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No. 95-1441

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LINDA J. BLESSING, DIRECTOR, ARIZONA
DEPARTMENT OF ECONOMIC SECURITY, PETITIONER

v.

CATHY FREESTONE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an individual has a private right of action under 42 U.S.C. 1983 to seek redress against state officers responsible for administering a State's child support enforcement program under Title IV-D of the Social Security Act, 42 U.S.C. 651 et seq., for violations of the Act and its implementing regulations.

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INTEREST OF THE UNITED STATES

Through Title IV-D of the Social Security Act, 42 U.S.C. 651 et seq., Congress has made the needs of children and families for vigorous and effective child support enforcement a national priority. Title IV-D, which is administered by the Secretary of Health and Human Services, is one of the largest cooperative federal-state programs. More than 19 million people received child support services under Title IV-D in FY 1995, and the United States paid the States in excess of \$2.0 billion for those services. The Title IV-D program has located millions of absent parents and helped hundreds of thousands of children identify their fathers. The nearly \$40 billion in child support collected since 1990 alone has resulted in hundreds of thousands of families avoiding or

leaving the welfare rolls, thereby reducing the human and financial toll of welfare dependence. See generally HHS, Child Support Enforcement: Nineteenth Annual Report to Congress 2, 29-45 (1994). The United States has a strong interest in ensuring that the duties States voluntarily assume under Title IV-D are enforced in a manner that protects the rights of needy children and their parents, and at the same time avoids interference with federal oversight or with those areas of Title IV-D administration that Congress left to state discretion.

STATEMENT

1. Congress first required States to undertake child support enforcement efforts as a condition of receiving federal funds in 1950, under the Aid to Families with Dependent Children (AFDC) program. Ch. 809, § 321(b), 64 Stat. 550. In 1968, Congress required States participating in AFDC to create an organizational unit for establishing paternity and collecting child support; enter into cooperative agreements with local officials to accomplish those goals and identify missing parents; and cooperate with other States in locating parents and enforcing support orders. Pub. L. No. 90-248, §§ 201(a)(1), 211(a), 81 Stat. 877-879, 896-897.

2. Congress's frustration with the lack of progress in child support enforcement culminated in the passage, in 1975, of Title IV-D of the Social Security Act, 42 U.S.C. 651 et seq. Pub. L. No. 93-647, § 101, 88 Stat. 2337-2361 (1975 Act); see also S. Rep. No. 1356, 93d Cong., 2d Sess. 42-44 (1974). Congress concluded that "children have the right to receive support from their fathers,"

and that Title IV-D would "help children attain this right, including the right to have their fathers identified so that support can be obtained." S. Rep. No. 1356, supra, at 42. The 1975 Act envisioned "a far more active role on the part of the Federal Government" in monitoring state programs and directly assisting the States' enforcement of children's rights. Id. at 2.

The 1975 Act required States participating in AFDC to "have in effect a plan approved under [Title IV-D] and operate a child support program in conformity with such plan." § 101(c)(5)(C), 88 Stat. 2360. Each State must provide services to locate noncustodial parents and establish the paternity of and secure support for children receiving AFDC benefits. 42 U.S.C. 654(4) and (8).¹ AFDC recipients must assign their support rights to the State and cooperate in enforcement efforts. 42 U.S.C. 602(a)(26).² Amounts recovered generally are retained by the State to reimburse it and the federal government for AFDC assistance provided to the family. 42 U.S.C. 657(a)-(b). Congress required States to provide services to non-AFDC families as well, 42 U.S.C. 654(6), although those families are not required to assign their support rights, 45 C.F.R. 302.33(e), and any child support the State collects must be

¹ Unless otherwise indicated, references to the United States Code are to the 1994 edition, which predates the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, discussed infra.

² Once assigned, the support obligation is owed to the State and is collectible under all applicable state processes. 42 U.S.C. 656(a)(1). The custodial parent retains the right to enforce the obligation, although any payments obtained must be turned over to the State to the extent of AFDC payments received. 42 U.S.C. 602(a)(26)(A); 45 C.F.R. 232.12(b)(4).

paid to the family, 42 U.S.C. 657(a)(4)(B).

Congress agreed to pay 75% of the States' administrative costs under Title IV-D. 1975 Act, § 101(a), 88 Stat. 2355-2356. Congress also provided incentive payments for successful collection efforts. 42 U.S.C. 658. The 1975 Act directed the Secretary to establish standards for state programs in locating absent parents, establishing paternity, and obtaining child support "as [s]he determines to be necessary to assure that such programs will be effective," and to set organizational and staffing requirements for state child support offices. 42 U.S.C. 652(a)(1)-(2); see S. Rep. No. 1356, supra, at 46-47. The 1975 Act also established a federal Parent Locator Service utilizing federal and state records. 42 U.S.C. 652(a)(9), 653. The Secretary was charged with annually approving and auditing state programs. 42 U.S.C. 652(a)(3)-(4). If a State's program was found to be deficient, its federal Title IV-A (primarily AFDC) allotment was to be reduced by 5%. 1975 Act, § 101(c)(6)(A), 88 Stat. 2360.³

In 1976, Congress required state employment agencies to provide the addresses of absent parents to the State's child support agency. Pub. L. No. 94-566, § 508, 90 Stat. 2689. In 1980, Congress (i) funded 90% of state costs of developing automated information systems; (ii) expanded incentive payments to the States; (iii) funded enforcement activities of certain state court personnel; (iv) gave States access to wage information held by the federal government and state employment offices; and (v) expanded the authority of the Internal Revenue Service (IRS) to collect child support arrearages. Pub. L. No. 96-265, §§ 402-405, 408, 94 Stat. 462-465, 468-469; Pub. L. No. 96-272, §§ 301, 307, 94 Stat. 527, 531. In 1981, Congress authorized the IRS to withhold tax refunds of persons delinquent in their child support obligations, 42 U.S.C. 664; 26 U.S.C. 6402, and directed States to withhold a portion of unemployment benefits from such parents. Pub. L. No. 97-35, § 2335, 95 Stat. 863-864. Amendments in 1982 reduced federal funding to 70%, permitted collections from military

3. By the mid-1980s, more than \$10.8 billion in child support had been collected under Title IV-D, annual collections had nearly quadrupled, and state and local revenues had grown by more than \$300 million. S. Rep. No. 387, 98th Cong., 2d Sess. 11 (1984). Nevertheless, Congress found that there remained "a critical lack of child support enforcement," which had "a critical impact on the health and welfare of the children of the Nation." Pub. L. No. 98-378, § 23(a)(2), (5), 98 Stat. 1329. Congress was concerned that, by measuring their success "solely in terms of welfare savings," many States were disinclined to assist non-AFDC families. H.R. Rep. No. 527, 98th Cong., 1st Sess. 29 (1983). Congress amended Title IV-D in 1984 to ensure, "through mandatory income withholding, incentive payments to States, and other improvements in the child support enforcement program, that all children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance regardless of their circumstances." Pub. L. No. 98-378, preamble, 98 Stat. 1305; see also *id.* § 23(a)(3), 98 Stat. 1329.

The 1984 amendments required States to adopt laws and procedures providing for (i) mandatory wage withholding; (ii) expedited processes for obtaining and enforcing support orders; (iii) state income tax refund intercepts; (iv) property liens for overdue support; (v) establishment of paternity any time prior to a child's eighteenth birthday; (vi) posting of bonds to secure

personnel, and provided for disclosure of information obtained under the food stamp program. Pub. L. No. 97-248, §§ 171-176, 96 Stat. 401-404; Pub. L. No. 97-253, § 169, 96 Stat. 779.

payment of overdue support; (vii) reporting overdue support to consumer credit agencies; and (viii) withholding overdue support from wages without further judicial order. 42 U.S.C. 666(a)(1)-(8), (b); see S. Rep. No. 387, supra, at 26-30. States are required to have those laws "in effect" and to "implement the[ir] procedures," and to establish state-wide guidelines for child support amounts. 42 U.S.C. 654(20), 667.⁴

At the same time, Congress reduced the frequency and inflexibility of the Secretary's administrative oversight.⁵ With the exception of States under penalty, audits were made triennial, 42 U.S.C. 652(a)(4), and Title IV-A penalties were based on a State's failure to attain "substantial compliance," rather than "full compliance," with Title IV-D requirements, 42 U.S.C. 603(h)(1); see also 42 U.S.C. 602(a)(27). A State is in "substantial compliance" if "the Secretary determines that any noncompliance * * * is of a technical nature which does not adversely affect the performance of the child support enforcement program." 42 U.S.C. 603(h)(3).⁶ Congress replaced the flat 5%

⁴ Because interstate cases present "one of the most difficult areas of child support enforcement," S. Rep. No. 387, supra, at 34, Congress provided grants for state programs that improve interstate enforcement. 42 U.S.C. 655(e); see also 42 U.S.C. 658(d) (incentive credits for both States in interstate collections).

⁵ Congress also reduced federal funding to a final floor of 66%, which is the current level for most administrative costs. 42 U.S.C. 655(a)(2). Matching funds at the 90% level were retained for automating data processing systems. 42 U.S.C. 655(a)(1)(B).

⁶ The Secretary has interpreted "substantial compliance" as: (A) full compliance with requirements that services be offered statewide and that certain recipients be notified monthly of the support collected, as well as with reporting, record-keeping, and

penalty with a system of graduated penalties, ranging from 1% to 5% of total IV-A funds, and allowed States to avoid penalties by timely submission and successful implementation of corrective plans. 42 U.S.C. 603(h)(1), (2)(A) and (B).⁷ Those changes shifted the focus of federal oversight to overall programmatic performance. S. Rep. No. 387, supra, at 32. In so doing, Congress was "not abandoning the[] requirements of existing law but rather expect[ed] them to be more fully carried out." Id. at 33.

4. In 1988, Congress again amended Title IV-D to increase state duties and performance levels. S. Rep. No. 377, 100th Cong., 2d Sess. 8 (1988). States were required to implement "new and more stringent provisions for wage withholding" and periodically review and adjust individual support awards. Id. at 15; 42 U.S.C. 666(a)(8) and (10), (b)(3). Congress directed the States to adopt automated case tracking systems and continued 90% federal funding for them. 42 U.S.C. 654(24). States also were required to inform AFDC families monthly of collections on their behalf, 42 U.S.C. 654(5), and to adhere to state guidelines for setting child support awards, 42 U.S.C. 667(b). Congress directed the Secretary to adopt regulations setting specific time limits for States to accept and

accounting rules; (B) 90% compliance with case opening and case closure criteria; and (C) 75% compliance for most remaining program functions. 45 C.F.R. 305.20. Since 1988, "substantial compliance" has also required States to succeed in establishing paternity in a specified percentage of cases. 42 U.S.C. 652(g).

⁷ A State's failure to submit a plan that conforms to Title IV-D's state plan requirements can also result in denial of federal funds under Title IV-D itself. See 45 C.F.R. 301.13; see also 45 C.F.R. 74.22(h)(1), 74.61, 74.62; 45 C.F.R. Pt. 74, App. J.

respond to requests for services, locate absent parents, establish paternity, initiate child support proceedings, and collect and distribute child support, 42 U.S.C. 652(h)-(i).⁸ Finally, Congress set federal standards for establishing paternity that, if not met, would result in a reduction in AFDC funds. 42 U.S.C. 652(g).⁹

5. a. On August 22, 1996, the President approved The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996 Act). As relevant here, the 1996 Act transformed AFDC into a block-grant program. Recipients now face a five-year cap on benefits, and Title IV-A does not "entitle any individual or family to assistance under any State program funded under this part." *Id.* § 103(a)(1), 110 Stat. 2113, 2137 (to be codified at 42 U.S.C. 601(b), 608(a)(7)). Similar language regarding the Title IV-D program was proposed (see H.R. 4, 104th Cong., 1st Sess. § 302 (1995)), but not enacted. The requirement under Title IV-A that States operate their child support programs in "substantial compliance" with Title IV-D has been replaced; States now must certify that they "will operate a

⁸ See 45 C.F.R. Pt. 303. The Secretary has consulted extensively with state child support enforcement officials in establishing these standards and timeframes. See 54 Fed. Reg. 15,877-15,878 (1989).

⁹ See also 42 U.S.C. 666(a)(5)(B) (genetic testing made available in contested paternity cases); 42 U.S.C. 655(a)(1)(C) (90% federal funding for paternity tests). In 1993, Congress increased the percentage of children for whom the State must establish paternity annually. 42 U.S.C. 652(g). Congress also mandated that States establish simplified civil procedures, including hospital-based programs, for voluntary acknowledgment of paternity. 42 U.S.C. 666(a)(5)(C); see generally H.R. Rep. No. 111, 103d Cong., 1st Sess. 487-489 (1993).

child support enforcement program under the State plan approved under part D." 1996 Act, § 103(a)(1), 110 Stat. 2114 (to be codified at 42 U.S.C. 602(a)(2)). But the 1996 Act retained the framework of graduated penalties under Title IV-A for failure to comply substantially with Title IV-D's requirements. Id. 110 Stat. 2145 (to be codified at 42 U.S.C. 609(a)(8)).

b. Although the 1996 Act transformed numerous welfare programs into block grants, Congress left Title IV-D intact and, indeed, increased state responsibilities under the program. The 1996 Act amended the rules governing distribution of collections to give priority to families who have left the welfare rolls. § 302(a), 110 Stat. 2200 (to be codified at 42 U.S.C. 657(a)(2)). Each State must establish a directory of new hires, a central registry of support orders, and centralized collection and disbursement units. Id. §§ 311, 312(a), 313(a), 110 Stat. 2205, 2207, 2209 (to be codified at 42 U.S.C. 654(27) and (28), 654a(e)). Congress set strict time limits for States to distribute support collections, notify employers to withhold child support, and take administrative enforcement action in interstate cases. Id. §§ 312(b), 313(b), 323, 110 Stat. 2208, 2211, 2222 (to be codified at 42 U.S.C. 653a(g)(1), 654b(c)(1), 666(a)(14)).

