" as if the [\*60] majority's new law-of-the-case exception already existed (maj. op. at 9). The majority's theory has two flaws, both fatal. First, the Supreme Court had no reason to "act" as if the majority's new law-of-the-case exception already existed in Pennhurst II because there was no law-of-the-case issue there at all. n4 Second, regardless of how the majority thinks the Supreme Court "acted" in Pennhurst II, the Court clearly rejected the majority's "jurisdictional question" exception four years later in Christianson.

- - - - -Footnotes- - - - -

n4 In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981) ("Pennhurst I"), the Court eliminated one federal basis for a consent decree, then remanded the case to the court of appeals to determine if state law or federal constitutional or statutory grounds could support the decree. Id. at 31. Pennhurst I did not decide whether the Eleventh Amendment would bar a federal court from granting relief against a state on pendent state-law claims. Rather, in directing the court of appeals to consider whether state law could support the decree, the Court directed the court of appeals to consider that question. Only after the court of appeals held on remand that state law alone was sufficient to support the order, 673 F.2d 647 (3d Cir. 1982) (en banc), did the Supreme Court squarely confront the Eleventh Amendment question. Since the Court had not faced the question before Pennhurst II, it had not established any law of the case to apply.

- - - - -End Footnotes- - - - -

[\*61]

B

Even if my colleagues were free to create an exception to the law-of-the-case doctrine for "jurisdictional questions," they still would face a major problem here: the application of Gibbs step two is not, as they claim,

"jurisdictional," see (maj. op. at 12). It becomes "jurisdictional" in my colleagues' eyes only because they must see it this way. Otherwise, there is no explaining why they ignore the law of the case and take it upon themselves to reexamine this court's earlier holding in LaShawn I. And so they form a perfect circle: Gibbs step two is jurisdictional because it requires continuous reexamination (maj. op. at 11), and it requires continuous reexamination because it is jurisdictional (maj. op. at 13). There is, however, a rub--the Supreme Court and the lower federal courts have uniformly recognized that the second step of the Gibbs analysis is decidedly not jurisdictional. The matter is discretionary. Here the discretion had already been exercised--in LaShawn I--in favor of resolving the case entirely on pendent local law grounds.

Obviously, the concept of pendent jurisdiction entails a jurisdictional element, but that is comprised in the first [\*62] step of the Gibbs analysis. See *Wal-Juice Bar, Inc. v. Elliott*, 899 F.2d 1502, 1503 (6th Cir. 1990); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988); *Dimond v. District of Columbia*, 253 U.S. App. D.C. 111, 792 F.2d 179, 188 (D.C. Cir. 1986); *Financial Gen. Bankshares, Inc. v. Metzger*, 220 U.S. App. D.C. 219, 680 F.2d 768, 772 (D.C. Cir. 1982). Step one of Gibbs deals with the court's "power" to hear pendent local law claims--its jurisdiction--when the case raises a "substantial" federal issue and the federal and local law claims "derive from a common nucleus of operative fact" and "are such that [the plaintiff] would ordinarily be expected to try them all in one proceeding." Gibbs, 383 U.S. at 725. The federal courts' subject matter jurisdiction, to the extent Congress authorizes it, is derived directly from Article III, Section 2, extending the judicial "Power" to "all Cases in Law and Equity arising under this Constitution, the Laws of the United States..." U.S. CONST. art. III, @ 2; see also *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-96, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980). The doctrine [\*63] of pendent jurisdiction rests on the idea that the court's jurisdiction over the underlying federal claim brings the related pendent claims under the scope of Article III because they are part of the same "case" or "controversy." See Gibbs, 383 U.S. at 725; *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821-23, 6 L. Ed. 204 (1824). Gibbs' requirements of a substantial federal claim, a common nucleus of operative fact, and the expectation of one trial, 383 U.S. at 725, "serve[ ] as an operational definition of the "one constitutional "case" ' language." Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1416 (1983).

There can be not the slightest doubt here that the children's claims under federal statutory law, the Constitution, and District of Columbia law all arise from a common set of facts. The district court's jurisdiction--its power--to decide the local law claims thus turned on the substantiality of the underlying federal claims. Whether a court may decide pendent claims is determined on the face of the pleadings. Contrary to what the majority [\*64] tells us, the ultimate disposition of the federal claim is "immaterial on the question of power." 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* @ 3567.1, at 114-15 (1995).

