

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LINDA J. BLESSING, DIRECTOR, ARIZONA
DEPARTMENT OF ECONOMIC SECURITY, Petitioner
v. CATHY FREESTONE, ETC., ET AL.

CASE NO: 95-1441

PLACE: Washington, D.C.

DATE: Monday, January 6, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LINDA J. BLESSING, DIRECTOR, :

4 ARIZONA DEPARTMENT OF :

5 ECONOMIC SECURITY, :

6 Petitioner :

7 v. : No. 95-1441

8 CATHY FREESTONE, ETC., ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Monday, January 6, 1997

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:04 a.m.

15 APPEARANCES:

16 C. TIM DELANEY, ESQ., Solicitor General of Arizona,
17 Phoenix, Arizona; on behalf of the Petitioner.

18 MARSHA S. BERZON, ESQ., San Francisco, California; on
19 behalf of the Respondents.

20 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-1441, Linda J. Blessing v. Cathy
5 Freestone.

6 Mr. Delaney.

7 ORAL ARGUMENT OF C. TIM DELANEY

8 ON BEHALF OF THE PETITIONER

9 MR. DELANEY: Mr. Chief Justice and may it
10 please the Court:

11 Congress enacted title IV-D pursuant to its
12 Spending Clause powers. That meant, under Pennhurst, that
13 Congress had to unambiguously notify the States of any
14 consequences of their accepting Federal funds so that the
15 States could make an informed choice about whether to
16 participate in that program, and under this Court's
17 decisions in Suter, Congress could provide that notice to
18 the States by unambiguously conferring rights in title IV-
19 D that would be privately enforceable.

20 Here, Congress has neither unambiguously
21 conferred any rights upon respondents, nor unambiguously
22 notified the States that title IV-D can be enforced
23 privately by over 18 million title IV-D applicants.
24 Indeed, title IV-D says just the opposite, because when
25 Congress offered the title IV-D partnership agreement to

1 the States, it unambiguously deposited all enforcement
2 authority in the Secretary of Health and Human Services.

3 Congress told the States unambiguously that the
4 Secretary would enforce title IV-D, that the Secretary
5 would apply a substantial compliance standard on a
6 systemwide basis rather than an individual case-by-case
7 basis.

8 QUESTION: Well, what was sought here in the
9 complaint was something based on the substantial
10 compliance requirement, was it not, in the complaint?
11 This was a broad complaint.

12 MR. DELANEY: Yes, Justice O'Connor.

13 QUESTION: There are, however, some provisions
14 in the statute here that are very specific. For instance,
15 provisions that for, if the State is going to collect
16 money for non-AFDC parents, that it will pay the money
17 over to those parents very specifically and within certain
18 time limits.

19 Now, that's a pretty specific requirement, is it
20 not? Do you say that no parent for whom the State has
21 collected money under that provision would have a right to
22 ask the State to pay it over if it were withheld?

23 MR. DELANEY: Justice O'Connor, that is an
24 important difference here in this case, and that is, once
25 the State actually receives the money, then the

1 individuals would have a right, a property interest in
2 getting that money if the State is wrongfully withholding
3 it, but that is not a statutory right. That then becomes
4 a constitutional right in their property. They don't need
5 to move forward --

6 QUESTION: Well, it might also be a statutory
7 right. In any event, you would find at least some
8 provisions are specific enough that by some route they
9 could be enforced, would you not?

10 MR. DELANEY: No, ma'am, not through the title
11 IV-D itself. As we envision title IV-D, it's a funding
12 mechanism. The States gave up some of its rights in terms
13 of domestic relations to the Federal Government in
14 exchange for the money, so it's a contract between the
15 sovereign interests, and what's happening here is we have
16 the Federal Government coming in and trying to run part of
17 the program.

18 QUESTION: I would think some of the specific
19 provisions might well fall within cases that we have
20 decided previously giving individuals some rights, but
21 this complaint was not based on any such specific request,
22 was it?