The 1996 Act directed States to adopt more streamlined processes for establishing paternity and to employ more rigorous child support enforcement techniques, such as automatic liens and suspension of driver's and professional licenses. §§ 314, 331(a), 368, 369, 110 Stat. 2212-2214, 2227-2230, 2251 (to be codified at

42 U.S.C. 666(a)(1), (4)(A), (5) and (16), (b)). In addition, States must adopt expedited procedures for (i) genetic testing; (ii) access to financial information and government records; (iii) mandatory income withholding; (iv) securing assets; and (v) increasing monthly payments in cases of arrearages. Id. § 325(a), 110 Stat. 2224 (to be codified at 42 U.S.C. 666(a)(2) and (c)). Support orders must be reviewed and updated upon request every three years, and States must give families notice of relevant proceedings and copies of orders, notice of right to seek review, and, upon request, information on the status of payments. Id. §§ 304(a), 312(b), 351, 110 Stat. 2205, 2208, 2239, 2240 (to be codified at 42 U.S.C. 654(12), 654b(b)(4), 666(a)(10)(A) and (C)).

c. The 1996 Act overhauled audit procedures and directed the Secretary to establish a new performance-based incentive and penalty program. §§ 341(a), 342(b), 110 Stat. 2231, 2233-2234 (to be codified at 42 U.S.C. 652(a)(4), 658 note). A State now must submit annual reports documenting that its program is "operated in compliance with" Title IV-D, and the State's review must employ standards and procedures set by the Secretary. Id. § 342(a)(3), 110 Stat. 2233 (to be codified at 42 U.S.C. 654(15)). The Secretary's triennial audit must assess the "completeness, reliability, and security of the data and the accuracy of the [State's] reporting systems"; "the adequacy of financial management"; and "whether collections and disbursements of support payments are carried out correctly," and it may pursue "such other purposes as the Secretary may find necessary." Id. § 342(b), 110

Stat. 2233-2234 (to be codified at 42 U.S.C. 652(a)(4)(C)).¹⁰

6. Arizona has elected to participate in the AFDC and Title IV-D programs and has submitted plans assuring that it will operate a child support enforcement program in accordance with Title IV-D's requirements. Based on those commitments, Arizona has received approximately \$1.4 billion in AFDC funds and more than \$222 million in Title IV-D funds from the federal government since 1976.

SUMMARY OF ARGUMENT

A. This Court should not reconsider Maine v. Thiboutot, 448 U.S. 1 (1980). Principles of stare decisis counsel strongly against overruling a 16-year-old precedent that this Court unanimously reaffirmed two Terms ago. In any event, Congress twice ratified Thiboutot and its progeny in 1994.

B. Petitioner's invocation of "principles of federalism" is misplaced. Title IV-D is a voluntary program through which Congress has given the States billions of dollars and developed a nationwide child support enforcement infrastructure. The growing interstate character of the child support problem and the need for uniform enforcement call for a substantial federal role. The 1996 Act, moreover, demonstrates that Congress is responsive to federalism concerns in welfare administration. Under Title IV-D,

¹⁰ The Department of Health and Human Services is currently evaluating the impact of the 1996 Act on the Title IV-D program and assessing what regulatory changes are necessary or appropriate to interpret and implement its provisions. We have been informed by the Department that, in its judgment, the 1996 Act will require substantial revisions in performance incentives, standards and procedures for audits, and the definition of "substantial compliance" as the basis for penalties under Title IV-A.

however, Congress chose to strengthen the standards governing state programs. Enforcement of those standards in an action against state officials under 42 U.S.C. 1983 is fully consistent with Ex parte Young, 209 U.S. 123 (1908), and does not contravene the Eleventh Amendment.

C. Title IV-D's text, structure, and legislative history establish that it creates enforceable rights in the individuals who seek child support services from a State. Its primary purpose is to provide children with much-needed child support services, which give them an opportunity to establish familial relationships with both parents and avoid a childhood pervaded by economic hardship. In addition, a number of provisions of Title IV-D and its implementing regulations speak in specific and mandatory terms that are well within the competence of courts to enforce.

Petitioner argues that Title IV-D's "substantial compliance" floor for avoiding administrative penalties enables a State to ignore 25% of the children and families seeking its services. But Congress's employment of a flexible measure of programmatic performance to undergird the funding relationship between governments does not mean that Congress no longer expected full adherence to Title IV-D's requirements in a State's furnishing of child support services to particular beneficiaries. Petitioner's claim that Congress should have warned that a Section 1983 action would be available is also without merit, because Section 1983's text, reinforced by recent Acts of Congress and this Court's precedents, provided ample notice.

Not all of Title IV-D's provisions, however, are judicially enforceable to the same degree. Congress preserved state discretion in some areas, such as selecting appropriate collection tools and initiating judicial proceedings. Whether a Section 1983 action is available thus will depend on which aspect of the State's program is at issue and the nature of the relief sought in a given case.

The Secretary's generalized audit procedures do not preclude Section 1983 remedies, especially where, as here, there is no alternative avenue through which individuals can enforce their rights. The availability of relief under Section 1983 in appropriate circumstances will complement the Secretary's oversight and promote Congress's goal of effective and uniform child support enforcement across the Nation.

ARGUMENT

TITLE IV-D CREATES INDIVIDUAL RIGHTS THAT MAY BE ENFORCED IN AN ACTION UNDER 42 U.S.C. 1983

A. Maine v. Thiboutot Should Not Be Reconsidered

Section 1983 creates a private cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. This Court held in Maine v. Thiboutot, 448 U.S. 1 (1980), that Section 1983 authorizes suits by private individuals against state actors who violate rights created by federal statutes, specifically including the Social Security Act. Id. at 4-8. Petitioner asks (Br. 32) this Court to "reconsider" Thiboutot and limit sharply the federal laws

that may be enforced under Section 1983. There is no basis for doing so."

Principles of stare decisis counsel strongly against unraveling more than a decade and a half of precedent. "[S]tare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." United States v. International Business Machines Corp., 116 S. Ct. 1793, 1801 (1996) (internal quotation marks omitted). Both the doctrine and its underlying purposes apply with "special force" to issues of statutory construction. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989). This Court's "reluctance to overturn [statutory construction] precedents derives in part from institutional concerns about the relationship of the judiciary to Congress," for Congress is always free to correct the Court's interpretation of the laws it passes. Neal v. United States, 116 S. Ct. 763, 769 (1996).

Consequently, this Court will overrule precedent construing a federal statute only if (i) intervening law has undercut the "conceptual underpinnings" of the decision; (ii) "later law has rendered the decision irreconcilable with competing legal doctrines or policies"; or (iii) the Court is provided "compelling evidence

" Petitioner did not present this issue in her petition for certiorari. Sup. Ct. R. 14.1(a). The petition did not mention Thiboutot, let alone urge that it be reconsidered. The question presented suggested only that permitting an action under Section 1983 would "contravene this Court's precedents" (see Pet. i), not that seminal precedent in this area would have to be reconsidered for petitioner to prevail.

bearing on Congress' original intent." Neal, 116 S. Ct. at 769. None of those "special justification[s]" is present here. Arizona v. Rumsey, 467 U.S. 203, 212 (1984). Quite the opposite is true.

Intervening law has repeatedly followed and reaffirmed Thiboutot. Just two Terms ago, this Court unanimously reconfirmed and applied Thiboutot's holding in Livadas v. Bradshaw, 114 S. Ct. 2068, 2083 (1994). No Justice has suggested that Thiboutot should be reexamined, and Thiboutot has come to occupy an active and vital position in the law, as petitioner recognizes. See Pet. Br. App. C. Petitioner offers no new or compelling evidence of Congress's original intent to suggest that Section 1983 no longer "means what it says" (Thiboutot, 448 U.S. at 4).¹²

In any event, in 1994, Congress twice ratified Thiboutot and its progeny -- in 42 U.S.C. 1320a-2, and then in 42 U.S.C. 1320a-10.¹³ In the text of those provisions, Congress made clear that a

¹² Petitioner's suggestion (Br. 31) that Thiboutot is "in conflict" with precedent concerning implied rights of action ignores the difference between the two inquiries:

[The implied cause of action inquiry] reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of express congressional authorization of private suits," these separation-of-powers concerns are not present in a § 1983 case.

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990) (citations omitted). Indeed, it would be inconsistent with the separation of powers to require that courts themselves find an implied right of action before giving effect to an express cause of action enacted by Congress.

¹³ Section 1320a-2 (like Section 1320a-10) provides:

In an action brought to enforce a provision of this

cause of action is available to enforce provisions of the Social Security Act consistent with this Court's precedents predating Suter v. Artist M., 503 U.S. 347 (1992), which of course include Thiboutot. See H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994) ("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 Security Act are able to seek redress in the federal courts to the extent they were able to prior to * * * Suter v. Artist M."); 140 Cong. Rec. S15,024 (daily ed. Oct. 8, 1994) (Sen. Rockefeller).¹⁴ This Court's pre-Suter precedents therefore must continue to govern the availability of suits under Section 1983 to enforce provisions of the Social Security Act.

**B. Private Enforcement Comports With Principles
Of Federalism And The Eleventh Amendment**

1. Petitioner's invocation of "principle[s] of federalism"

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] (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.

¹⁴ Congress previously had amended 28 U.S.C. 1331 to remove the amount-in-controversy requirement, predicated on Thiboutot's recognition of a Section 1983 action to enforce federal statutes. See Pub. L. No. 96-486, 94 Stat. 2369; S. Rep. No. 827, 96th Cong., 2d Sess. 5 & nn.8-9 (1980).

(Br. 24) to bar recognition of a Section 1983 action must be placed in context. Title IV-D is one of the most generous federal spending programs in existence, financing from 66% to 90% of the States' child support enforcement efforts. Indeed, most States profit from their Title IV-D programs.¹⁵ This case, therefore, is primarily about how federal money is spent. "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).

Child support enforcement, moreover, is not an area of purely local concern. Interstate cases present "one of the most difficult areas of child support enforcement." S. Rep. No. 387, supra, at 34. The mobility of absent parents makes cooperation among States and uniform national enforcement standards of critical importance. See, e.g., id. at 27; 142 Cong. Rec. H7759 (daily ed. July 17, 1996) (Rep. Roukema) (noting "absolute requirement for interstate enforcement of child support, because the current, State-based system is only as good as its weakest link").¹⁶

Finally, the administration of welfare programs is an area in which Congress itself has been responsive to the States' interests

¹⁵ In 1994, States realized \$484 million in savings, at a cost to the federal government of nearly \$1 billion. See Nineteenth Annual Report 77-78; Staff of House Comm. on Ways and Means, 103d Cong., 2d Sess., Overview of Entitlement Programs: 1994 Green Book 494-499 (Comm. Print 1994) (WMCP:103-27).

¹⁶ This case thus stands in sharp contrast to Suter, in which the Secretary, consistent with congressional intent, rejected national standards and opted to permit States substantial flexibility to tailor their efforts to the needs of each case. 503 U.S. at 360-363.

and deferred to state autonomy when it found that cause appropriate. The 1996 Act vividly demonstrates that the political process can address state concerns about excessive regulation, entitlements, unfunded mandates, and impediments to experimentation. Congress's decision in the same Act to carve Title IV-D out for more directive treatment reflects a deliberate determination that the problem of child support in this Nation can be combatted effectively only through a closely coordinated, comprehensive, and vigorously enforced federal-state program. See H.R. Rep. No. 651, 104th Cong., 2d Sess. 1331 (1996).

2. The Eleventh Amendment bars suits against States, not against state officers. Almost 90 years ago, this Court held that the Eleventh Amendment does not bar suits for injunctive relief against state officers. Ex parte Young, 209 U.S. 123, 155-157 (1908). That decision has been consistently reaffirmed. See, e.g., Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1132 (1996); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989); see also Edelman v. Jordan, 415 U.S. 651, 664-668 (1974) (Ex parte Young suit permitted to enforce provisions of Social Security Act). Respondents have not named the State of Arizona or one of its agencies as a defendant in this action. The suit is brought against a state official seeking only injunctive and declaratory relief. The suit thus falls squarely within the traditional boundaries of Ex parte Young and does not transgress

the Eleventh Amendment.¹⁷

Petitioner's reliance (Br. 26-30) on Seminole Tribe is misplaced. The Ex parte Young aspect of that decision was based on statutory construction, not constitutional limitations. 116 S. Ct. at 1133 & n.17. Because "Congress ha[d] prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right," the Court concluded that Congress did not intend to permit an Ex parte Young suit. Id. at 1132. Here, by contrast, there is no "carefully crafted and intricate remedial scheme" that would be rendered "superfluous" (id. at 1132, 1133) by permitting private enforcement under Section 1983. Unlike the statute at issue in Seminole Tribe, Title IV-D contains no alternative avenue for judicial enforcement by non-federal parties in a suit directly against the State itself, and private suits against state officials under Section 1983 in appropriate circumstances would complement the Secretary's programmatic audit and enforcement powers.