Once a district court finds a substantial federal claim, it has jurisdiction over the entire case. The court then must engage in the second step of the Gibbs analysis and decide whether to exercise that jurisdiction over the local or state law claims. This aspect of Gibbs--the so-called "key issue" according to

my colleagues--is not a jurisdictional determination. It is an entirely prudential one, which is why Gibbs held that "pendent jurisdiction is a doctrine of discretion...." 383 U.S. at 726. n5 To reach a contrary conclusion, the majority must misconstrue a decision of the Seventh Circuit and then completely mischaracterize a decision of this circuit. In Maguire v. Marquette University, 814 F.2d 1213 (7th Cir. 1987), the Seventh Circuit did not, as the majority claims, call the Gibbs step two analysis jurisdictional. See maj. op. at 12. It applied that label only to the Gibbs "rule" that "if the federal claims are dismissed before trial [\*65] ... the state claims should be dismissed as well." See Gibbs, 383 U.S. at 726. The majority's mischaracterization of this court's decision in Minker v. Baltimore Annual Conference of United Methodist Church, 282 U.S. App. D.C. 314, 894 F.2d 1354 (D.C. Cir. 1990), is far worse. The majority insinuates that the Minker court called Gibbs step two a "jurisdictional question." Maj. op. at 13. It did no such thing. In Minker, this court said, "Our holding raises a new jurisdictional question on remand." 894 F.2d at 1361. The new question left "on remand" was not a Gibbs question--this court handled that one itself--but rather was whether the plaintiff had sufficiently pled diversity to provide an independent basis of jurisdiction over his state-law claim. 894 F.2d at 1361. That is a jurisdictional question all right, but it is not Gibbs step two.

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n5 While it is true that the Supreme Court in Gibbs explained that the step two question remains open through "the litigation," the Court meant only that the question need not be decided forever on the pleadings, but could be reconsidered during pretrial proceedings or even the trial itself. See Gibbs, 383 U.S. at 727. While it may be true that a district court can relinquish its pendent jurisdiction even after trial, see (maj. op. at 12), the majority has identified no case in which that question was revisited after a trial, an appeal, a remand, and another appeal.

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[\*66]

Despite my colleagues' best efforts, then, Gibbs step two remains not a "jurisdictional inquiry," n6 but a prudential determination left to the discretion of the court that makes it. There is no other way to explain Schmidt v. Oakland Unified School District, 457 U.S. 594, 595, 73 L. Ed. 2d 245, 102 S. Ct. 2612 (1982), in which the Supreme Court held that a federal court's decision whether to resolve pendent local law claims was to be reviewed for abuse of discretion. See also Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 310 U.S. App. D.C. 409, 48 F.3d 1260, 1265-66 (D.C. Cir. 1995) (Williams, J.) ("Whether actually to decide [the local-law claims] is a matter left to the sound discretion of the district court.... We review for abuse of discretion.").

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n6 Congress has also explicitly recognized the discretionary nature of the second step of the Gibbs inquiry. The Judicial Improvement Act, enacted in 1990 and codified in part at 28 U.S.C. @ 1367, states:

... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction

that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. @ 1367(a) (*italics added*). When the federal claim drops out, the district court has discretion to retain or dismiss the pendent local law claims: "The district courts may decline to exercise supplemental jurisdiction over a claim in subsection (a)" for any of the reasons listed in @ 1367(c)(1)-(4). 28 U.S.C. @ 1367(c) (*italics added*).

The majority passes over @ 1367 because this case began before the statute's effective date (*maj. op. at 11 n.3*). But in attaching their jurisdictional label to Gibbs step two, my colleagues should have paused to consider that @ 1367 "codified the doctrine of pendent jurisdiction developed by the Supreme Court in the case of *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), and its progeny." *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995); see also *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 310 U.S. App. D.C. 409, 48 F.3d 1260, 1266 (D.C. Cir. 1995). (The statute also did a good deal more by allowing the federal courts to exercise jurisdiction over pendent parties, cf. *Finley v. United States*, 490 U.S. 545, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989), as distinguished from pendent claims. See David D. Siegel, *Practice Commentary*, 28 U.S.C.A. @ 1367; FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, Part III, at 546-68 (Apr. 2, 1990 & July 1, 1990).)

- - - - -End Footnotes- - - - -  
[\*67]

The majority purports to apply that standard here, apparently concluding that the district court abused its discretion in "failing to consider the impact of Gibbs step 2 factors--particularly considerations of comity--on its exercise of jurisdiction...." *Maj. op. at 18*. What discretion? The district court did not address Gibbs step two on remand and for good reason: this court already had done so. See *LaShawn I*, 990 F.2d at 1326. The district court, in other words, had no discretion to abuse. It was bound by the holding in *LaShawn I*. See *In re Ivan F. Boesky Securities Litigation*, 957 F.2d 65, 68 (2d Cir. 1992) (explaining that the law-of-the-case doctrine leaves a district court "no discretion" in carrying out an appellate court's directions on remand). If we suppose that the district court abused its discretion in complying with our ruling in *LaShawn I*, what, according to the majority, should the district court have done?

III

The majority's handiwork thus far ought to be enough to leave the district judge thoroughly confused, but my colleagues are not finished yet. For the remand, they direct the district court to apply an entirely new set of pendent jurisdiction [\*68] rules and then to ignore the clear direction of Congress in interpreting the federal statutory scheme at the center of this case.