23 MR. DELANEY: No. This was a very broad --

24 QUESTION: Now, in Arizona's brief here you seem
25 to want us to address some other issues like the

1 overruling of Maine v. Thiboutot, and some Eleventh
2 Amendment arguments that were not raised in the cert
3 petition. Is that correct?

4 MR. DELANEY: We have raised those --

5 QUESTION: Why should we get into those? I
6 mean, you didn't come here with cert petition questions
7 identifying those.

8 MR. DELANEY: We did not specifically, but we
9 think that they are subsumed within the question
10 presented, and --

11 QUESTION: Fairly subsumed, so that people all
12 around the country would understand you were going to be
13 here arguing the overruling of Maine v. Thiboutot.

14 MR. DELANEY: Yes, ma'am, and indeed the
15 respondents, when they opposed our cert petition, said
16 that we were doing just that, and that our petition loudly
17 echoed that type of activity, and they have fully briefed
18 the case.

19 We think that this case presents an excellent
20 vehicle for the Court to reexamine Maine v. Thiboutot, but
21 we don't come here today saying that that's the only way
22 we can win. We can set that argument aside, and we win on
23 the fact that title IV-D does not unamiguously notify the
24 States that there is any enforceable right in --

25 QUESTION: But Mr. Delaney, that hasn't been the

1 approach when 1983 is there. This is not a Cort v. Ash
2 case. This is a 1983. Maine v. Thiboutot says there is a
3 right to enforce laws of the United States, and in
4 connection with the question that Justice O'Connor asked
5 you, I think you responded that there would be a claim --
6 suppose the State collected the money and simply didn't
7 turn it over. You acknowledge there would be such a
8 claim?

9 MR. DELANEY: We believe that there would be a
10 claim under either State law grounds or constitutional
11 grounds in the property interest.

12 QUESTION: But what about a case where the
13 parent was located, the noncustodial parent, and had a
14 job, and the State simply refused to do anything about a
15 wage implementation order? Would that also -- well, would
16 it be enforceable or not in Federal court?

17 MR. DELANEY: No, ma'am, it would not be
18 enforceable under title IV-D, because title IV-D again is
19 a funding mechanism, and it's a funding relationship, and
20 in order for the court -- or in order for the parents to
21 come in and say that they have an enforceable right, we
22 need to make sure that they have one. Here, there is no
23 conferral of that right.

24 QUESTION: So your view is it's either all or
25 nothing, so that there's no claim possible under IV-D no

1 matter how specific?

2 MR. DELANEY: And -- correct, and in terms of
3 the substantial compliance standard that Congress has laid
4 out in title IV-D, again that gets back to the funding
5 mechanism, when you have this funding relationship and
6 Congress says in order to continue getting funds you have
7 to perform at a substantial compliance standard on a
8 system-wide basis.

9 And it used to be when IV-D was first enacted
10 that it was full compliance in 1975, and it continued that
11 way until 1984, and Congress saw that no State had ever
12 been able to comply at a full compliance standard, so
13 Congress ratcheted it down from full compliance down to
14 substantial compliance, and in the process notified the
15 States that you didn't have to deliver service in each and
16 every case, and that's the way that the Secretary also
17 enforces it.

18 QUESTION: Well, it notified the States that it
19 wouldn't take its enforcement measures such as reducing,
20 what is it, the IV-A money or whatever, as a result of
21 something less than a failure, or substantial compliance,
22 but it doesn't follow from that that there is no
23 individual right if in a particular case there is
24 individual crime.

25 MR. DELANEY: Well, in fact we think that it

1 does follow that way, Your Honor, because Congress has
2 developed a very comprehensive scheme in title IV-D.

3 You mentioned the fact that we would be losing
4 title IV-A funds. The rationale there is Congress wanted
5 to have title IV-D operating full bore, at full speed,
6 doing all that it could for the masses that it was
7 designed to try to take care of, and in the process of
8 then pulling off on an individual case-by-case basis
9 various lawsuits we're -- again, we have over 18 million
10 title IV-D applicants across the Nation, and it will
11 cripple the program if you allow these individuals to then
12 come in and try to enforce this on a case-by-case basis.