C. Title IV-D Creates Judicially Enforceable Rights

Not every violation of a federal statute constitutes the deprivation of a "right * * * secured by federal law" within the

¹⁷ Much of petitioner's argument stems from a concern that courts should not enforce Title IV-D's "substantial compliance" provision, because relief necessarily would operate against the State, not a state official. As we argue below (see p. 24, infra), however, the "substantial compliance" provision is not enforceable under Section 1983. On the other hand, a suit seeking compliance with a provision of Title IV-D that is enforceable by custodial parents and children will necessitate nothing more than the typical Ex parte Young relief: an injunction directing agency officials to perform specific duties that are spelled out in the Act and regulations.

meaning of Section 1983. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989). The statute in question must create judicially enforceable rights. Ibid.; see also Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15-30 (1981). A federal statute creates an enforceable "right" if (i) Congress intended the provision in question to benefit the putative plaintiff; (ii) the provision is binding and mandatory on the States, rather than precatory; and (iii) the right is not beyond the competence of the judiciary to enforce. Wilder, 496 U.S. at 509; Golden State, 493 U.S. at 106. All three factors weigh in favor of finding enforceable rights under Title IV-D.¹⁸

1. Needy Children And Their Custodial Parents Are Title IV-D's Intended Beneficiaries

Title IV-D's plain language identifies children and custodial parents in need of support services as the intended beneficiaries.

¹⁸ Prior to the 1988 amendments, the Secretary took the position that there was no right of action under Section 1983 to enforce Title IV-D. The Secretary has reconsidered that position in light of the amendments in 1988 and later years. Most courts that have considered the question have held that Title IV-D creates enforceable rights. See Howe v. Ellenbecker, 8 F.3d 1258, 1262-1263 (8th Cir. 1993), cert. denied, 114 S. Ct. 1373 (1994); Albiston v. Maine Comm'r of Human Servs., 7 F.3d 258, 264-268 (1st Cir. 1993); Carelli v. Howser, 923 F.2d 1208, 1210-1212 (6th Cir. 1991); King v. Bradley, 829 F. Supp. 989, 992-995 (N.D. Ill. 1993); Behunin v. Jefferson County Dep't of Social Servs., 744 F. Supp. 255, 257-258 (D. Colo. 1990); Beasley v. Harris, 671 F. Supp. 911, 920-922 (D. Conn. 1987); Davis v. McClaran, 909 S.W.2d 412, 416-417, 419-420 (Tenn. 1995), cert. denied, 116 S. Ct. 1370 (1996); see also Wehunt v. Ledbetter, 875 F.2d 1558, 1568-1577 (11th Cir. 1989) (Clark, J., dissenting), cert. denied, 494 U.S. 1027 (1990). But see Wehunt, 875 F.2d at 1565-1566; Mason v. Bradley, 789 F. Supp. 273, 276-277 (N.D. Ill. 1992); Oliphant v. Bradley, No. 91 C 3055, 1992 WL 153637, at *5-*7 (N.D. Ill. Feb. 20, 1992).

Congress enacted the program "[f]or the purpose of enforcing the support obligations owed by absent parents to their children and the spouse * * *, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children." 42 U.S.C. 651. Title IV-D offers free (or highly subsidized) child support services to all persons in need of such assistance,¹⁹ and individuals have a right to receive those services regardless of whether they will ultimately prove beneficial.²⁰ Thus, the rights secured by Title IV-D are similar to a statutory right to educational or medical services, which individuals may receive even if they may not actually learn or enjoy better health as a result. See, e.g., Smith v. Robinson, 468 U.S. 992, 1010 (1984). The right to child support services has recently taken on added importance because the 1996 Act's five-year cap on welfare benefits makes the opportunity for families to

¹⁹ The application fee charged non-AFDC families is nominal and often paid by the State. 42 U.S.C. 654(6); 45 C.F.R. 302.33. According to its state plan, Arizona charges a \$1 fee, which the State pays, and does not recoup collection costs from the family.

²⁰ Many of Title IV-D's provisions speak in terms of state obligations running to individuals. See, e.g., 42 U.S.C. 654(4) ("State will" provide paternity services to "each child"), 654(5) (individual notification and right to request review of order), 654(6) (child support and paternity services available to any individual), 657 (outlining distribution of collections to families), 1996 Act, §§ 304(a), 312(b), 110 Stat. 2205, 2208 (to be codified at 42 U.S.C. 654(12), 654b(b)(4)) (right of "individuals" to notice of proceedings and information about support collected).

secure alternative income sources particularly valuable.²¹

The legislative history confirms that Title IV-D is "a bill of rights for children" and custodial parents. 121 Cong. Rec. 26,541 (1975) (Sen. Nunn). The 1975 Senate Report declared that "children have the right to receive support from their fathers"; that Title IV-D will "help children attain this right, including the right to have their fathers identified so that support can be obtained"; and that Title IV-D's vigorous implementation will "deter[] [parents] from deserting their families to welfare and children will be spared the effects of family breakup." S. Rep. No. 1356, supra, at 42. The 1984 amendments reaffirmed Congress's commitment to children and their custodial parents. H.R. Rep. No. 527, supra, at 29 (Title IV-D is "aimed at serving children"); S. Rep. No. 387, supra, at 6. Finally, while the 1996 Act provides that some provisions of the Social Security Act do not create individual entitlements (1996 Act, § 103(a)(1), 110 Stat. 2113 (to be codified at 42 U.S.C. 601(b)), similar language with respect to Title IV-D was not enacted. See H.R. 4, supra. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

²¹ Petitioner's reliance (Br. 16-17) on Linda R.S. v. Richard D., 410 U.S. 614 (1973), is misplaced. Respondents do not seek to compel state officials to bring a criminal prosecution or civil action, and they do not rely on a non-statutory interest in child support services. Respondents instead seek to enforce a federal statutory right to services due from the State, even if those services may not, in turn, succeed in obtaining support payments. Cf. id. at 617 n.3 ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

Congress acts intentionally and purposely in the disparate inclusion or exclusion." Brown v. Gardner, 115 S. Ct. 552, 556 (1994); accord John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 100 (1993) ("we are mindful that Congress had before it, but failed to pass, just such a scheme").

Petitioner is wrong in arguing (Br. 15, 20-21, 26) that Congress enacted Title IV-D primarily to benefit the public fisc by reducing welfare expenditures. Nothing in Title IV-D's stated purpose or text evinces such a narrow focus, and the requirement that States offer their services to non-AFDC beneficiaries (who now outnumber AFDC beneficiaries, Nineteenth Annual Report 118) refutes that contention. The 1984 amendments responded to congressional concern that States measured their success "solely in terms of welfare savings," since "[t]he objectives behind the program are greater than merely recouping federal and state AFDC expenditures." H.R. Rep. No. 527, supra, at 29-30. Congress intended Title IV-D to effectuate "the larger societal responsibility for making sure that all children receive financial support from both their parents to the fullest extent possible." Id. at 30; see also S. Rep. No. 1356, supra, at 42 (protection of children is "more important[]" than potential financial benefit to government); 130 Cong. Rec. 9843 (1984) (Sen. Dole). The 1996 Act reaffirms that Title IV-D's "fundamental goal * * * is to increase the financial security of children." H.R. Rep. No. 651, supra, at 1440.

Certain of Title IV-D's provisions, however, do not give rise to enforceable rights because they do not provide for specific

child support services or confer individual benefits. See Golden State, 493 U.S. at 106 (plaintiff must show that "the provision in question" benefits her). In particular, the requirement that a State operate its child support program in "substantial compliance" with Title IV-D does not create a right running to individuals. Rather, "substantial compliance" establishes a floor below which a State program's performance warrants the assessment of financial penalties by the federal government. See, e.g., Albiston v. Maine Comm'r of Human Servs., 7 F.3d 258, 266 (1st Cir. 1993) (substantial compliance "is not * * * the measure of what the regulations require; it is intended to measure how great a failure to meet those requirements should cause funds to be cut off") (quoting Withrow v. Concannon, 942 F.2d 1385, 1387 (9th Cir. 1991)); cf. Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 663-664 (1985). Indeed, the phrase appears in Title IV-A and IV-D only in penalty provisions. See 42 U.S.C. 652(g); 1996 Act, § 103(a)(1), 110 Stat. 2145 (to be codified at 42 U.S.C. 609(a)(8)).²² Because achieving "substantial compliance" on a program-wide basis is not a distinct child support service for any individual child or parent, the court of appeals erred in finding that standard enforceable under Section 1983. See Pet. App. 14a-15a, 18a.

²² Prior to the 1996 Act, a reference to "substantial compliance" was included in the provision obligating States participating in AFDC to maintain a Title IV-D program. 42 U.S.C. 602(a)(27). The 1996 Act reconfirmed that "substantial compliance" is a penalty trigger by deleting the phrase from Section 602(a)(27) and confining it to the penalty provision. 1996 Act, § 103(a)(1), 110 Stat. 2145 (to be codified at 42 U.S.C. 609(a)(8)).

2. Title IV-D's Requirements Are Clear And Mandatory

a. Because the enforceable provisions of Title IV-D are concrete, mandatory, and binding, they provide States with ample notice of the services they must provide as a condition of receiving federal funds. See Golden State, 493 U.S. at 106. Title IV-D lists 33 specific requirements that state plans "must provide" for the State to receive Title IV-A and IV-D funds. 42 U.S.C. 654 (e.g., paternity establishment, parent locator service, payment distribution order, collection of overdue child support, interception of federal income tax refunds; services "shall" be made available to non-Title IV-A families). Title IV-D also lists 22 laws that States "must have in effect" (42 U.S.C. 666), and provides that States "shall implement" the procedures under those laws (42 U.S.C. 654(20)); see also 42 U.S.C. 657 (directing how collections "shall be distributed"), 667 (States "must establish guidelines" for child support awards). Likewise, Title IV-D provides for the establishment of time limits within which States "must accept and respond to" requests for services and "must distribute" funds collected. 42 U.S.C. 652(h) and (i). Compare Wilder, 496 U.S. at 512 (requirement that state plan "must provide" for specified manner of payment is mandatory and binding).²³

By contrast, when Congress wished only to encourage state action or to make certain Title IV-D program components and services optional, it spoke in non-binding, precatory terms. See

²³ The regulations speak in equally mandatory terms. See 45 C.F.R. Pts. 302 (listing what States "shall provide"), 303 (listing services States "must" provide and timeframes that "must" be met).

42 U.S.C. 654(21)(A) (imposition of fees is "at the option of the State"), 668 (States "encouraged" to adopt simplified civil process for paternity establishment in contested cases); 1996 Act, § 904, 110 Stat. 2349 ("sense of the Senate" that States should pursue efforts and adopt pilot programs to collect support from unemployed parents or those who refuse to pay); Pub. L. No. 98-378, § 23(a)(2) and (5), (b)(1), 98 Stat. 1329-1330 ("sense of the Congress" that States should develop measures to enhance enforcement).

b. Title IV-D's requirements are not only mandatory, but are also spelled out in concrete and specific terms so that States know precisely what is expected of them. Cf. Suter, 503 U.S. at 359-360 (no enforceable right where neither federal statute nor regulations set forth contours of state duties). Title IV-D prescribes in extensive detail the precise components of plan requirements, how services must operate, timeframes for performance, the required content of state laws and administrative procedures, and a specific hierarchy for payment distributions. See 42 U.S.C. 654, 657, 666, 667; 1996 Act, §§ 313(b), 351, 110 Stat. 2210, 2211-2212, 2239 (to be codified at 42 U.S.C. 653a(b), (e) and (g), 666(a)(10)). The Secretary's regulations offer even more detailed direction, setting precise time limits for many administrative actions and mapping out specific administrative responses to a variety of child support service requests and problems. 45 C.F.R. Pts. 302, 303.²⁴

²⁴ Petitioner cannot claim a lack of notice that she would have to comply with the Secretary's regulations. The statutory text notifies her that she will be bound by regulations (e.g., 42 U.S.C. 652(f), (h) and (i), 654(3), (9) and (14)), and that the State's plan must "provide that the State will comply with such

Unlike the statutory provision in Suter, then, Title IV-D demands far more of States than the mere submission of a plan that duly recites the obligatory components listed in the Act. Cf. Suter, 503 U.S. at 358; see also 42 U.S.C. 1320a-2 and 1320a-10 (directing application of pre-Suter precedent). Title IV-D specifies what state child support services and laws shall be "in effect." 42 U.S.C. 654, 657, 666, 667. Indeed, in enacting Title IV-D in 1975, Congress expressed frustration that previous legislation had entailed little more than a "perfunctory review [by the Secretary] of the State plan material submitted by the State to see that it contains the statement that there will be a child support program which complies with the law." S. Rep. No. 1356, supra, at 47. Congress made clear that such "paper compliance would no longer suffice." Ibid.²⁵

Nor can petitioner fairly claim that Title IV-D requires only "substantial compliance" with its terms. As noted above (see p.

other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments." 42 U.S.C. 654(13) (as amended by 1996 Act, § 395(d)(1)(D), 110 Stat. 2259). Even without such provisions, the statutory text is not the sole source of binding obligations enforceable under Section 1983. Suter, 503 U.S. at 359; Wilder, 496 U.S. at 519; School Bd. of Nassau County v. Arline, 480 U.S. 273, 286 n.15 (1987); cf. Dennis v. Higgins, 498 U.S. 439, 447 n.7 (1991); Golden State, 493 U.S. at 112 (enforceable right implicit in statutory language).

²⁵ Title IV-D leaves no doubt that compliance with the Act's specific mandates is a condition of receiving federal funds. 42 U.S.C. 603(h) (federal funds reduced if program fails to comply substantially), 652(a)(4) and (g) (conditions for Title IV-A and Title IV-D funds), 655(a)(1); 45 C.F.R. Pt. 301 (same); cf. Pennhurst, 451 U.S. at 24-25 (no right where States were unaware that substantive conduct was a condition of federal funding).