A

On remand, the majority declares, the district court must "examine[ ] the validity of the federal claims" and determine whether "any federal grounds survive that could support an injunction." *Maj. op. at 2, 19. n7* This direction happens to conflict directly with *Rosado v. Wyman*, 397 U.S. 397, 405, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970), which is relegated to a footnote in the

majority opinion. In *Rosado v. Wyman*, the Supreme Court roundly rejected the idea that "once a federal court loses power over the jurisdiction-conferring claim, it may not consider a pendent claim." 397 U.S. at 404. Just as a federal court does not lose jurisdiction over a diversity action if one of the parties moves while the appeal is pending, a federal court does not lose pendent jurisdiction over the local law claims if the federal claims are decided against the plaintiff or otherwise drop out of the case. *Id.* at 405 & n.6. In the Supreme Court's words, *Rosado* holds that there is no requirement that a federal court have "jurisdiction over the primary claim at all stages of the litigation as [\*69] a prerequisite to resolution of the pendent claim," *id.* at 405--a holding completely at odds with the majority's proposition that even now, after an extensive trial and two appeals, the pendent jurisdiction already exercised must be undone unless the plaintiffs' local law claims remain closely intertwined with "winning" federal claims. Under *Rosado*, even if the first panel had reversed the judgment to the extent the district court found the District in violation of federal law, pendent jurisdiction over the local law claims would still exist, and the extensive violations of local law would support the decree.

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n7 It is a mystery to me why the majority assigns this task to the district court, rather than to itself. The questions posed are questions of law, and this court is in as good a position to decide them as the district court. The majority's assignment sets the stage for yet another appeal, and the district judge must be as baffled as I am by this court's conflicting commands.

- - - - -End Footnotes- - - - -

Having made a shambles [\*70] of Gibbs step two and of *Rosado v. Wyman*, the majority lays waste to what remains of the law of pendent jurisdiction. Unlike plaintiffs in any other case ever decided by the federal courts, the plaintiffs here may retain their victory on their local law claims only if it turns out that they had "winning" federal claims. *Maj. op.* at 18. "Winning"? Where does this idea come from? Gibbs and the cases following it require only that the federal claim asserted in the complaint be "substantial," that is, that it "have substance sufficient to confer subject matter jurisdiction on the court," a principle derived from *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 77 L. Ed. 1062, 53 S. Ct. 549 (1933). Gibbs, 383 U.S. at 725. According to *Levering*, "jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial ... either because [it is] obviously without merit, or "because its unsoundness so clearly results from the previous decisions of [the Supreme] court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." " 289 U.S. at 105-06 (italics added) [\*71] (quoting *Hannis Distilling Co. v. Mayor of Baltimore*, 216 U.S. 285, 288, 54 L. Ed. 482, 30 S. Ct. 326 (1910)). A federal question is therefore "substantial" for purposes of pendent jurisdiction if it is not "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous," or "no longer open to discussion." *Hagans v. Lavine*, 415 U.S. 528, 536-37, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974) (internal quotation marks and citations omitted); see also *District of Columbia Common Cause*, 858 F.2d at 10; *Town of W. Hartford v. Operation Rescue*, 991 F.2d 1039, 1049 (2d Cir.), cert. denied, 114 S. Ct. 185 (1993); *Matasar*, *supra*, 71 CAL. L. REV. at 1419. The Court explained in *Hagans*: "The limiting words 'wholly' and 'obviously' have cogent legal significance.... Those words import that claims are

constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial...." 415 U.S. at 537-38.

In requiring the district court to find a "winning" federal claim as a prerequisite to exercising jurisdiction over pendent local law claims, my colleagues [\*72] have thus overruled the Supreme Court's decisions in Levering, Hagans, and Gibbs--a tall order for two judges of an inferior federal court.

Given their treatment of Supreme Court precedents, it is little wonder that my colleagues also mow down two decisions of this court bearing directly on the issue they think needs deciding. In District of Columbia Common Cause v. District of Columbia, 858 F.2d at 10, we upheld solely on pendent local law grounds an injunction against the District of Columbia prohibiting it from spending public funds to oppose citizens' initiatives. Far from determining whether a winning federal claim supported the injunction, we refused to decide the merits of the federal claim (much as did the panel in LaShawn I) because it was not "so attenuated and unsubstantial as to be absolutely devoid of merit," and was therefore substantial enough to support the pendent claims. Id. (citation omitted). Dimond v. District of Columbia, 253 U.S. App. D.C. 111, 792 F.2d 179 (D.C. Cir. 1986), is to the same effect. We there reversed the district court's ruling that a District of Columbia statute violated federal law. Although the federal claim was a loser, we considered it "substantial [\*73] enough" to allow us to exercise jurisdiction over the pendent local law claim and to decide it, which we did. 792 F.2d at 188. n8