13 QUESTION: I thought your point is it wasn't the
14 deal, that the States when they went in thought that all
15 they had to do was make a good faith effort and achieve
16 substantial compliance.

17 MR. DELANEY: Absolutely, Your Honor. It was --

18 QUESTION: And if they have to achieve total
19 compliance, at least insofar as being liable to individual
20 suits is concerned, it's quite a different program they're
21 buying.

22 MR. DELANEY: It would radically change, Your
23 Honor -- just as you are suggesting it was radically
24 change the agreement that we had entered into with the
25 Federal Government.

1 The Federal Government came in and told us again
2 that we would have to comply on a substantial compliance
3 standard on a system-wide basis, that if we didn't we
4 would have liquidated damages in the form of specific
5 liquidated penalties against us, but again they would be
6 assessed against title IV-A as opposed to title IV-D.

7 We were told that the Secretary would then have
8 the discretion to waive those liquidated damages when
9 appropriate, and we could then go in and negotiate with
10 the Secretary. There were other mechanisms available for
11 us to go in and in essence say, this isn't the time to be
12 enforcing the terms this rigorously.

13 But again, we were told that we had an
14 agreement, and it was given to us in very unambiguous
15 terms exactly how it would be enforced.

16 QUESTION: Well, the Federal Government has not
17 yet suspended Arizona from the benefits.

18 MR. DELANEY: Your Honor, in fact the Secretary
19 has found that Arizona is in substantial compliance. In
20 1984 she came out --

21 QUESTION: That's a surprising finding, in light
22 of Arizona's recalcitrance in carrying out its program and
23 its apparent inability to handle these matters. I mean,
24 it has been a dismal sort of a performance there in
25 Arizona, but nonetheless, the Federal Government has not

1 withdrawn the funding.

2 MR. DELANEY: Correct. Arizona has not had
3 anything withheld beyond the -- it was almost \$1 million.
4 We did have that penalty assessed against us in the early
5 nineties. In terms --

6 QUESTION: Has the Federal Government -- excuse
7 me.

8 MR. DELANEY: In terms of Justice O'Connor's
9 statement Arizona has done an abysmal job, as the
10 complaint lays out, in 1988 Maricopa County, with no
11 notice to the State, bailed out of the title IV-D program,
12 and it dumped over two-thirds of all of the cases in title
13 IV-D upon the State. The State then had to scramble to
14 try to start meeting those obligations.

15 And then in 1991 -- again, the Secretary then
16 came out and found that we were out of substantial
17 compliance, did the audit, and then was coming in annually
18 to do new audits to see where we were, did assess
19 penalties of almost a million dollars, and then found
20 under a subsequent audit than Arizona has now achieved
21 substantial compliance.

22 And, indeed, as we lay out in some of our
23 briefing materials, Arizona's now receiving national
24 awards, and it's the number one State in terms of
25 improvements for collections over the last 4 years, so

1 Arizona has turned things around and in large part because
2 of the comprehensive mechanism that Congress has laid out,
3 which is to get our attention, and it did when we got that
4 million-dollar penalty assessed against us, but then to --

5 QUESTION: Did the Federal Government intervene
6 in the district court action?

7 MR. DELANEY: No, sir, not in this case.

8 QUESTION: There was a letter that said in 1992
9 Arizona was found in substantial compliance. Has there
10 been anything from the Federal Government since then
11 evaluating this program's compliance?

12 MR. DELANEY: Your Honor, that was actually a
13 letter in 1994 based on the latest audit, that Arizona is
14 in substantial compliance.