24, supra), "substantial compliance" governs the assessment of penalties against States, and the definition of "substantial compliance" alerts States that it does not express the full measure of their obligations under the program. 42 U.S.C. 603(h)(3) (contrasting "substantial compliance" with a State's "full compliance with the requirements of this part," and characterizing any failure to be in full compliance as "noncompliance"); see also Bennett, 470 U.S. at 663 ("substantial compliance" provision in education program is prospective penalty that does not limit duty to comply with statutory conditions); Albiston, 7 F.3d at 266 ("the 'substantial' compliance required to avoid administrative penalties * * * is independent of, and narrower than, the State's direct obligation to AFDC recipients") (citing Wilder, 496 U.S. at 514-515 & n.11).²⁶

In short, Judge Kleinfeld's assertion in dissent below that Title IV-D requires only that States "do a pretty good job" (Pet. App. 37a) is irreconcilable with Congress's provision of major federal funding conditioned on compliance with ever-increasing and detailed statutory directives. Congress's enduring commitment to "the country's most neglected children" (Child Support and the Work Bonus: Hearing on S. 1842 & S. 2081 Before the Senate Comm. on Finance, 93d Cong., 1st Sess. 59 (Sept. 25, 1973)) demands more

²⁶ See also 59 Fed. Reg. 66,212 (1994) ("States are required to meet all Federal requirements contained in program regulations, whether or not the requirements are included under [the regulatory definition of 'substantial compliance']."); 50 Fed. Reg. 19,623 (1985); 49 Fed. Reg. 36,773 (1984) ("substantial compliance" should not be "construed to imply that it would be permissible for States to neglect or exclude certain cases or classes of cases").

than such casual attention to the task.

c. Petitioner does not dispute the mandatory nature of Title IV-D's language. Nor does she claim ignorance of the character and caliber of child support services that Title IV-D requires. What petitioner claims instead (Br. 7, 15-16) is that she did not know that those requirements would be enforceable under Section 1983. This Court, however, has required only that the statutory "provision in question" create binding obligations, Golden State, 493 U.S. at 106, and that Congress "express clearly its intent to impose conditions on the grant of federal funds," Pennhurst, 451 U.S. at 24. This Court has never required Congress, in addition, to notify state officials in advance that a Section 1983 action will be available. Bell, 461 U.S. at 790 n.17 (Pennhurst concerned "imposing an unexpected condition for compliance," not "the remedies available against a noncomplying State"). None of the statutes at issue in Wilder, Golden State, Thiboutot, or other cases in which this Court found an action under Section 1983 available, contained such language.

In any event, Section 1983's text and this Court's cases construing it independently provide sufficient notice. States, therefore, are fairly charged with the knowledge that Section 1983 "must be broadly construed," Golden State, 493 U.S. at 105, and that a cause of action under Section 1983 "remains a generally and presumptively available remedy for claimed violations of federal law," Livadas, 114 S. Ct. at 2083. No serious federalism or comity benefit would be gained by requiring Congress to furnish still

further and particularized advance notice to state officials that admittedly clear conditions on federal funding may be enforced under Section 1983, especially since such suits would result only in injunctive or declaratory relief requiring state officials to comply with those conditions in the future.

Nor would petitioner's proposal aid in identifying the "rights" secured by federal law; a provision in Title IV-D confirming the existence of a Section 1983 action would leave open that question. Even when a federal law does create enforceable rights, however, petitioner wants to require that Congress affirmatively confirm that a Section 1983 action is available. The rule is exactly the opposite: "[W]e recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy." Wilder, 496 U.S. at 509 n.9 (emphasis added); see also Livadas, 114 S. Ct. at 2083; Golden State, 493 U.S. at 107 (burden on defendant to show that Congress has withdrawn Section 1983 remedy). Congress has not done so here. See pp. 33-36, infra.

Petitioner's proposal is also reminiscent of the failed argument that an express right of action under Section 1983 is available only if an implied right of action would be available. Wilder, 496 U.S. at 508 n.9. As Wilder recognized, Congress has already told the States, through Section 1983, that a cause of action is available to enforce rights created by federal law. Congress said it again (twice) in 1994, with particular reference to enforcement of the Social Security Act, when it enacted 42

U.S.C. 1320a-2 and 1320a-10. Nothing in principles of federalism suggests that it would be appropriate for this Court to compel a coordinate Branch to say again what it has said three times before. Congress, after all, can always "affirmatively withdraw[] the remedy." Wilder, 496 U.S. at 509 n.9.

3. Some, But Not All, Of Title IV-D's Child Support Enforcement Provisions Are Judicially Enforceable

A statutory right will not be found if its enforcement "would strain judicial competence." Livadas, 114 S. Ct. at 2083. Many of the requirements that Title IV-D imposes on state child support services are straightforward administrative and ministerial tasks of a sort that courts can and do routinely enforce. For example, the requirement that a State pay the support it collects to non-Title IV-A families, 42 U.S.C. 657, is a specific, direct, and non-discretionary duty that courts are fully capable of enforcing.²⁷ Likewise, due to developments in state law and the automation of government records, the requirement that States implement income withholding to enforce child support orders is mechanical and virtually ministerial, at least in cases (like respondents') in which the father and his source of income have already been located and the support order established. 42 U.S.C. 666(a)(1) and (b); 45 C.F.R. 303.100.

By contrast, Congress has expressly preserved the States'

²⁷ The former requirement that States pay the first \$50 of child support collected each month to an AFDC family fell in the same category. 42 U.S.C. 602(a)(8)(A)(vi), 657(b)(1), repealed 1996 Act, § 302(a), 110 Stat. 2200 (to be codified at 42 U.S.C. 657(a)(2)).

discretion with respect to other aspects of child support enforcement. For example, although Title IV-D requires States to have laws that permit the imposition of liens, state tax refund intercepts, bond requirements, and references to consumer credit reporting agencies to collect overdue support (42 U.S.C. 666(a)(3), (4), (6) and (7)), States retain discretion to decide in individual cases whether use of those procedures will "carry out the purposes of this part or would be otherwise inappropriate in the circumstances" (42 U.S.C. 666(a)). Because the propriety of such measures "will obviously vary with the circumstances of each individual case," and because Congress left those enforcement decisions to the States, respondents would not have a right under Section 1983 to force a child support agency to take one of those measures. Suter, 503 U.S. at 360. Similarly, Title IV-D leaves to the State the discretion to "determin[e] when it would be appropriate to take an enforcement action in the future" (45 C.F.R. 303.6(c)(4)), preserving the State's traditional prosecutorial discretion in deciding which cases to bring to court. Decisions of that sort are not readily susceptible to judicial review or enforcement. See Heckler v. Chaney, 470 U.S. 821, 831-835 (1985); but cf. Dunlop v. Bachowski, 421 U.S. 560 (1975).

In short, whether Title IV-D creates a judicially enforceable right depends upon the nature of the provision a plaintiff seeks to enforce. Because the court of appeals did not order particular relief, it is unnecessary for this Court to parse Title IV-D and its implementing regulations to determine which provisions create

rights and which do not, and what remedy would be appropriate for a violation.²⁸ This Court may leave it to the district court on remand to determine which claims are susceptible to judicial enforcement, based on the facts alleged, an evaluation of the applicable statutory and regulatory provisions, and traditional notions of prosecutorial discretion.

D. Congress Has Not Foreclosed Actions Under Section 1983

Even if a federal law creates private rights, judicial enforcement is not available under Section 1983 if Congress has specifically foreclosed that avenue of relief. Golden State, 493 U.S. at 106; see also Robinson, 468 U.S. at 1009-1013; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-20 (1981). This Court, however, "'do[es] not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.'" Wilder, 496 U.S. at 520 (quoting Wright v. City of Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 423-424 (1987)). Here, nothing in Title IV-D's text or legislative history suggests that Congress withdrew a Section 1983 remedy, cf. Robinson, 468 U.S. at 1009 (statutory text and legislative history directed that claims be adjudicated through special statutory scheme),²⁹ and individual

²⁸ At least some of respondents' claims involve enforceable rights. See, e.g., Complaint ¶¶ 9-23, 29-39, 42-51, 56-61 (J.A. 7-9, 10-11, 12-15) (wage withholding, parent locator searches, commencing interstate collections, administrative paternity establishment).

²⁹ The courts have divided on whether the Secretary's enforcement powers preclude a Section 1983 action. See Howe, 8 F.3d at 1263 (not foreclosed); Albiston, 7 F.3d at 268-269 (same);

beneficiaries have no alternative means of vindicating their own Title IV-D rights. Cf. ibid.; Sea Clammers, 453 U.S. at 13-18.³⁰

The Secretary's triennial audit powers do not displace a private cause of action under Section 1983. As petitioner repeatedly notes, the Secretary audits for "substantial compliance" on a programmatic basis, rather than to vindicate the rights of individual applicants for services. The nature of the Secretary's task, combined with its infrequency, precludes characterizing it as sufficiently "comprehensive" to foreclose a Section 1983 action. Wilder, 496 U.S. at 521-522; Wright, 479 U.S. at 428 ("generalized powers" "to audit, enforce annual contributions contracts, and cut off federal funds" are "insufficient to indicate a congressional intention to foreclose § 1983 remedies"). In the Secretary's judgment, under the principles and limitations set forth above,

King, 829 F. Supp. at 995 (same); Behunin, 744 F. Supp. at 257-258 (same); Davis, 909 S.W.2d at 417-419 (same); see also Wehunt, 875 F.2d at 1575-1577 (Clark, J., dissenting) (same); Carelli, 923 F.2d at 1212-1216 (foreclosed on particular facts); Oliphant, 1992 WL 153637, at *9-*10 (foreclosed).

* While beneficiaries could still enforce their support rights against the absent parent under state law, that would do nothing to vindicate their federal right under Title IV-D to receive child support services from the State (just as a plaintiff's ability to purchase educational or medical services in the marketplace does not constitute an adequate substitute for a right to educational or medical services from the State). Furthermore, the state IV-D agency has access to enforcement tools and sources of information that a beneficiary or private attorney would not. Arizona law does allow suits, under some circumstances, to compel agency action, Ariz. Rev. Stat. Ann. §§ 12-820 to 12-826 (1992 & Supp. 1994), but not for the "exercise of an administrative function involving the determination of fundamental governmental policy," id. § 12.820.01(A)(2) (1992). In any event, the availability of a parallel state court action does not preclude an action under Section 1983. Cf. Patsy v. Board of Regents, 457 U.S. 496, 506-507 (1982).

private enforcement of those provisions of Title IV-D that create enforceable rights would furnish an important complement to the Secretary's necessarily macroscopic oversight of the States, by ensuring that the States carry out the specific duties to children and custodial parents that they have voluntarily assumed under Title IV-D, while at the same time affording protection for the States in those areas Congress has left to their discretion.³¹ Albiston, 7 F.3d at 269 (audit "protect[s] important federal interests * * * [in] overall performance," while Section 1983 "safeguards the individual AFDC recipient's interests in the timely receipt of the mandated federal benefits").³²

³¹ This is not to suggest that States are generally lax in their enforcement of child support obligations. Under Title IV-D, States have become more aggressive and successful in establishing orders and collecting support. See generally HHS, Child Support Enforcement: FY 1995 Preliminary Data Report 13-36 (May 1996).

³² Concerns voiced by petitioner and her amici that allowing actions under Section 1983 will open the litigation floodgates and divert valuable resources are misplaced. The majority of courts that have addressed the issue have already approved Section 1983 actions (see n.18, supra), without any of those dire predictions coming to pass. By way of comparison, no such avalanche followed this Court's decision in Edelman, which held that individuals can sue under Section 1983 to force States to comply with federal time limits in administering the former Aid to the Aged, Blind and Disabled program. Indeed, some of the most successful and efficient Title IV-D programs are in States where Section 1983 actions have been permitted. Nineteenth Annual Report 10-11. Principles of standing and ripeness may prevent claims concerning inconsequential deviations from technical statutory and regulatory requirements that resulted in no real injury to persons seeking services. Cf. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). In addition, courts will always retain their traditional equitable discretion to withhold relief when the departure from federal law is inconsequential or the state default has been corrected. See Withrow, 942 F.2d at 1388; Haskins v. Stanton, 794 F.2d 1273, 1277 (7th Cir. 1986). And limitations on class actions under Fed. R. Civ. P. 23 must, of course, be enforced. See also Pub. L. No. 104-

Common sense also dictates that the Secretary's supervisory audit powers do not foreclose private enforcement. Congress has spent the last 20 years legislating in ever-increasing detail the standards for state child support services, and it has given the States billions of dollars of the taxpayers' money expressly conditioned on their compliance with those standards. Given the amount of money allocated and the breadth and depth of regulation, there is no basis for believing that Congress, in seeking to protect the "millions of women and children who are victimized by the nonpayment of child support" (129 Cong. Rec. 33,037 (1983) (Rep. Biaggi)), intended to rely entirely on a federal audit that occurs only once every three years and that (at least by petitioner's characterization) disregards whether fully one-fourth of Title IV-D's targeted beneficiaries is entirely neglected by the system.

134 § 504(a)(7), 110 Stat. 1321-53 (barring use of funds furnished by Legal Services Corporation to support class actions). Should litigation nevertheless prove burdensome, Congress can readily respond by imposing an exhaustion requirement or otherwise limiting the availability of Section 1983 in this context. Cf. 42 U.S.C. 1997e (imposing exhaustion requirement on prisoner suits). Finally, if the specific requirements and timetables that Congress has enacted and strengthened under Title IV-D prove unworkable in practice, that is a problem for Congress to fix by amending Title IV-D itself.

CONCLUSION

The judgment of the court of appeals should be affirmed, with provision for remand to the district court for further proceedings with respect to respondents' particular claims.

Respectfully submitted.

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No. 95-1441

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BLESSING,
Petitioner,

v.

FREESTONE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE
AMERICAN PUBLIC WELFARE ASSOCIATION AND THE
NATIONAL CHILD SUPPORT ENFORCEMENT
ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BLESSING,
Petitioner,
v.
FREESTONE, *et al.,*
Respondents.,

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE
**AMERICAN PUBLIC WELFARE ASSOCIATION
AND THE NATIONAL CHILD SUPPORT ENFORCEMENT
ASSOCIATION**
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER

INTEREST OF *AMICI CURIAE*

Pursuant to Court Rule 37, *amici curiae* respectfully submit this brief in support of Petitioner's request that this Court overturn the Ninth Circuit decision that, by creating a private right of action, would immobilize national child support enforcement programs and harm the children whom these programs serve. Consent to the filing of this brief has been granted by counsel for all parties and letters indicating such consent have been filed with the Clerk of this Court.