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n8 The majority relies on Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993) (en banc), cert. denied, 128 L. Ed. 2d 460, 114 S. Ct. 1831 (1994) (Evans III), to support its conclusion that the second part of the Gibbs analysis is a jurisdictional inquiry. Evans III is not on point. The Seventh Circuit reached the result it did because no substantial claim whatsoever--federal or local--underlay the district court's order. Evans III does not even discuss the question of pendent jurisdiction, since the only local claims at issue there were part of the plaintiffs' constitutional due process theory. 10 F.3d at 476. A prior appellate panel, Evans v. City of Chicago, 873 F.2d 1007 (7th Cir. 1989) (Evans II), rejected both of the plaintiffs' constitutional challenges to the City of Chicago's practice of paying some judgments earlier than others. That panel explicitly held that the City had not violated the Constitution's guarantee of equal protection, id. at 1015-18, and according to Evans III, there was "little doubt that Evans II would have repulsed a due process argument had the plaintiffs presented it for decision," 10 F.3d at 480-81. Given the absence of a substantial federal claim, the Evans III court held that the district court had no jurisdiction to enforce the consent decree. The "bare consent of the officeholder" was not a sufficient basis for imposing obligations on the City. Id. at 479.

Here, it is not the "bare consent" of the District that supports the consent decree. As this court held, the decree rests on the District's flagrant and repeated violations of District of Columbia law. LaShawn I, 990 F.2d at 1325. For purposes of this appeal, Evans III demonstrates, if anything, only that the first part of the Gibbs inquiry--the substantiality of the underlying federal claim--is jurisdictional.

Nor does Angela R. ex rel. Hesselbein v. Clinton, 999 F.2d 320 (8th Cir. 1993), support the majority's holding. In that case, as here, the federal claims against the governor of Arkansas and the director of the state's Department of Human Services were based in the Constitution, the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. @@ 620-628, 670-679, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. @@ 5101-5106a. 999 F.2d at 322. The court recognized the uncertainty of the constitutional claims of those children not in foster care. Moreover, it noted that the analysis in Suter v. Artist M., 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992), "might ultimately compel the conclusion that the ... federal statutes upon which plaintiffs rely do not create an enforceable private right of action on their behalf." 999 F.2d at 323, 324. Nevertheless, because these questions went to the merits of the plaintiffs' claims and did not "inescapably render the claims frivolous," it held the district court clearly had jurisdiction to enter a consent decree resolving the dispute. Id. at 324 (internal quotation marks and citation omitted). Thus, as to the question whether the plaintiffs here have federal claims substantial enough to support the district court's exercising pendent jurisdiction over their local law claims, Angela R. supports a conclusion directly contrary to the majority's.

The problem in Angela R. was not jurisdictional, but centered on "future enforcement of [the] obligations" imposed by the decree. Id. The Eighth Circuit concluded that the consent decree did not resolve specifically enough how it was to be enforced, and that the district court therefore abused its discretion in approving it. Id. at 325. Because Angela R. was a suit against state officials, Eleventh Amendment concerns made it particularly important that the decree's enforcement provisions were consensual and plain. Id. at 325-26. Those concerns are not present here. See infra pp. 17-18.

- - - - -End Footnotes- - - - -  
[\*74]

The majority ignores Dimond but attempts to distinguish District of Columbia Common Cause on the ground that the injunction there was somehow inoffensive to the notion of "comity" the majority tries to fashion out of its favorite recurring non sequitur, Pennhurst II. Maj. op. at 17-18. Pennhurst II is an exceedingly odd, indeed astonishing, source for the majority's views on the comity this court owes local District of Columbia courts. Odd because Pennhurst II dealt with something no one would have dreamed this case involved--the Eleventh Amendment to the Constitution. Exceedingly odd because the Eleventh Amendment confers immunity on the states from certain suits in federal court, and when last I checked, the District of Columbia was not a state. Astonishing because the majority nonetheless finds that Pennhurst II and the Eleventh Amendment somehow "suggest that, in general, injunctions against nonfederal officials based on nonfederal law should be disfavored." Maj. op. at 15-16.

It is hard to take this seriously. The Eleventh Amendment prohibits federal courts from entertaining "suits in law or equity, commenced or prosecuted against one of the United [\*75] States." U.S. CONST. amend. XI (italics added). That eliminates the District of Columbia. I would have thought that judges in this circuit needed no reminding that the District is not a sovereign state, separate from the federal government. It is the seat of our national government, and it is subject to Congress' plenary authority under Article I, Section 8, Clause 17 of the Constitution. n9 See *Palmore v. United States*, 411 U.S. 389, 397, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973). Although inhabitants of the District today possess, to some degree, the power of self-government,

District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), they hold that power at Congress' forbearance, and it is far from absolute. Congress has "reserved the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject ... including legislation to amend or repeal any law in force in the District ... and any act passed by the [District] Council." Id. @ 601. The District government must submit any law it enacts to Congress, which can disapprove the law within 30 days. Id. @ 602(c)(1). [\*76] The District may make no expenditures, even of funds it raises through its own means of revenue collection, unless approved by an act of Congress. Id. @ 446.