15 QUESTION: But it was as of 1992, was it not,
16 or --

17 MR. DELANEY: It was based on a 1992 audit, and
18 no, there is not a subsequent audit that has taken place.

19 QUESTION: Do I assume correctly that you would
20 agree that if the agreement between the National
21 Government and the State of Arizona, it had a clause in it
22 providing that Maine v. Thiboutot would be applicable in
23 the relationship between Arizona and the welfare
24 recipients, that then the agreement would be sufficiently
25 unambiguous and they would have the private rights of

1 action to compel your enforcement, is that correct?

2 MR. DELANEY: If it was that specific in the
3 statute, yes, but it is not in this particular statute,
4 and there are all sorts of mechanisms that I've already
5 identified showing that it is not.

6 QUESTION: Do you also take the position that,
7 regardless of how clear the general law might be -- for
8 example, Maine v. Thiboutot law -- indicating that the
9 welfare recipients would have an action for enforcement,
10 that still there would be no action cognizable unless the
11 agreement between the Federal Government and the States
12 expressly referred to that unambiguous law?

13 MR. DELANEY: We believe that that is what is
14 required under this Court's decisions in Suter, and in
15 Pennhurst, that in the Spending Clause context the States
16 have to be put on notice what the consequences of their
17 agreement or --

18 QUESTION: Right, but the notice must be within
19 the four corners of the agreement. The notice cannot be
20 notice by virtue of general but unambiguous law if it is
21 not specifically referred to in the agreement. Is that
22 correct?

23 MR. DELANEY: Yes, sir. That is our position,
24 that it does need to be spelled out within the confines of
25 the funding mechanism statute so that the States are on

1 notice what it is that they're going to be exposed to.

2 And again, the problem that we face as States is
3 that there are two different lines of authority out there.
4 we have the Pennhurst-Suter line that talks in terms of
5 the Spending Clause and the fact that there are
6 significant federalism concerns here when you have
7 contracts between two different sovereigns, and then we
8 have the Wright-Wilder case, line of cases that suggest to
9 the contrary.

10 QUESTION: But isn't -- I haven't looked at
11 Pennhurst recently, but wasn't it the problem in Pennhurst
12 that the State didn't know for sure what its obligation
13 was, not -- the question wasn't whether there was a remedy
14 if there were a clear obligation.

15 MR. DELANEY: They -- the problem there was that
16 the States were not on notice what was required.

17 QUESTION: That's right.

18 MR. DELANEY: Right.

19 QUESTION: But here you're on notice about
20 what's required.

21 MR. DELANEY: No. We're not on notice about
22 what the consequences are. We would put --

23 QUESTION: By that you mean you're not on notice
24 as to whether or not somebody can sue you if you fail to
25 do what's required.

1 MR. DELANEY: Yes, sir, and we believe that is a
2 very significant difference, because if we're being told
3 that we're going to be penalized by the Secretary and the
4 Secretary alone, then we can deal with that, but to then
5 have 18 million different individuals who can then walk in
6 and demand enforcement is something completely different.
7 We were never told that they had enforceable rights.

8 QUESTION: It seems to me that you're -- even
9 under your acknowledgement you're potentially liable to
10 18 million individuals if you don't give them the money
11 that's coming to them. You've said that yourself, but you
12 say they just have to sue not in Federal court but in
13 State court for their own property.

14 MR. DELANEY: If I did, Your Honor, I misspoke.
15 These individuals do not have any enforceable rights. Our
16 contract is with the Federal Government. Our obligations
17 flow to the Secretary.

18 QUESTION: I thought in answer to Justice
19 O'Connor you said that if money was owing to a particular
20 individual they could sue for it.

21 MR. DELANEY: But that's different. When
22 there's money that we have actually received from a third
23 party and we are holding that money, then --

24 QUESTION: Aren't there 18 million people for
25 whom that could happen?

1 MR. DELANEY: If we are able to collect, but
2 again, Nation-wide the collection rate is only 18 percent
3 because of the significant problems in child support
4 enforcement.