The American Public Welfare Association ("APWA") is a nonprofit, bipartisan organization of individuals and State and local agency administrators concerned with government human service programs. APWA's members include all State and many territorial human service agencies, more than 1,200 local and federal agencies, and several thousand individuals who work in or otherwise have an interest in government human service programs. APWA's National Council of State Human Service Administrators represents the interests of State IV-D program directors through its Child Support Enforcement Subcommittee. APWA's mission is to assist State human service directors in developing and implementing sound public welfare policy. As an organization of experts in this field, APWA submits this *amici curiae* brief to expose the practical, real world problems that the Ninth Circuit's decision both ignores and exacerbates.

The National Child Support Enforcement Association ("NCSEA") is a nonprofit association founded in 1952. Its mission is to promote and protect the well-being of children and their families through the effective enforcement of child support obligations. NCSEA's membership of more than 2,400 includes judges, court administrators, private and legal services attorneys, federal policymakers, social workers, child support enforcement caseworkers, family support councils, State and county child support agencies and probation departments, policy "think tanks" and child support advocates. Its membership also includes corporations which supply products and services that these individuals and entities need to ensure that children receive the support they deserve from both parents as efficiently and effectively as possible. NCSEA works with Congress and the federal Office of Child Support Enforcement to ensure passage and implementation of effective child support laws and regulations. It also serves as a training and educational organization for its members, offering training conferences and smaller seminars on a wide range of child support topics.

SUMMARY OF ARGUMENT

In *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995), the Ninth Circuit found that custodial parents could bring a class action suit under 42 U.S.C. § 1983 against the State of Arizona for services received through the State's child support enforcement ("CSE") program, administered under Title IV-D of the Social Security Act ("IV-D").¹ The Ninth Circuit's decision would entitle families receiving child support enforcement services from a State to sue the State for its performance in any phase of the child support enforcement ("CSE") program. This decision usurps a comprehensive oversight scheme that Congress put in place when it designed the program. It also thrusts federal courts into the middle of appropriation decisions made by State legislatures and the day to day minutiae of administering the IV-D program. The Ninth Circuit's decision also creates an unattainable expectation of perfect performance and perfect results by States in every case.

"Child support enforcement" is a deceptively simple phrase for a program that, in reality, calls for execution and repetition of a complex sequence of prerequisite activities, including locating absent parents, establishing paternity, establishing and enforcing child support obligations, and collecting child support payments currently due and back payments (or "arrearages"). Like an intricate set-up of dominoes, complete success cannot be achieved unless each and every piece falls correctly into place, allowing the next step to go forward. Yet none of these activities can be performed in a vacuum, but must instead be conducted against a tide of burgeoning social problems (such as increasing numbers

¹ In 1975, Congress responded to the growing number of parents failing to pay child support by creating the Child Support Enforcement Act in Title IV-D of the Social Security Act, 42 U.S.C. § 651-699. (Public Law 93-647). The 1975 legislation authorized federal matching funds to be used by States to help enforce support obligations of noncustodial parents by accomplishing a series of necessary activities. The program is often called simply "IV-D" in reference to the section number corresponding to its statutory placement in the Social Security Act.

of single parent families), and complexities related to interstate enforcement and the involvement of third parties (such as noncustodial parents and private sector employers unfamiliar with assisting in a public sector program) that make enforcement efforts even more difficult.

The Ninth Circuit decision fails to acknowledge the grim reality that, despite optimum processes and resources, Herculean efforts, and tremendous luck, it can still be impossible to collect child support from an alleged father, for whom only a first name is known, who has moved multiple times, and who, when finally discovered, is in prison with no income, has crossed jurisdictional lines, or has simply quit his job to avoid making payments before he moves again to renew the vicious cycle.² It may be equally impossible to collect from a wealthy professional, who, after a divorce, denies paternity, hides assets, moves from State to State for years to avoid paying child support, and owes his children hundreds of thousands of dollars.³ Sadly, examples such as these are all too common.

The Ninth Circuit decision will only exacerbate the difficulties of collecting child support. Creating a right of action that allows custodial parents to file a private lawsuit against the State whenever a parent alleges that the State has not satisfactorily collected the support that the noncustodial parent owes, thus creating a 100 percent compliance standard, will harm all Title IV-D beneficiaries because the time, effort, and money

² One noncustodial parent's extensive efforts to avoid his child support obligation included quitting a job to avoid a wage withholding order, hiding income, failing to obey 12 consecutive court orders to appear, moving to at least three States, and assuming false identities. He was assisted in these activities by his mother. *Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support, Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) (statement of Martha Barger, Victimized Parent, Wheaton, IL).

³ Another "deadbeat dad" who has received national press attention recently earned more than \$300,000 a year, yet failed to pay about \$640,000 in child support while living in a number of States and Canada. Orange County Register, June 3, 1996, at 22.

that States will be forced to divert to defend these actions will—by necessity—be taken from honest efforts to serve the millions of families that currently benefit from this growing program that is designed to force irresponsible parents to provide for their children. These children will suffer from overburdened IV-D programs that will be significantly less capable of serving them. Therefore, this Court should reverse the Ninth Circuit decision.

ARGUMENT

I. EVEN IF A STATE PERFORMS EVERY CHILD SUPPORT ENFORCEMENT ACTIVITY PERFECTLY, ALL THE CHILD SUPPORT DUE IN EVERY CASE MAY NOT BE COLLECTED BECAUSE OF THE REAL WORLD PROBLEMS THAT THE NINTH CIRCUIT IGNORES.

On the surface, getting parents to take responsibility for their own children might seem to be a relatively easy objective. In reality, however, this "easy" objective can prove virtually unattainable. Indeed, notwithstanding Title IV-D's elaborate system of plans, policies and procedures, the irrefutable fact remains that collections are not always possible, as evidenced by the national collection rate of 18 percent.⁴ Why is enforcement so difficult? The most significant reason, and the factor that makes the Ninth Circuit's decision unworkable, is that, at every juncture in this complex and massive program, States run into any number of external variables that are outside their control, yet can drive the outcome and, in some cases, make enforcement impossible.

⁴ Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Child Support Enforcement, Nineteenth Annual Report to Congress, for the Period Ending September 30, 1994*, at 28 (1994) [hereinafter *Nineteenth Annual Report to Congress*].

To understand the number of external variables on which enforcement hinges, it is important to first understand the size and scope of the IV-D program and the complex and involved nature of the child support enforcement process.⁵ The Title IV-

⁵ The Title IV-D child support process can follow many different paths and involve many different steps, which may approximate the following: (1) first, assuming that the custodial parent decides to turn to government assistance rather than the many other available options, a custodial parent must fill out an application for services. Within 20 days of receiving the application, a child support worker must open a case by establishing a case record. The worker will contact the custodial parent for an intake interview, at which the worker gathers basic data about the custodial parent and child and as much information about the noncustodial parent as possible; (2) if the location of the noncustodial parent is unknown, the worker begins to use the information the custodial parent has given to search the databases available to locate the other parent (such as employment records, motor vehicle records, tax records, and many other locator tools); (3) once the worker has located the noncustodial parent, the worker will initiate paternity establishment proceedings and establish a support order or enforcement proceedings, depending on the stage at which a case enters the system; (4) if the child has no legal father, within 90 days of locating the alleged father, the worker must summon him to court for paternity establishment and child support proceedings. In most States, this requires the State to make personal service of the notice of proceedings on the alleged father. At the hearing, the court may order the mother, alleged father and child to undergo genetic testing before making a paternity determination. If the alleged father fails to appear for the hearing and service was properly made, the court can enter a default judgment of paternity against him and proceed to establish a support order; (5) if paternity has already been established, within 90 days the worker must initiate proceeding to establish a support order, if none exists. This too requires the worker to make service—usually personal—on the noncustodial parent of the hearing to establish a support order. At that hearing the court will use the State child support guidelines to determine the amount of support and enter an order in that amount. If the noncustodial parent fails to appear, the court may enter a default order based on the information it has before it about both parents' financial situations; (6) upon entry of an order, the IV-D agency begins collecting the support and distributing all or part of it to the custodial family; (7) in seeking a support order, the State must also ask the court to order the noncustodial parent to provide group health coverage for the child if it is available; (8) to enforce the order, the worker must first try to implement a wage assignment, so that

D program currently is a massive undertaking that provides support enforcement services to families who receive public assistance,⁶ families who do not receive public assistance but apply for services,⁷ families that have children in foster care,⁸ families that receive medical assistance,⁹ and families that reside in other States.¹⁰ State programs may be called upon to establish paternity for children who have no legal father, establish child support orders for children who are not living with both parents, collect the child support ordered by the courts for the custodial family, find assets of the noncustodial parent to satisfy the support obligation if regular support payments cease, distribute the child support collected to the custodial family, modify the

the employer will deduct the child support from the noncustodial parent's paycheck. The success of this activity hinges on how conscientious the employer is about reporting the identities of its employees (both long-term, and in some States, newly-hired) and about deducting the support and sending it to the IV-D agency; (9) any time the noncustodial parent changes jobs, the worker will have to repeat this process, and get the new employer to implement the wage assignment; (10) if the support owed cannot be collected through a wage assignment, the child support worker must find other sources of income using locator tools such as unemployment benefits, workers compensation payments, bank accounts, tax refunds, lottery winnings, and rental receipts; (11) modification of orders, based on reviews that must be conducted every three years, requires new support orders that take into account the current financial situation of both parents; and (12) if the noncustodial parent is out-of-state, different locator tools must be used and difficult jurisdictional issues are raised.

⁶ 42 U.S.C. § 654.

⁷ IV-D services are available to all applicants without limitation. This means that if a millionaire falls behind in child and spousal support, the former spouse can receive IV-D services, either free or upon payment of an application fee up to \$25. 42 U.S.C. § 654(6); U.S. House of Representatives, Ways and Means Comm., *1994 Green Book, Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, 103d Cong., 2d Sess. 459 (1994) [hereinafter the *1994 Green Book*].

⁸ 42 U.S.C. § 654.

⁹ Id.

¹⁰ Id.

child support orders as the noncustodial families' situations change, and locate noncustodial parents who may not want to be found.

Consequently, any single case can require that the State CSE program perform hundreds of individual actions over the term of the case. Successfully navigating through this maze of activity is no small feat; in addition to balancing a number of concurrent activities, caseworkers must also interact with a number of case participants who have competing priorities.¹¹ In addition to the case principals—the child, custodial parent, and noncustodial parent—delivery of child support enforcement services may also involve the executive,¹² legislative,¹³ and judicial agencies¹⁴ of State and local government (such as tax collection agencies), the courts and district attorneys, and private institutions (such as banks, employers, and credit bureaus).¹⁵

The following section reveals a mere sample of the most common and frequent problems that Title IV-D programs encounter that make the Ninth Circuit's decision unworkable.

¹¹ During its "lifespan, a case could involve dozens of employers, several private attorneys, court staff, financial institutions, welfare eligibility workers, even interested public officials." *Child Support Enforcement: The Federal Role, Hearings Before the Subcomm. on Federal Services, Postal Service, and Civil Service of the Senate Comm. on Government Affairs*, 103d Cong., 2d Sess. (statement of Pat Addison, Program Specialist, Commonwealth of Virginia, Dept. of Social Services, Division of Child Support Enforcement) [hereinafter Statement of Addison].

¹² When child support enforcement activities are handled through an administrative proceeding.

¹³ Legislatures make program funding decisions.

¹⁴ When child support enforcement activities are handled through a judicial proceeding.

¹⁵ Federal law calls for States to use several enforcement tools that require interaction with other private and public entities. These include State and federal tax refund offset procedures, unemployment compensation offset procedures, liens against real and personal property for overdue support amounts, State tax refund withholding, reporting overdue support owed to consumer credit bureaus, and requiring bonds or other guarantees to secure overdue payments. *1994 Green Book*, at 469-470.

A. Serving a Growing CSE Caseload.

The CSE caseload increased 180 percent between 1980 and 1992, from 5.4 million to 15.2 million.¹⁶ In fiscal year 1994 the IV-D caseload was composed of 18.6 million cases.¹⁷ In a 1992 study of 136 local child support offices, the U.S. General Accounting Office ("GAO") found that overall caseloads per worker nationwide equal or even exceed 1,000 cases at any one time.¹⁸ None of these of cases can be resolved through a single activity and no two cases are ever identical. Many CSE cases may also remain active for decades, depending on State law and federal case closure rules.¹⁹ A single case may be in the system for many years, until the child reaches the State's age of majority.²⁰

¹⁶ *Child Support Enforcement; Federal Efforts Have Not Kept Pace With Expanding Program, Hearings Before the Subcomm. on Federal Services, Post Office and Civil Service of the Senate Comm. on Governmental Affairs*, 103d Cong., 2d Sess. (1994) (statement of Joseph F. Delfico, Director, Income Security Issues, U.S. General Accounting Office) [hereinafter Statement of Delfico].

¹⁷ *Nineteenth Annual Report to Congress*, at 27.

¹⁸ General Accounting Office, *Interstate Child Support: Wage Withholding Not Fulfilling Expectations* 54 (1992) [hereinafter *Interstate Child Support*]; *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. 112 (1995) (statement of Wallace Dutkowski, Director of Child Support, Michigan Dept. of Social Services, for the American Public Welfare Association) [hereinafter Statement of Dutkowski].

¹⁹ The age of majority varies by State. Some States may also seek recovery of arrears after the child reaches adulthood. Collection efforts may also continue beyond the legal age of majority if the child is attending college. (It is widely perceived that the regulations on case closure are restrictive and prohibit closing cases that are unworkable).