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n9 For purposes of 42 U.S.C. @ 1983, Congress has indicated that the District of Columbia should be treated as a municipal government. H.R. REP. NO. 548, 96th Cong., 1st Sess. 2 (1979). After noting that municipalities may be liable for @ 1983 violations under *Monell v. City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the House report stated: "That decision leaves the District of Columbia government and its officers as the only persons in the United States or its territories who are not subject to Section 1983 liability." H.R. REP. NO. 548, supra, at 2. By contrast, @ 1983 does not abrogate the Eleventh Amendment immunity accorded to States. *Quern v. Jordan*, 440 U.S. 332, 340-41, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979); *Alabama v. Pugh*, 438 U.S. 781, 57 L. Ed. 2d 1114, 98 S. Ct. 3057 (1978) (per curiam).

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The District is thus a distinctly federal entity, "truly sui generis in our governmental structure." [\*77] *District of Columbia v. Carter*, 409 U.S. 418, 432, 34 L. Ed. 2d 613, 93 S. Ct. 602 (1973). A suit in federal court against a federal entity "is hardly the instrument of a distant, disconnected sovereign," *Hess v. Port Auth. Trans-Hudson Corp.*, 130 L. Ed. 2d 245, 115 S. Ct. 394, 401 (1994), and thus raises none of the concerns that underpin the Eleventh Amendment or the Supreme Court's application of it in *Pennhurst II*. Accordingly, the cases the majority cites concerning the comity owed states--*Angela R. ex rel. Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993), and *Evans v. Buchanan*, 468 F. Supp. 944 (D. Del. 1979)--are irrelevant here. n10

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n10 *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 307 U.S. App. D.C. 263, 28 F.3d 130 (D.C. Cir. 1994), is likewise of little value here because it concerned not the comity federal courts owe District of Columbia courts, but the respect owed the District's administrative agencies in a statutory scheme in which Congress specifically said that the District of Columbia should be treated like a state. See 28 F.3d at 132 n.1.

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[\*78]

Stripped of their faulty Eleventh Amendment underpinnings, my colleagues' views on the comity owed District of Columbia courts turn solely on their misunderstanding of the Gibbs step two analysis. The majority seems to think that the existence of local law claims automatically counsels against the

exercise of jurisdiction over them. If that were true, pendent jurisdiction would never exist. But as this court has made clear, it is the extent to which a local law issue is "novel and unsettled"--and not its mere existence--that might counsel against the exercise of jurisdiction. Compare *Financial Gen. Bankshares, Inc. v. Metzger*, 220 U.S. App. D.C. 219, 680 F.2d 768, 775 (D.C. Cir. 1982) (district court abused its discretion in exercising pendent jurisdiction over "novel and unsettled" local law issues) and *Grano v. Barry*, 236 U.S. App. D.C. 72, 733 F.2d 164, 169 (D.C. Cir. 1984) (rejecting pendent jurisdiction over "novel and unsettled" local law issues) with *Dimond v. District of Columbia*, 792 F.2d at 189 (where local law issues were neither novel nor unsettled, uncertainty in local law could not weigh heavily against the exercise of pendent jurisdiction). The majority has identified no such "novel and unsettled" [\*79] local law issues at stake here. To do so now, it would have to overrule yet another portion of *LaShawn I*, in which this court held that District of Columbia law clearly provides private causes of actions for all of the children in the plaintiff class. 990 F.2d at 1326.

B

This brings me to the majority's treatment of *Suter v. Artist M.*, 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992), and the statute Congress passed in the wake of that decision.

*Suter* held that one of the provisions of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. @@ 620-627 and @@ 670-679 ("the Act"), upon which plaintiffs have relied, could not be enforced through a private cause of action. In light of the Court's holding with respect to that provision--42 U.S.C. @ 671(a)(15)--the majority suggests that the substantiality of the federal claims asserted by those plaintiff children who are not in custody may be undermined because, in view of *Suter*, they may not be able to enforce any of the Act's provisions. n11 Maj. op at 26. And so the majority instructs the district court, on remand, to consider the effect of *Suter*.

- - - - -Footnotes- - - - -

n11 The district court found the District in violation of six provisions of the Act. See *infra* note 13.

- - - - -End Footnotes- - - - -

[\*80]

That instruction collides with 42 U.S.C. @ 1320a-2, a 1994 statute severely limiting *Suter*. The statute provides:

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

Id. Theorizing that Congress may have been "misled" or "confused" by the language of Suter (maj. op. at 24-25), my colleagues essentially conclude that this statute has no effect at all. Maj. op. at 25-26. They claim that the first sentence of @ 1320a-2 means nothing because Suter did not turn [\*81] solely on the fact that the provision at issue was included in the state plan requirement. That point might be well taken, but what about the next sentence? There, Congress specifically directed the federal courts to use the same "grounds for determining the availability of private actions" they used before Suter and to disregard any new grounds the Supreme Court first applied in Suter. This direction may be understood only in light of the dissenting opinion in Suter, which claimed that the Suter majority had "changed the rules of the game" for finding private rights of action under @ 1983. See 503 U.S. at 377 (Blackmun, J., dissenting). Rightly or wrongly, Congress credited the dissenters' view. "The intent of this provision," the Conferees stated, "is 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...." H.R. CONF. REP. NO. 761, 103d Cong., 2d Sess. 926 (1994) (italics added). Two district courts have considered @ 1320a-2 and [\*82] have so read the provision. See Harris v. James, 883 F. Supp. 1511, 1519 (D. Ala. 1995) (explaining that in @ 1320a-2, Congress "mandated that courts continue to apply a pre-Suter approach"); Jeanine B. ex rel. Blondis v. Thompson, 877 F. Supp. 1268, 1283 (D. Wis. 1995) (explaining that @ 1320a-2 requires courts to "rewind the clock' and look to cases prior to Suter to determine the enforceability of other provisions"). n12