5 QUESTION: What apart from -- let's leave aside
6 the question of the collection activity that we're talking
7 about. What if the State of Arizona simply withheld,
8 under the prior AFDC scheme simply withheld a payment due?
9 Could the individual bring a claim for that payment?

10 MR. DELANEY: We don't believe they could under
11 title IV-D, no, sir.

12 QUESTION: How would they do it?

13 MR. DELANEY: If Arizona withheld the -- if we
14 collected the moneys?

15 QUESTION: No. I don't know exactly what the
16 AFDC formula is, but whatever the AFDC formula is, if
17 there were a single parent with two children, and they
18 were entitled to X dollars a month, and the State did not
19 distribute the X dollars, could the parent and the
20 children bring a claim against the State for the money?

21 MR. DELANEY: No, sir. No. No longer, because
22 in the 1996 Reconciliation Act --

23 QUESTION: No, I -- under the prior AFDC scheme.

24 MR. DELANEY: Under the prior AFDC scheme I
25 believe so, under Thiboutot, but that is different than

1 our scheme, where we have this agreement. Again, it's a
2 funding mechanism, and there's not direct dollars --

3 QUESTION: No, but what is there -- I'm sorry,
4 but what is there in the AFDC law or in the agreement
5 between the State and the National Government with respect
6 to the administration of the AFDC scheme that gives them,
7 or perhaps in your terms puts the State on clear notice
8 that the individual recipients could bring an individual
9 claim for the money in the case that I posit, which is not
10 present with respect to the action before us here? What
11 in the agreement is different?

12 MR. DELANEY: Justice Souter, I'm not as
13 familiar with the AFDC case law or statute, just as you
14 are not, but the significant difference is that --

15 QUESTION: We're evenly matched.

16 MR. DELANEY: We're evenly matched.

17 (Laughter.)

18 MR. DELANEY: I wish that were the case. In --

19 (Laughter.)

20 MR. DELANEY: In terms of the difference,
21 though, there is a very significant difference. In title
22 IV-A with AFDC, under the old system you had direct
23 dollars, they were quantifiable, that if you went through
24 and you met the specific standards of the day you could
25 then have an entitlement to that.

1 Under title IV-D you're talking about services,
2 not dollars. You're talking about something that's not
3 quantifiable, something that is much more amorphous, and
4 in title IV-D the difference is instead of having a direct
5 one-on-one relationship, we as the State have to go out
6 and try to locate an absent parent, have to establish
7 paternity for Joe or John or Paul or Ringo, who may be in
8 various different States, so we have to issue subpoenas to
9 try to track them down. It's a very different --

10 QUESTION: Well, that might very well go to the
11 question whether you had fulfilled your obligation in an
12 individual instance to try to collect, but I don't know
13 that it would support a distinction in principle between
14 the two cases.

15 Take an example -- in fact, I guess it's already
16 been mentioned -- in which the parent with the support
17 responsibility is more or less standing on the sidewalk
18 outside the State welfare office. All they've got to do
19 is serve him with a document and haul him into court, and
20 the State simply says, we don't want to. We're busy. We
21 have other things to do.

22 There, it seems to me the State's obligation is
23 just as clear and definite as it is in the instance of the
24 obligation to pay money, and I'm having difficulty drawing
25 the distinction in principle between those two sets of

1 circumstances.

2 MR. DELANEY: And a lot of that falls back, Your
3 Honor, to the issue of what the States were told, and we
4 were told that we would have to substantially comply in
5 order to get our funds, and --

6 QUESTION: So I think you're saying -- I'm
7 sorry, but may I interrupt you with this question: I
8 think you're saying not so much that you weren't put on
9 notice that you would have this obligation, but that the
10 substantial compliance requirement in effect puts you on
11 notice that you didn't have it.

12 In other words, I think you're arguing that the
13 substantial compliance condition says, we don't worry
14 about individual cases. Your only obligation is an
15 obligation in the mass, as it were. Is that your
16 argument, that it's kind of like a defense?