²⁰ U.S. Commission on Interstate Child Support, *Supporting Our Children: A Blueprint for Reform; The U.S. Commission on Interstate Child Support's Report to Congress* 159-160 (1992); Statement of Addison.

Today, at least one-third of all American families are headed by single parents.²¹ The social trend of single parenthood,²² not surprisingly, has resulted in alarming growth in the demand for IV-D services. Between 1980 and 1992 non-AFDC cases grew from 15 percent to 43 percent of the caseload.²³ In fact, the non-AFDC caseload now exceeds the ongoing AFDC caseload.²⁴

B. Locating Absent Parents.

Federal regulations require States to access all appropriate locate sources within 75 calendar days of determining that location is necessary to take the next appropriate action in a case. To be in substantial compliance with IV-D, the States must satisfy this standard in 75 percent of the cases pursuant to 45 C.F.R. § 303.3. (The 75 percent standard applies to all other substantive areas as well). 45 C.F.R. § 305.20(a)(3)(ii).

Location of absent parents is made difficult by factors such as: (1) a woman's genuine lack of knowledge as to the surname of the alleged father; (2) the custodial parent's inability or unwillingness to provide additional information about the alleged

²¹ Paula Roberts, *New Child Support Data From the Census Bureau*, Clearinghouse Review (Jan. 1996), at 874.

²² From 1970 to 1992, the number of children living with a divorced parent nearly tripled, while the number living with a never married parent grew nearly elevenfold. *1994 Green Book*, at 459. In 1991, the number of births to unmarried mothers was 1.2 million. Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Eighteenth Annual Report to Congress (for the period ending Sept. 30, 1993)* 3 (1994) [hereinafter *Eighteenth Annual Report to Congress*]. In 1992, 1.2 million divorces were granted in the United States. *Id.*

²³ Statement of Delfico.

²⁴ *Child Support Enforcement: Opportunity to Reduce Federal and State Costs, Hearings Before the Subcomm. on Human Resources, House Comm. on Ways and Means*, 104th Cong., 1st Sess. 3 (1995) (statement of Jane L. Ross, Director, Income Security Issues, Health, Education and Human Services Division) [hereinafter *Statement of Ross*].

father²⁵ (such as a date of birth or Social Security number that are needed to search locator databases); (3) the significant mobility of Americans; and (4) the conscious and diligent effort on the part of some noncustodial parents to evade responsibility by using fraudulent social security numbers, moving across jurisdictional lines to avoid location, and leaving jobs to avoid garnishment of wages.²⁶

C. Establishing Paternity.

The IV-D agency must attempt to establish paternity in all cases in which children have been born out of wedlock. 45 C.F.R. §§ 302.31. The average number of children in the CSE caseload requiring paternity establishment in fiscal year 1993 was 3.5 million.²⁷

Establishing paternity is complicated by the following factors: (1) multiple possible fathers often exist, all of whom must be located, served with process, and genetically tested; (2) one of the parties fails to appear for genetic testing; (3) the mother was married to, but not living with, her husband, who is not the father of the child; (4) the mother fails to appear in court as a necessary witness in a default hearing; (5) mothers often do not seek to establish paternity when their babies are born, and it is generally more difficult to establish paternity by the time they apply for AFDC or Medicaid benefits;²⁸ and (6) the process by which paternity is established vary by State (some States may,

²⁵ Often, custodial parents simply cannot obtain accurate information because they are forced to rely on information provided by the noncustodial parents, their family or their friends as to his location.

²⁶ *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Hearings Before the Subcomm. on Human Resources of the House Ways and Means Committee*, 104th Cong., 1st Sess. (1995) (statement of Marilyn Ray Smith, President, National Child Support Enforcement Association) [hereinafter *Statement of Smith*].

²⁷ *Eighteenth Annual Report to Congress*, at 44.

²⁸ Roberts, Paula, *Hot Topic/Cold Reality: Establishing Paternity for Children Receiving Public Assistance*, Clearinghouse Review, 49-53 (May 1995).

for example, require jury trials to resolve contested paternity cases).

D. Providing Services in Interstate Cases.

The handling of interstate cases is far more difficult and complex than the handling of intrastate cases. Custodial parents in interstate cases are less likely to receive support payments than those in intrastate cases.²⁹ Approximately 30 percent of the national caseload involves interstate cases, but, as a result of the many barriers to interstate enforcement, interstate collections comprise only 8 percent of total collections.³⁰

Interstate case processing requires individuals and agencies in two or more jurisdictions to coordinate a series of activities; communicate detailed information precisely and in a form compatible with the needs of other jurisdictions; and understand and cooperate with the varying policies and procedures that jurisdictions across the country follow.³¹

Such cases may be stalled by: (1) a lack of uniformity in laws (e.g., each state has its own particular laws, rules, procedures, support guidelines, etc.); (2) inconsistent interpretation of laws and orders; (3) a tendency by judges in the noncustodial parent's State to favor the noncustodial parent who is before the court, as opposed to the custodial parent, who is not present; (4) the staleness of information in the petition by the time the hearing is set; and (5) the difficulty of obtaining information from another state to refute a noncustodial parent's defense, due to difficulty in reaching the custodial parent (who may be unable to afford a telephone).

²⁹ General Accounting Office, *Interstate Child Support; Mothers Report Receiving Less Support From Out-of-State Fathers*, 3 (1992).

³⁰ *Nineteenth Annual Report to Congress*, at 35 (data for fiscal year 1994).

³¹ *Supporting Our Children: A Blueprint for Reform*, at 3.

E. Serving Teenage Parents.

In 1993 72 percent of all nonmarital births were to mothers under age 20.³² Cases involving teen parents usually require more services and are more difficult to successfully serve than cases involving older and married or formerly married parents. These cases typically require paternity establishment and paternity may be contested rather than acknowledged.³³ Young parents, many of whom may still be in high school, may not be employed or financially capable of paying child support.³⁴ Young parents are also less likely to understand the complexity of the child support enforcement program and are therefore less capable of assisting in their cases than older parents.³⁵

F. Establishing Support Obligations.

Within 90 days of location, a IV-D agency must establish a support order or complete service of process in support proceedings in at least 75 percent of its cases. 45 C.F.R. §303.4. Like every other child support enforcement activity, this is a high volume task. In fiscal year 1994, for example, the IV-D program established over 1 million support orders.³⁶

Circumstances that contribute to the difficulty of establishing support orders include: (1) the noncustodial parent is self-employed and lies about his income; (2) the noncustodial parent declares bankruptcy; and (3) the support guidelines are complex requiring consideration of a number of issues, such as custodial arrangements, costs of child care, any special needs of the child,

³² *Advance Report on Final Natality Statistics, 1993*, Monthly Vital Statistics Report, Vol. 44, No. 3, Sup. (1995).

³³ See generally, *Supporting Our Children: A Blueprint for Reform*, at 193-200 (discusses issues specific to teenage parents).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Nineteenth Annual Report to Congress*, at 2.

and the age of the child, and they vary from state to state, complicating interstate cases.³⁷

Federal regulations also require IV-D agencies to ask that medical support be included in every child support order. 45 C.F.R. §302.80. State IV-D agencies must also enforce these medical child support orders. Medical support enforcement requires States, in addition to their other duties, to: (1) process referrals from the Medicaid agency; (2) determine whether the noncustodial parent has a health insurance policy or plan that will cover the child; (3) obtain information about the plan to enable the filing of claims; (4) file claims with the insurer (or transfer the information to the Medicaid agency for filing); (5) secure health insurance coverage through a court or administrative order; and (6) recover amounts necessary to reimburse medical assistance payments made by the State on the child's behalf.³⁸ Enforcement is made difficult by factors such as: (1) noncustodial parents who will not obtain available group health coverage or refuse to enroll their child; (2) noncustodial parents who refuse to provide information identifying the plan and the procedures for filing claims or refuse to allow the custodial parent to file claims, preventing the custodial parent from reimbursing the provider or getting back funds paid to the provider; (3) employers and insurers that fail to provide information concerning the availability of group coverage; (4) employers that fail to deduct an amount sufficient to cover the cost of health insurance premiums; (5) employers that fail to handle enrollment when the noncustodial parent refuses to comply with the support order;³⁹ and (6) the federal Employment Retirement Income Security Act of 1974 ("ERISA")⁴⁰ complicates the process by allowing covered health plans to determine whether a medical child

³⁷ See, e.g., Statement of Addison (the age of majority with respect to child support enforcement varies by State).

³⁸ 1994 Green Book, at 473-474.

³⁹ See, General Accounting Office, *Ensuring That Noncustodial Parents Provide Health Insurance Can Save Costs*, 1-2 (1972).

⁴⁰ 29 U.S.C. § 1001 et seq.

support order is qualified, triggering the plan's obligation to administer the provision of benefits under the order.⁴¹ Each health plan covered under ERISA may also have its own set of requirements⁴² which make mass processing of orders impossible and individual handling of each ERISA case a necessity.

G. Enforcing Support Obligations.

In IV-D cases in which the responsibility for and obligation of support are set, the agency must enforce the order using a wide range of mandated enforcement techniques. 45 C.F.R. § 303.6. While wage withholding may be the most effective tool for enforcement of support orders,⁴³ efforts to withhold wages are made difficult by circumstances such as: (1) a noncustodial parent who has little or no income due to incarceration, unemployment or disability;⁴⁴ (2) difficulties in timely identification of a noncustodial parent's employer, particularly where the noncustodial parent works in an industry such as construction, in which frequent job changes are common; (3) a noncustodial parent working in the underground economy to avoid paying support (and, in many cases, income taxes); (4) the inability of state courts to assert jurisdiction over an noncustodial

⁴¹ While the Omnibus Budget Reconciliation Act of 1993 (which amended, Section 1902 of the Social Security Act with respect to medical support requirements under Medicaid) addressed the chilling effect of ERISA on medical child support orders, some difficulties remain.

⁴² One section of ERISA, found at 29 U.S.C. § 514, preempts State laws and regulations governing health insurance and employee benefit plans including employer self-funded health insurance plans.

⁴³ B. Paulin, *New Initiatives in Enforcing Support*, Delaware Lawyer, Summer 1993, 47, 48 (1993).

⁴⁴ An Urban Institute study found that noncustodial fathers who pay child support have significantly higher incomes than noncustodial fathers who do not pay child support. Between 11 to 25 percent of noncustodial parents had personal incomes below the poverty level (based on the poverty threshold for individuals in 1990). Sorensen, E., *The Urban Institute, Noncustodial Fathers: Can They Afford to Pay More Child Support?* 33-35 (Feb. 1995).

parent on an Indian reservation;⁴⁵ and (5) the fact that, because federal employers do not pay into the States' unemployment insurance funds, federal employees (including military employees) generally cannot be located through this mechanism.

The noncustodial parent population also tends to have very unstable employment patterns.⁴⁶ A 1992 GAO study on the efficacy of wage withholding indicates that in one quarter of the cases reviewed the noncustodial parent was reported to have left the employer by the time that the child support order was served.⁴⁷ More than half of the parents in the cases reviewed turned out to be unemployed.⁴⁸ Even where wage withholding was implemented, about half stopped paying because employment with the employer ended.⁴⁹ Not surprisingly, noncustodial parents who are self-employed or change employers frequently are very difficult to locate and pursue.

* * *

In summary, even if the IV-D program takes every possible action in a case, an individual plaintiff still may not receive child support payments because of the factors discussed above that stand in the way of child support enforcement and collection.

⁴⁵ Because of the Indian Tribes' status as sovereign nations, the authority of State and local governments and the jurisdiction of State law is limited or nonexistent. Consequently, State IV-D activity is generally constrained with respect to noncustodial parents who reside within the jurisdiction of an Indian Tribe. See F. Cohen, *Handbook on Federal Indian Law*, 241-42 (1982).

⁴⁶ "[E]very year 59 percent of child support obligors hop from job to job." Statement of Smith, at 71.

⁴⁷ *Interstate Child Support*, at 52.

⁴⁸ *Interstate Child Support*, at 52.

⁴⁹ *Interstate Child Support*, at 53.

II. ALLOWING A PRIVATE RIGHT OF ACTION WILL IMMOBILIZE THE IV-D PROGRAM, THWARTING CURRENT EFFORTS TO IMPROVE THE PROGRAM AND ULTIMATELY HARM, NOT HELP, THE CHILDREN IT SERVES.

A. Additional Costs Will be Imposed on the States.

Allowing the Ninth Circuit decision and rationale to stand would impose crippling costs on States. The potential litigants number in the millions⁵⁰ and the number of cases may be exponential because child support enforcement encompasses so many separate activities and players. A private right of action could very well result in separate litigation on each separate activity, in every State and in every county.

Congress lodged power over the IV-D program in the Secretary and required the Secretary to negotiate with States regarding the terms of their agreements with the federal government. Congress and the Secretary have left the States with the power to decide how much money a State will spend on the IV-D program.⁵¹ State legislatures must make funding decisions among hundreds of agencies and programs competing for the States' limited financial resources. It is virtually impossible for State legislatures to accurately budget for programs when the federal courts may order that millions of dollars be spent on staff, equipment and services that were not anticipated or planned.

Multiple lawsuits would place a tremendous burden on the program. Costly litigation diverts a State's limited resources from the mission of the IV-D program to pay the Special

⁵⁰ The number of potential plaintiffs could exceed three million in the Ninth Circuit alone. Petitioner's Petition for Writ of Certiorari, at 17, *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995).

⁵¹ Under the State/federal funding arrangement for CSE, States receive a 66 percent federal match rate plus incentives, based on recovered child support. State and local governments must pay the remaining share of costs. *1994 Green Book*, at 489.