- - - - -Footnotes- - - - -

n12 Before Suter, federal courts had sustained private actions brought under 42 U.S.C. @ 1983 to enforce the Act's provisions. See, e.g., Timmy S. v. Stumbo, 916 F.2d 312, 316 (6th Cir. 1990) (determining that the "reasonable promptness" provision of 42 U.S.C. @ 671(a)(12) is enforceable under 42 U.S.C. @ 1983); L.J. ex rel. Darr v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988), cert. denied, 488 U.S. 1018, 102 L. Ed. 2d 805, 109 S. Ct. 816 (1989) (holding the substantive requirements listed in @ 671(a)(9), (10) & (16) enforceable under @ 1983); Lynch v. Dukakis, 719 F.2d 504, 512 (1st Cir. 1983) (concluding that the case plan requirements of @ 671(a)(16) and @ 675(1) & (5)(B) are enforceable under @ 1983).

- - - - -End Footnotes- - - - -

[\*83]

My colleagues see things differently. They say that because Congress did not identify the specific Suter "grounds" it wished to reject, it must not have meant to reject any grounds. Maj. op. at 26. Even if that argument made any sense, it still would directly contradict both the language of the Suter amendment, which overturns "any such grounds" applied in Suter but not applied in prior Supreme Court decisions, see 42 U.S.C. @ 1320a-2, and the "hornbook law" presumption against "interpreting a statute in a way which renders it ineffective," see Federal Trade Comm'n v. Manager, Retail Credit Co., Miami Beach Branch Office, 169 U.S. App. D.C. 271, 515 F.2d 988 (D.C. Cir. 1975).

In short, Congress has directed the federal courts not to consider Suter in deciding whether there may be private enforcement of the Act, while my

colleagues have directed the district court to do just the opposite.

Congress' command raises constitutional problems of its own. Congress may not prescribe rules of decision for cases pending in the federal courts. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-48, 20 L. Ed. 519 (1871); *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1314-15 (9th Cir. 1990), [\*84] rev'd on other grounds, 503 U.S. 429, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992). But cf. *Plaut v. Spendthrift Farm, Inc.*, 131 L. Ed. 2d 328, 115 S. Ct. 1447, 1457 (1995). And it is far from certain whether Congress may, consistent with principles of separation of powers and the independence of the judicial branch, direct the lower federal courts to disregard the reasoning of an otherwise binding Supreme Court decision.

There is no reason why the district court, and ultimately this court, should have to ponder this serious question or the other constitutional issues the majority sends back to it, issues raised by the dictum in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), with respect to the in-custody children. Maj. op. at 18 n.9. For more than a century, the Supreme Court has endorsed the practice of deciding cases on the basis of a pendent state-law claim in order to avoid constitutional questions. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J., concurring); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193, 53 L. Ed. 753, 29 S. Ct. 451 (1909); *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394, 30 L. Ed. 118, 6 S. Ct. 1132 (1886). *Pennhurst II* itself stressed that nothing in its decision [\*85] regarding the immunity of states under the Eleventh Amendment was "meant to cast doubt on the desirability of applying the principle [of avoiding constitutional questions] in cases where the federal court has jurisdiction to decide the state-law issues." 465 U.S. at 118-19 n.28. And in a later case, the Supreme Court held that it was an abuse of discretion for a court of appeals to reach a federal constitutional question when it could have avoided doing so by deciding the case on pendent state-law grounds. *Schmidt v. Oakland Unified Sch. Dist.*, 457 U.S. at 595.

The majority opinion turns the table upside down. Again ignoring higher authority, the majority orders the district court to abuse its discretion by deciding the constitutional issues.

#### IV

It is time to bring this opinion to a close. The majority's opinion disregards the law of this court and of the Supreme Court. My colleagues do not like the idea of a federal district court issuing a decree to govern local institutions. Nor do I, nor, for that matter, does the district judge in this case. But we are sworn to uphold the law. I therefore dissent.

#### ADDENDUM

The case went to trial four years ago. Two weeks of testimony [\*86] revealed the District of Columbia's deficient, inept administration of its foster care system. This testimony, together with more than a thousand admissions of fact by the District, showed that District officials had consistently failed to carry out responsibilities imposed on them by federal and local laws. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 960, 986-87 (D.D.C. 1991). These were far from minor infractions. The transgressions psychologically,

emotionally and physically harmed those children in the District's foster care system and those children who, although not yet in the District's care, were known to the District because of reported abuse and neglect. Id. at 987.