17 MR. DELANEY: Yes, Your Honor, that is a way of
18 looking at us, at our argument, which is we were told that
19 we wouldn't have to do it on a comprehensive system, and
20 we were told not only in -- with -- in terms of
21 substantial compliance. We were told in section 658, that
22 would then reward us with incentives if we did better than
23 had been anticipated.

24 As the Court found in Pennhurst, the fact that
25 there are incentives show that there cannot be any

1 mandatory obligations.

2 QUESTION: Mr. Delaney, in comparing the two,
3 the direct benefit to the IV-A money, isn't there
4 something like for social security benefits that there's
5 an administrative route that you have to go first, and
6 then if you're turned down, then you have further judicial
7 review? Is there nothing like that for --

8 MR. DELANEY: There is nothing in IV-D that --

9 QUESTION: And in IV-A -- I'm trying to get back
10 to Justice Souter's question, when he said well, what if
11 you were entitled to AFDC benefits and the State didn't
12 pay them, under the old regime.

13 MR. DELANEY: Again, that's different than what
14 we --

15 QUESTION: And it seems to me that most benefit
16 systems like that you have to make an application, get
17 turned down, go through the administrative mill, and then
18 end up in court.

19 MR. DELANEY: Right, and again the key phrase
20 there is a benefit program. That is different than title
21 IV-D, which is -- concerns services that the State is
22 providing based on an agreement that we have with the
23 Federal Government.

24 And it's different because again on -- we're
25 being told that we're going to be measured with

1 substantial compliance, with incentives, with the
2 paternity establishment, for example, and the statute
3 itself says that we will comply if we get anywhere between
4 45 and 90 percent establishment of paternity.

5 That's not 100 percent. We're not being told by
6 our Federal partner in this that we have to reach 100
7 percent anywhere. We're being told --

8 QUESTION: What about the payments? What about
9 the -- perhaps the statute's changed so much that I don't
10 know which version I'm dealing with, and so I might just
11 be referring to an old statute, but this -- the words I
12 have in the red brief at the end seem to talk about IV-D.

13 And then there's something, 42 U.S.C. 64, that
14 says a State plan for child and spousal support must, on
15 page 9a it says, provide that amounts collected as support
16 shall be distributed as provided in section 657, and then
17 section 657, which wasn't actually in the brief, seems to
18 have, like, eight paragraphs which say rather specifically
19 who gets what money, and then it seems like 654(b) says
20 the State disbursement unit shall distribute all amounts
21 payable under 657(a) within 2 business days.

22 So it seemed like there was a lot of rather
23 specific requirements saying exactly how many dollars
24 different people would receive, some of them being AFDC
25 people and some of them being non-AFDC people, and I think

1 Justice O'Connor's original question, which I thought
2 Justice Stevens was getting at too, is doesn't at least
3 that part of the statute create a private right, or create
4 a 1983 action that would require the State to pay the
5 money, the specific dollars that it must pay to the people
6 who are entitled to those dollars?

7 MR. DELANEY: Your Honor, if we have actually
8 received the moneys and we're holding the moneys and we
9 don't distribute, then yes, we could be sued if we're
10 wrongfully withholding it, but we could be sued not under
11 title --

12 QUESTION: Well, I would be amazed if the
13 Constitution says you have to pay within 2 business days,
14 as this statute does. I would be amazed if the
15 Constitution has the same requirements as to how much
16 money you can deduct for expenses or not as this statute
17 does.

18 So are you saying that this statute does not at
19 least give that right, the right that the very specific
20 provisions as to actual dollars that the State would have,
21 are you saying that this statute does not give that right
22 to a person who is entitled to those dollars?

23 MR. DELANEY: Your Honor, in terms -- getting
24 back to substantial compliance, or whether we have been in
25 substantial compliance, we don't know yet --

1 QUESTION: I'm not talking about substantial
2 compliance, you realize. My question is, is it your view
3 that the statute does not give that right to those very
4 dollars with the specific expense deductions, the specific
5 time periods, to the particular plaintiffs who are
6 entitled to those dollars? That was my question.