Master's salary, plaintiffs' attorney's fees, and the State's own costs and attorney's fees in defense of the case. This is not overstatement, but a candid reporting of unfortunate but undeniable facts.⁵² The financial and personal costs to all beneficiaries would be astronomical. Time, energy, and money would be diverted from the program's mission. More custodial parents would lose because the diversion of focused resources will invariably mean that IV-D agencies will be able to help fewer people. More children will lose because increased actions being taken in a few cases will result in other cases receiving no attention. And, most importantly, there is absolutely no guarantee that any funds will be collected. The Ninth Circuit's decision is illogical, because its "solution" hurts those whom it tries to help.

B. Litigation Will Result in Conflicts Among the Secretary, the Federal Courts, States and Localities.

In addition to satisfying the Secretary, as Congress required, under the Ninth Circuit's decision, State governments will be required to satisfy federal judges if federal courts become involved in the micromanagement of the IV-D program. The result will be that States will not know what the law actually requires of them. They may face the loss of federal AFDC money through audit penalties on the one hand and contempt sanctions on the other.

⁵² The California IV-D agency estimates its costs for the Plaintiff's attorney fees in *Barnes v. Healy*, 980 F.2d 572 (9th Cir. 1993) (the case challenged the handling of the receipt and distribution of child support monies, and, among other things, the lack of notice of support collections to obligees), to be \$1.71 million and the postage for mailing notices to obligees, over \$1 million. West Virginia's IV-D agency estimates that its costs in connection with *Brinkley v. Hill*, No. 5:88-1502 (S.D. West. Va.) (post-judgment litigation), which involved just one county, reached at least \$600,000 per year (for expenses related to the Federal Master, plaintiff's attorney expenses, and defense).

If, for example, a federal district court issues an injunction and appoints a Special Master to supervise enforcement of the court's orders, the Director of a State's IV-D program will be placed in the impossible position of receiving conflicting directions from the Secretary and from the Special Master. The Director could be torn between either complying with the strict orders of a Special Master (who need not worry about budget constraints or cost-effectiveness), or working with the requirements of the Secretary to whom Congress granted flexibility because of the program's complex nature. On a day to day basis, imposition of a Special Master would require the IV-D staff to take precious time from pursuing support payments to satisfy time consuming requirements of the Special Master (such as compiling compliance data).

The current judicial handling of IV-D cases at the State and local level in some regions provides little reason to expect that federal judicial involvement will cause the enforcement process to run more smoothly. Variations in judicial procedures, judges' varying degrees of knowledge about the program,⁵³ and court delays at the State and local level have been problematic.⁵⁴ In fact, many IV-D professionals have recommended that States use administrative processes exclusively.⁵⁵ These fragmented procedures will only become more so when every jurisdiction has its own line of case law. Interstate cases, in particular, will become virtually impossible to track and enforce, as will cases in States where child support enforcement is administered at the county level. Where States have privatized child support

⁵³ *Interstate Child Support*, at 59.

⁵⁴ *Child Support Enforcement; Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, Serial 103-30, 103d Cong., 1st Sess. (1993) (statement of David T. Ellwood, Asst. Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Services).

⁵⁵ *Id.*

enforcement activities,⁵⁶ the initial issue is where true liability would lie. It is likely that suits against these States will lead to a complex web of litigation that draws in the State, the contractors, private employers, and any other players whose compliance is essential to successful enforcement.

C. Child Support Policy Should be Made by the Executive Branch and the Congress, Who Speak for the Will of the People, Rather than the Judicial Branch.

The IV-D program is one of a number of State/federal programs that serve children in need.⁵⁷ Government resources are not unlimited, and, if certain welfare reform bills currently pending in Congress become law, States will find that they have significantly less money with which to provide these services. The grim reality is that sound social policy will continue to require identification, evaluation, and implementation of trade-offs. In an environment in which all parties can agree that the need is growing, State and federal programs should decide where scant resources are best spent. The decision of whether services should be expanded, maintained, or cut altogether should be made by the executive branch and by Congress who speak for the will of the people who pay for and benefit from the programs. Turning this role over to the judiciary would surely "remove from the people and their representatives the ability to shape policy."⁵⁸

⁵⁶ As of November 1995, one or more child support services were privatized statewide in 20 states and, at the local office level, 18 states had privatized services. At that time, additional privatization was planned in several states. General Accounting Office, *Child Support Enforcement: States and Localities Move to Privatized Services 2* (Nov. 1995).

⁵⁷ Such programs include Medicaid, school-based health initiatives, the Maternal and Child Health program (Title V of the Social Security Act), and the Special Supplemental Food Program for Women, Infants, and Children (WIC) under section 17 of the Child Nutrition Act of 1966.

⁵⁸ S. Fluckiger, *The Changing Relationship of the Judiciary to the Policy and Administrative Processes of Government: An Overview of Recent*

The States are best able to craft public policies that balance the interests of individual applicants against the States' taxpayers' interest in utilizing their resources efficiently. The States are best suited to obtaining the most benefits for a maximum number of people, by determining the scope of services and benefits, establishing eligibility criteria, replenishing the supply of money available for public aid, and establishing legal family relationships for their constituents. Federal judges' decisions are not made in a political process where cost, benefit, and competing claims for money are considered. A Special Master can only substitute his or her judgment concerning the allocation of resources and remedies for that of the State and federal agencies.

The Respondents not only ask the federal judiciary to make social welfare policy for States, they also ask the judiciary to exceed current congressional thinking. Not even the child support enforcement advances that Congress is currently considering can ensure that the States will be able to provide every child support enforcement service possible at all times throughout the life of every case so that every noncustodial parent supports his child.

III. CONGRESS DID NOT INTEND A PRIVATE RIGHT OF ACTION WHEN IT ESTABLISHED A CAREFULLY REGULATED PUBLIC PROGRAM WHILE ALSO ALLOWING CUSTODIAL PARENTS TO PURSUE ENFORCEMENT DIRECTLY, RATHER THAN ONLY THROUGH THE STATES.

Congress chose to address the need for child support enforcement by creating a public program that is regulated by a comprehensive remedial scheme, comprised of audit provisions and detailed performance criteria, and carefully monitored by both federal and State government.⁵⁹ Congress has amended this scheme several times, making it increasingly detailed with each amendment.⁶⁰ In fact, the 1984 amendments to Title IV-D

⁵⁹ Although States are primarily responsible for administering Title IV-D, the program remains a state-federal partnership. The federal government sets the federal program standards and policy, evaluates States' performance, offers States technical assistance and training, and in certain instances offers direct assistance to States in locating absent parents and collecting support. State child support enforcement agencies have responsibility for administering the program at State and local levels. The federal government and the States, and in some States, county governments, share the program costs. *1994 Green Book*, at 455. Federal responsibility for program oversight lies with the Office of Child Support Enforcement (OCSE) in the U.S. Department of Health and Human Services.

⁶⁰ In 1984, Congress substantially expanded and changed the program through the Child Support Enforcement Amendments of 1984 (Public Law 98-378). The 1984 Amendments emphasized that States are required, among other things, to make IV-D services available to all children without regard to income. The Amendments also mandated, as a condition of receiving federal money, States' enactment of specific new statutes aimed at improving child support enforcement. In 1988, Congress enacted the Family Support Act of 1988 to further improve the program by, among other things, placing greater emphasis on establishing paternity and ensuring the fairness and currency of child support awards. (Public Law 100-485). Pursuant to the Family Support Act, IV-D agencies must review support orders and modify them, if appropriate, every three years. The 1988 Amendments also required States to implement statewide automated tracking and monitoring systems. Recognizing the problems associated with collection of support when the parties reside in different states, the

adopted an internal federal regulatory scheme significantly different from the original audit and penalty provisions which were functionally identical to those which still apply to virtually all welfare entitlement programs. See 42 U.S.C. § 603(h) (amended, 1984).

A. Congress Made the Secretary Responsible for Oversight of the IV-D Program.

In recognition that it could not expect States to succeed in collecting support in every single case, Congress, in 1984, statutorily delegated directed authority to the Secretary of the Department of Health and Human Services ("HHS") to define the level of performance required to substantially comply with the federal mandate to operate an effective and efficient IV-D program. 42 U.S.C. § 652. Under the standard developed by the Secretary and administered by the Office of Child Support Enforcement, States must meet the compliance provisions in 75 percent of all their cases. The Ninth Circuit decision can be read to give States no leeway at all; they would all have to meet every requirement in every case or be subject to suit in federal court.

The regulations that HHS enacted added new performance indicators to the IV-D internal enforcement scheme. These new indicators were designed (1) to compel states to achieve both AFDC cost recovery and welfare cost avoidance⁶¹ by nonAFDC collections and (2) to set the minimum cost effectiveness

legislation also established the Commission on Interstate Child Support to recommend improvements in laws and procedures related to enforcing support orders across state lines. Many of the Commission's recommendations reflected state-based initiatives. See, *Supporting Our Children: A Blueprint for Reform*, e.g., at 127 (discusses some States' creation of rebuttable presumption of parentage in certain cases and recommends national adoption).

⁶¹ Section 457 of the Social Security Act (42 U.S.C. 657) provides for cost recovery through the use of support collections made with respect to AFDC recipients to reimburse both the State and federal share of the current assistance payment. Cost avoidance is achieved by eliminating families' need for AFDC assistance through the collection of child support.

standards for state IV-D operations. 45 C.F.R. §§ 305.20 and 305.98. At the same time, the Secretary of HHS developed new program compliance and results audit criteria to define "substantial compliance" as required by the statutory amendments. 42 U.S.C. § 603(h).

For a State to receive federal funding for the IV-D program, the Secretary must approve the State Plan. 45 C.F.R. § 301.10. The State Plan is essentially a contract between the State and federal government upon which the availability of federal funding is predicated. The State Plan must comply with the federal regulations, many of which require States to adopt specific laws designed to improve support collection. The regulations governing the approval of State Plans contemplates a careful review of the Plan by federal regional staff, discussion with the IV-D agency for clarification, and negotiation with the IV-D agency. 45 C.F.R. § 301.13(b). The State Plan must also reflect compliance with minimum organizational and staffing requirements. 45 C.F.R. § 303.20.

If the Secretary is not assured that the State Plan complies with all regulatory requirements, the State may not receive federal funding. In carrying out its enforcement role, the Secretary uses a financial "carrot and stick" approach of incentives and penalties. Incentive payments are made based on the State's child support collections. 42 U.S.C. § 658, 45 C.F.R. §§ 302.55, 304.12. The Secretary may withhold advance funds for a State's failure to submit full and complete reports as federal regulations require. 45 C.F.R. § 301.16. The Secretary audits State programs at least every three years to determine the State's compliance with federal statutes and regulations. 42 U.S.C. § 652 (a)(4), 45 C.F.R. § 305.10.

Federal law prescribes a financial penalty for non-compliance based on a percentage of the State's AFDC federal matching funds. The first failure to substantially comply results in a penalty of one to two percent; the second results in a penalty of two to three percent; and third and subsequent failures result

in a penalty of three to five percent. 45 C.F.R. § 305.100. Comprehensive annual audits are conducted on State programs that are under penalty until the deficiencies are corrected.

Recognizing the inherent complexities of the program, Congress provided that the penalty for a failure to substantially comply may be held in abeyance for up to one year to allow the State to implement a corrective action plan. 45 C.F.R. § 305.99. At the end of the corrective action period, the Secretary conducts a follow-up audit targeted at the areas of program noncompliance. 45 C.F.R. § 305.99(d).

Congress clearly recognized that the social and practical impediments to child support enforcement required that the Secretary be given the flexibility to suspend penalty imposition so that noncomplying States could focus on developing and implementing corrective action plans. Given this recognition, Congress could not have intended to allow individuals to divert the States' attention and limited resources by filing private causes of action under IV-D whenever they chose to do so.

Moreover, the enforcement scheme is not a "dead letter," because the Secretary has taken enforcement actions. For example, in 1992, the Secretary levied one percent penalties against two States.⁶² In 1993, the Secretary sent notices to fifteen States informing them that audits of their programs indicated they were not in substantial compliance with federal requirements and imposed a three percent penalty against one State.⁶³ In 1994, the Secretary issued final reports to seven States indicating that audits showed that they were not in substantial compliance, and imposed a one percent penalty against two States.⁶⁴

⁶² Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Seventeenth Annual Report to Congress* (for the period ending Sept. 30, 1992) 45 (1993).

⁶³ *Eighteenth Annual Report to Congress*, at 38-39.

⁶⁴ *Id.*

These enforcement activities have also proven to be effective mechanisms for helping States achieve substantial compliance. For example, follow-up audit reports were issued in 1993 to seven States that had been issued notices in prior years, of these, five States had achieved substantial compliance and their penalties were rescinded (the other two were yet to be evaluated).⁶⁵ Audit penalties were also rescinded for ten of the fifteen States that were sent notices in 1993 because they had achieved substantial compliance (the remaining four were to be evaluated).⁶⁶

B. Congress Left Intact the Custodial Parent's Rights to Take Direct Action Against the Nonpaying Parent.

The IV-D program is intended to assist custodial parents in collecting support, but it is not the parents' sole remedy. The program was not intended to replace private remedies that are available to persons seeking child support from noncustodial parents. Congress left intact the rights of parties to take court action on their own and still receive IV-D services.⁶⁷ Every custodial parent retains the right to hire an attorney or represent themselves in a court action to establish or enforce support.⁶⁸ Recognizing the importance of alternatives, many states, including Arizona, have taken steps to improve unrepresented parties' access to court, by standardizing procedures and making them more accessible to the pro se litigant. This may be done through the development of form pleadings, providing

⁶⁵ Id. at 40.

⁶⁶ *Nineteenth Annual Report to Congress*, at 15.

⁶⁷ "We encourage States to establish a simple pro se process for establishment and modification of orders whereby the parents may essentially represent themselves." 55 FR No. 158, 33414, 33418 (1990).