The district court thus reached the "inescapable conclusion" that the District's foster care system complied with neither "federal law, District law, nor, for those plaintiffs in the District's foster care, the United States Constitution." Id. at 960-61. The District's administration of its foster care system violated numerous provisions of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. @@ 620-627 and @@ 670-679, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. @@ 5101-5106. [\*87] n13 The Adoption Assistance Act, the court held, conferred upon the plaintiffs rights that were privately enforceable under 42 U.S.C. @ 1983, which the District had violated by depriving plaintiffs of those rights. 762 F. Supp. at 988-90.

-Footnotes-

n13 Specifically, the court found the District in violation of the following requirements imposed upon recipients of federal funding for child welfare programs: (1) 42 U.S.C. @ 5106a(b)(2) (requiring prompt investigations into reports of abuse or neglect and necessary action to protect welfare of abused or neglected children), 762 F. Supp. at 968-70; (2) 42 U.S.C. @ 5106a(b)(3) (requiring demonstration of program to ensure effective treatment of child abuse and neglect cases), 762 F. Supp. at 970; (3) 42 U.S.C. @ 671(a)(15) (requiring provision of services to enable a child for whom a report has been made to remain in the home or, if removal is necessary, to enable the child to return home as quickly as possible), 762 F. Supp. at 970; (4) 42 U.S.C. @ 672(e) (mandating that a child return home within 180 days unless a judicial determination has been made that foster care placement is in the child's best interests), 762 F. Supp. at 971; (5) 42 U.S.C. @ 675(5)(A) (requiring procedures to assure children are placed in least restrictive settings), 762 F. Supp. at 971; (6) 42 U.S.C. @ 675(1) (requiring timely preparation of case plans containing specific information), 762 F. Supp. at 972-73; (7) 42 U.S.C. @ 675(5)(B) (requiring review of child's status at least every six months), 762 F. Supp. at 974; and (8) 42 U.S.C. @ 627(a)(2)(A) (requiring operation of information system from which status, location and goals for placement of all foster care children may be readily determined), 762 F. Supp. at 976-77.

-End Footnotes-

[\*88]

The district court also found that the District's operation of its foster care system violated numerous provisions of the District's Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2-22 (Sept. 23, 1977) (codified as amended at D.C. CODE ANN. @@ 2-1351 to -1357, @@ 6-2101 to -2107, @@ 6-2121 to -2127, and @@ 16-2351 to -2365); the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (Aug. 13, 1986) (codified as amended at D.C. CODE ANN. @@ 3-801 to -808); and the Child and Family Services Division Manual of Operations (September 1985). The District's obligations under its own laws parallel almost exactly the requirements of federal law. LaShawn A. ex rel. Moore v. Kelly, 301 U.S. App. D.C. 49, 990 F.2d 1319, 1324 (D.C. Cir. 1993) ("LaShawn I"). Analogizing the rights of children in foster care to rights of those involuntarily committed, LaShawn, 762 F. Supp. at 992, the district court ruled that these laws conferred liberty and property interests, protected under the Fifth Amendment, on the children in the custody of the District's foster

care system, *id.* at 994. The District had violated @ 1983 by depriving the children in foster care of these constitutionally [\*89] protected interests. 762 F. Supp. at 998.

The parties worked out a remedial order designed to correct deficiencies in the District's administration of its foster care system, and the district court entered it.

The District appealed, contending that the district court erred in finding that the administration of the District's foster care system violated the Fifth Amendment and that the intervening decision in *Suter v. Artist M.*, 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992), precluded any private cause of action under @ 1983 or federal child welfare statutes. *LaShawn I*, 990 F.2d at 1321-22. Recognizing that the appeal raised "complex constitutional and federal statutory issues," we held that it was unnecessary to reach the District's challenges. *Id.* at 1324. Under District law, children reported to have been abused or neglected had a private right of action under the District's Prevention of Child Abuse and Neglect Act. *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987). Because a government owes greater duties toward those in its custody, we concluded that the children in the District's foster care system also had a private right of action under the Act. *LaShawn I*, 990 F.2d at 1325. [\*90] In addition, we noted that the other District statute relied on by the children, the Youth Residential Facilities Licensure Act, explicitly provides these children with a private cause of action to sue under the Prevention of Child Abuse and Neglect Act. *Id.* at 1325-26. These statutes, we held, "provided an independent basis for supporting the district court's judgment." *Id.* at 1326. This court's authority to decide the case entirely on the pendent local claims, we stated, was "incontrovertible" under *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966).

Some of this already  
given away.

Havier Rabb / Peter Edelina

Yesterday - changes to Medicaid  
sending ops to state in Fed CT on  
various issues

disallow suits over reimbursement  
rates

provider say RR \$6, not \$4 - can't bring in Fed CT.  
More extreme proposal - no Fed CT access  
for ~~fed~~ providers

relegating to state?  
how does this work?  
K claim?

Beneficiaries - eligibility // benefits.

IA - troubled.

Non-uniform  
benefits/elig. defined diff ways in  
diff cases.