⁶⁸ OCSE has made clear its position that IV-D attorneys do not represent recipients of IV-D services. In the notice of proposed rulemaking issued August 15, 1990, the Federal Office of Child Support Enforcement states that "the IV-D agency does not provide legal services per se. Support rights are assigned to the State in AFDC cases, and even in non-AFDC cases, the traditional attorney-client relationship does not exist." 55 FR 33414 (1990).

instructions and other educational materials and providing the assistance of court personnel.⁶⁹ Private agencies also provide collection services with no up front costs to the custodial parents.

It is beyond the IV-D program's scope and capacity to ensure child support collection in all cases at all times. While the IV-D program provides special access to many proven support enforcement techniques, some cases require that more stringent and repetitive enforcement efforts be taken. IV-D agencies are not able to take such actions in all of these cases, given the over 18 million IV-D cases that exist. There is no substitute for self-help. A determined custodial parent with one case may be able to accomplish more than a IV-D worker with thousands of cases.

C. Congress Did Not Intend to Create a Child Support Assurance Program Guaranteeing Custodial Parents 100 Percent Payment.

Title IV-D performs a prosecutorial function that is not intended to guarantee delivery of any specific and finite "benefit" to any specific individual or family. This is not a public benefit program; any economic benefits to individuals or families that IV-D program efforts come from noncustodial parents rather than public funds, and there is no guaranteed monthly benefit that the State pays. Congress' primary purpose in enacting Title IV-D was to reduce the amount paid from the public treasury for welfare.⁷⁰ *Wehunt v. Ledbetter*, 875 F.2d 1559 (11th Cir. 1989).

⁶⁹ See generally, U.S. Dept. of Health and Human Services, *Developing Effective Procedures for Pro Se Modification of Child Support Awards* (1991).

⁷⁰ The IV-D program was originally intended to ease taxpayer burdens by recouping state and federal welfare expenditures necessitated by noncustodial parents' failure to make child support payments. See *Social Services Amendments of 1974*, S. Rep. No. 93-1356, 93d Cong. 2d Sess. 42 (1974).

* * *

The State human service agencies do not oppose the Ninth Circuit decision because they want to quash national child support enforcement efforts. They share the Respondents' desire for successful child support enforcement and devoutly wish that absent parents would take responsibility for their children so that they can grow up healthy, secure in the knowledge that their financial needs will be met and that they are valued by both their parents. Rather, State IV-D human service agencies oppose the Ninth Circuit decision because their extensive experience in constantly striving to improve the IV-D program and effectively increase the chances of recovering support, has taught them what will and will not improve the system. The Ninth Circuit's "answer" to the myriad of problems plaguing the system is really no answer at all.

Congress has already created a comprehensive system of oversight for the child support enforcement program and individuals who are dissatisfied with the services they receive have other avenues of redress. Private rights of action will force federal courts to appropriate for themselves the legislative prerogative to make sensitive funding decisions, involving them in a morass of individual case minutiae as well as broad policy decisions. Even if the courts were inclined to inject themselves into this process, better child support enforcement is not guaranteed because too many variables outside the program control the results. Lawsuits against the States will not make fathers acknowledge paternity without the compulsion of genetic testing or stop running from jurisdiction to jurisdiction and job to job to evade responsibility, or send a check every month to satisfy a child support order. In fact, these suits can only divert attention away from the real problem of parental irresponsibility, drain precious State resources, and because of the flood of litigation that would follow, worsen the child support services most families receive.

Since the inception of the IV-D program in 1975, States' abilities to locate fathers, obtain and enforce child support orders and collect support have grown tremendously.⁷¹ While there are still gains to be achieved in the program, States and Congress are working diligently to achieve them, as evidenced by current proposals in Congress, a recent Executive Order, and State innovations⁷² that would alleviate some of the major difficulties States face in enforcing child support.⁷³ We ask that the Court assist States by allowing them to continue improving the program by concentrating their resources on areas that will realistically improve the IV-D program for all families.

⁷¹ The number of paternities established through IV-D agencies has more than doubled between 1987 and 1993. Total IV-D collections increased from \$3.9 billion in 1987 to an estimated \$9.8 billion in 1994. *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Before the Subcomm. on Human Resources of the House Ways and Means Comm.*, 104th Cong. 1st Sess. 112 (1995) (statement of David T. Ellwood, Asst. Secretary for Planning and Evaluation, U.S. Dept. Health and Human Services).

⁷² States are developing innovations in child support enforcement through demonstration projects. For example, Florida discussed with HHS the possibility of developing a new system to identify Social Security numbers. Similarly, New England States are developing an interstate compact to facilitate collection in interstate cases. *Support Enforcement; Opportunity to Reduce Federal and State Costs*, Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 104th Cong. 1st Sess. (1995) (statement of Mary Jo Bane, Asst. Secretary for Children and Families, U.S. Dept. Health and Human Services).

⁷³ The President's Executive Order on Child Support (issued Feb. 27, 1995), would implement a new program that will help track nonpaying parents across State lines; challenge all States to follow the lead of the twenty-five States that already require or encourage employers to report new hires, and direct HHS to issue new regulations requiring women who apply for welfare to comply with parental establishment requirements before receiving benefits. In Congress, the Welfare Reform bill (introduced as H.R. 3507 in the House and S. 1795 in the Senate) would, among other things, require the establishment of a State and federal case registry, State and national new hire directories, an expanded federal parent locator service, and administrative enforcement in interstate cases.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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Dated: July 25, 1996

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

15-Oct-1996 02:47pm

TO: Jeremy D. Benami
TO: Emily Bromberg
TO: Elena Kagan
TO: Richard E. Green

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: Call from Elaine Ryan

FYI: I got a voice mail from Elaine Ryan saying the following:

She hears that HHS is going to file a brief with the Supreme Court against some state's position (not sure which state) on an issue relating to a private right of action in a child support case. (And the brief will make some reference to the importance of private right of action in welfare reform??)

She asked if this is true and if we can talk about it at tomorrow's 1pm meeting with them.

I left her voice mail asking her to tell me the name of the case and the state.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

15-Oct-1996 02:56pm

TO: Jeremy D. Benami
TO: Emily Bromberg
TO: Elena Kagan
TO: Richard E. Green
TO: Jeanine D. Smartt

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: The case Elaine Ryan raised...

is Blessing vs. Freestone. State is Arizona, but all states very interested.

I believe Jeanine Smartt has been working on this.

Question is whether a parent could sue the state for failure to get child support payments from non-custodial parent.

Jeanine, what's the scoop? Is it definite that HHS is doing this?

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

15-Oct-1996 03:22pm

TO: Diana M. Fortuna

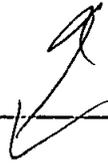
FROM: Jeanine D. Smartt
 Domestic Policy Council

CC: Jeremy D. Benami
CC: Emily Bromberg
CC: Elena Kagan
CC: Richard E. Green

SUBJECT: RE: The case Elaine Ryan raised...

Yes. the HHS General Counsel and DOJ Solicitor General offices have been working together on this issue. I have been working with Bob Keith and will get an update for you by COB today.

Blessing



HHH pos - legally defensible

WD - no final decision

If did -

mid pos b/w π + state

some degree of priv rt of act

w.r.t.
certain
provisions
not others

50% chance Ct will grant motion
to remand in light of new welfare

grant /

If denies - wk to 15 days -

~~30 days~~ 2 wk time here
in brief.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

09-Sep-1996 09:20am

TO: Elena Kagan

FROM: Jeremy D. Benami
 Domestic Policy Council

CC: Bruce N. Reed
CC: Diana M. Fortuna

SUBJECT: RE: attached

The issue here goes to state administrative discretion. States as you know will always take the position in any situation that they should be free to administer programs free from outside interference (and that includes the feds, citizens and the courts).

APWA and other state types are upset that we are filing an amicus brief in a situation they believe there should not be a right of action.

Carol and the President would be among the more sympathetic to the state arguments, but on the flip side we have been very tough on the child support issue and supported a larger federal role here than say in welfare.

Carol has never expressed a strong opinion on this case.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

09-Sep-1996 10:11am

TO: Elena Kagan

FROM: Bruce N. Reed
 Domestic Policy Council

CC: Jeremy D. Benami

SUBJECT: RE: attached

I talked to Walter Dellinger about this case a few months ago. The basic question is whether individuals have a right of action against the state to get moving on their child support case. The states are adamantly opposed (something like 36 states filed briefs at the appellate level). We're probably unleashing a monster with this right of action -- but since we're in favor of rights of action on Medicaid, and since states really do an abysmal job of collecting child support, it's probably the right thing to do.

But could you take a closer look just to make sure? If we're going to do it, we might want to make a big deal about it, and we'll need to be sure we're on firm political ground. (I'm sure the legal question is mixed.)

Thanks.

JBA
Learned the hour
comes. I've asked
learn to review.



NATIONAL CONFERENCE OF STATE LEGISLATURES

444 NORTH CAPITOL STREET, N.W. SUITE 515 WASHINGTON, D.C. 20001
202-624-5400 FAX: 202-737-1069

SEP - 6 1996

September 5, 1996

The Honorable Carol Rasco
Assistant to the President for Domestic Policy
2nd Floor, West Wing
The White House
Washington, DC 20500

Dear Ms. Rasco:

To: BRUCE R
ELENA K
FR: Jeremy
RE: Child Support
Amicus Case

MICHAEL E. BOX
HOUSE MAJORITY CHAIRMAN
ALABAMA
PRESIDENT, NCSL
RUSSELL T. LARSON
DEPUTY CONTROLLER GENERAL
DELAWARE
STAFF CHAIR, NCSL
WILLIAM POUND
EXECUTIVE DIRECTOR

I am writing on behalf of the National Conference of State Legislatures to strongly urge the Administration not to file an *amicus* brief against the state of Arizona in *Blessing v. Freestone*, No. 95 -1441. In *Blessing v. Freestone*, the plaintiffs assert a private right of action against the state to enforce collection of child support under the Child Support Enforcement Act. The Act does not create such a right. Rather, it establishes a framework for state agreements with the federal government regarding the collection of child support. It makes the Department of Health and Human Services-- not private parties--responsible for oversight.

If the Solicitor General files a brief supporting a broad private right of action, we could only conclude that the Administration is demanding that states guarantee child support collection. The law is not intended to open states to suit for specific failures in collection efforts. Such a rule would square with reality no more than a law subjecting the Internal Revenue Service to suit for failure to collect 100 percent of taxes owed. Throwing states into a maelstrom of litigation over individual collection efforts would detract from the cooperation needed between the federal government and the states to enhance enforcement.

The power of the federal government to require states to guarantee child support is restricted. Nevertheless, if the federal government seeks to compel state action as a condition of funding, it should do so through the legislative process. The effort to strengthen child support collection in Pub. L. 104-194, the welfare reform law, does not establish a state guarantee of collection.

Again, in the strongest terms, we urge you to resist efforts to radically expand private rights of action against states administering federal programs.

Sincerely,

Michael Box
House Majority Chairman, Alabama
President, NCSL

MB/JF/gw

Bruce Reed

Blessing: Hope remain

Don't fighting it
Feel like

The priv at of actic prob won't solve anything

Wisconsin waiver: They keep trying to end letter w/ ~~this waiver~~
no mention of res req. - saying can do what you want generally.

Pressure to send in medicaid grants

May end up w/ less in heart of issues:

- regulate in 45-day comment period.
- "completeness" - expanded checklist

State plan will include this - so we can't avoid this issue.

↓

Let's just grant the thing!

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

06-Sep-1996 03:36pm

TO: Carol H. Rasco

FROM: Jeanine D. Smartt
Domestic Policy Council

CC: Jeremy D. Benami

SUBJECT: APWA Child Support Case Update

With about 98.9% certainty the Solicitor General will file a "Friend of the Court" brief that supports the plaintiff in the Blessing v. Freestone case on either September 26th or 27th.

Background

The plaintiff (Freestone) is actually 6 individual plaintiffs who sued Arizona for failure to administer an adequate child support system. The case was thrown out of District court on August 12, 1993. The plaintiffs found success on October 12, 1995 when the 9th Circuit reversed the decision. On May 3, 1996 Arizona appealed under the Supreme Court - where we are now.

Freestone's Argument

There arguments range from the state's failure to establish a child support order to the state's failure to enact wage withholding even when given the employment information of the non-custodial parent. The plaintiffs simply want action. Please note, nothing in this suit entitles the plaintiffs to success, ie. receiving child support payments. A positive outcome for the plaintiff can only force Arizona to take some action.

Arizona's Case and APWA's Argument

(Linda Blessing is the Director of Arizona's Dept. of Economic Security) As you know, APWA sent a letter to you encouraging the Administration not to file a brief. The argument of Arizona and APWA is that according to IV-A statutes states only have to "substantially comply" which means adequately serve 75% of the population. (Please note that IV-D does not have compliance language therefore IV-A is used since states must run a child support system in order to receive IV-A funds.) APWA is also saying that the federal government is imposing additional requirements.

HHS General Counsel and Solicitor General Perspective

The dilemma here is that to a certain degree the state is accurate. The definition of "substantially comply" is ambiguous. However, since states have clearly stated Congressional guidelines as well as federal incentives to provide better services, they should do so. Thus, while the Administration files a brief that is diplomatic and outlines the complexity of this case it will support the plaintiff. (HHS Counsel really wants the case to be pushed back to

the 9th Circuit for further consideration, particularly given the new welfare rules.)

One of the issues is that states currently have no fair hearing requirements. (some states may have volunteer systems) So there is no way for an individual to complain about the system and have action taken on their behalf. In this particular case Arizona has had one of the worst child support programs and have been both penalized and audited in the past by HHS.

I hope this is helpful. If any additional issues come up during the Sept. 9 -10 conference please let me know. HHS Counsel stands ready to assist if it becomes a major issue.