Must be other ways to fix if too much litigation  
"ENTITLEMENT" ??

New  
same problem in welfare debate.

Talk w/ Steve

## SOCIAL SECURITY ACT—§ 1131(a)

527

tary determines that the total amount of Federal funds that will be expended under (or by reason of) the project over its approved term (or such portion thereof or other period as the Secretary may find appropriate) will not exceed the amount of such funds that would be expended by the State under the State plans approved under parts B and E of title IV if the project were not conducted.

EFFECT OF FAILURE TO CARRY OUT STATE PLAN<sup>153</sup>

SEC. 1130A. [ 42 U.S.C. 1320a-10] In 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. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability. *Provided, however,* That this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act is not enforceable in a private right of action.

NOTIFICATION OF SOCIAL SECURITY CLAIMANT WITH RESPECT TO DEFERRED VESTED BENEFITS<sup>154</sup>

SEC. 1131. [ 42 U.S.C. 1320b-1] (a) Whenever—

(1) the Commissioner of Social Security<sup>155</sup> makes a finding of fact and a decision as to—

(A) the entitlement of any individual to monthly benefits under section 202, 223, or 228, or<sup>156</sup>

(B) the entitlement of any individual to a lump-sum death payment payable under section 202(i) on account of the death of any person to whom such individual is related by blood, marriage, or adoption, or<sup>157</sup>

(2) the Commissioner of Social Security<sup>158</sup> makes a finding of fact and a decision as to the entitlement under section 226 of any individual to hospital insurance benefits under part A of title XVIII, or<sup>159</sup>

(3)<sup>160</sup> the Commissioner of Social Security<sup>161</sup> is requested to do so—

(A) by any individual with respect to whom the Commissioner of Social Security<sup>162</sup> holds information obtained under

<sup>153</sup>P.L. 103-432, §211(a), added section 1130A, applicable to actions pending on October 31, 1994, and to actions brought on or after such date.

<sup>154</sup>See Vol. II, P.L. 83-591, §6108(i), relating to disclosure of returns and return information by the Secretary of the Treasury to the Social Security Administration, and §7213(a)(1) relating to the penalty for unauthorized disclosure of that tax return information.

<sup>155</sup>P.L. 103-296, §108(b)(11)(A), struck out "Secretary" and substituted "Commissioner of Social Security", effective March 31, 1995.

<sup>156</sup>P.L. 103-296, §108(b)(11)(B), added "or".

<sup>157</sup>P.L. 103-296, §108(b)(11)(C), struck out "or" and §108(b)(11)(D), struck out subparagraph (C), effective March 31, 1995. For subparagraph (C) as it formerly read, see Vol. III, P.L. 103-296.

<sup>158</sup>P.L. 103-296, §108(b)(11)(A), struck out "Secretary" and substituted "Commissioner of Social Security", effective March 31, 1995.

<sup>159</sup>P.L. 103-296, §108(b)(11)(F), added a new paragraph (2), effective March 31, 1995.

<sup>160</sup>P.L. 103-296, §108(a)(11)(E), redesignated paragraph (2) as paragraph (3).

<sup>161</sup>P.L. 103-296, §108(b)(11)(A), struck out "Secretary" and substituted "Commissioner of Social Security", effective March 31, 1995.

<sup>162</sup>P.L. 103-296, §108(b)(11)(A), struck out "Secretary" and substituted "Commissioner of Social Security", effective March 31, 1995.

The NGA welfare resolution contains the following commitment:

"Add a state plan requirement that the state set forth objective criteria for the delivery of benefits and fair and equitable treatment."

This language was intended to ameliorate the harshness of H.R. 4 [the Republican welfare reform bill], which does not provide even minimum safeguards for families seeking or receiving assistance.

We agree with the NGA's proposal. Augmenting state plan submissions would benefit program recipients and, as well, would improve overall taxpayer understanding of and satisfaction with the welfare system.

Each state should be required to set forth, in its state plan, objective criteria that provide fair and equitable treatment to beneficiaries in the following areas:

- 1) nonfinancial eligibility criteria for benefits.
- 2) financial eligibility criteria based on the income and resources legally or actually available to applicants.
- 3) time frames for determinations [e.g., benefits, sanctions] under the plan and procedures for notifying applicants of determinations.
- 4) the application process for potential applicants.
- 5) when and how sanctions are to be applied against beneficiaries.
- 6) a commitment that families with similar needs will be treated similarly.
- 7) a commitment that the program will be administered statewide, and, if administered by subdivisions such as counties or cities, will be mandatory upon such subdivisions.

This is not a suggestion that H.R. 4 be amended to dictate the substance of each state's plan; the amendments would merely require that each state set forth in its plan its own decisions about each of the above issues.

The state plan would enhance accountability: it would apprise applicants and recipients of the conditions under which they would receive benefits and of their responsibilities as benefit recipients. Just as importantly, the state plan would become a forum through which concerned taxpayers could learn how their tax dollars were being spent. (Taxpayer education and accountability