7 MR. DELANEY: At first glance, yes. However,
8 getting back to substantial compliance, the Secretary will
9 be promulgating regulations saying how she is going to
10 measure substantial compliance. There are other
11 provisions in the statute that talks about having to do
12 certain things.

13 The Secretary has promulgated regulations and
14 said that those time lines can be waived, those time lines
15 can be treated differently if you collect the moneys
16 within the audit period, and so the whole substantial
17 compliance thing does come back in in terms of measuring
18 whether there would be an individual right there or not,
19 and --

20 QUESTION: Could I follow up on that for a
21 minute? Supposing you have the hypothetical situation
22 Justice Breyer described. You've got some money collected
23 there, and you're in substantial compliance with the
24 statute. You have that money sitting there, and a
25 plaintiff who wanted that money sued you in State court,

1 said we want that money turned over to us. Could you
2 defend on the ground that we don't have to because we're
3 in substantial compliance with the statute?

4 MR. DELANEY: No, Your Honor. Again, if we
5 actually had the money, I don't think that we could. I
6 think that we would have to --

7 QUESTION: Well then, why is substantial
8 compliance a defense to a Federal cause of action if it's
9 not a defense to a State cause of action?

10 MR. DELANEY: The chief concern we have -- and
11 again, this whole line of questions has gone off on the
12 issue of actually holding the moneys, and we think that
13 that's a different situation because we actually have
14 property that we are holding of someone else's. That's
15 distinguishable from the broad range of the rest of title
16 IV-D.

17 QUESTION: The complaint would not argue that
18 there's been a violation of any obligation under the act.
19 The complaint would simply say, you have my money, right?
20 It's a State law cause of action for money improperly
21 withheld.

22 MR. DELANEY: Exactly, and --

23 QUESTION: When did title to that money pass to
24 the individual? Isn't there just a Federal duty to turn
25 over an amount of money collected? You say it suddenly

1 became the individual's property.

2 MR. DELANEY: Well, actually, it's done pursuant
3 to a court order, and the court order tells the individual
4 that they have to pay. Then the State is sitting there as
5 a repository, so it's really just enforcing that current
6 court order, that we are then holding that individual's
7 money, that we then turn it over.

8 QUESTION: What relief was prayed for here by
9 the plaintiff?

10 MR. DELANEY: Sweeping relief, in that they
11 asked for an order that Arizona be ordered to achieve as
12 well as sustain substantial compliance.

13 Again, the Secretary has already found that we
14 are in substantial compliance.

15 QUESTION: So it wasn't just a request that
16 money held by you be turned over to individual plaintiffs,
17 then.

18 MR. DELANEY: No. No, it was not at all, Your
19 Honor. It had to do with much more broader scope, saying
20 that we have to be held in substantial compliance, and
21 again the Secretary has already found that we're in
22 substantial compliance, and the Secretary's brief today
23 tells us that that is not a right that the individuals can
24 be enforcing.

25 Your Honor, I'd like to reserve the balance of

1 my time.

2 QUESTION: Very well, Mr. Delaney.

3 Ms. Berzon, we'll hear from you.

4 ORAL ARGUMENT OF MARSHA S. BERZON

5 ON BEHALF OF THE RESPONDENTS

6 MS. BERZON: Mr. Chief Justice, and may it
7 please the Court:

8 I'd like to begin by clarifying the complaint.
9 The complaint in paragraph 143 on pages 36 and 37 of the
10 Joint Appendix spells out the particular provisions of the
11 statute and regulations that are being complained of here.

12 They include the collect and using the parent
13 locator service which is specifically mandated by the
14 statute, refusal to collect in the manner that is
15 specifically required by the statute, refusal to carry out
16 paternity determinations in the manner required by the
17 statute, and so on.

18 QUESTION: But the --

19 QUESTION: What relief was requested? Was the
20 counsel wrong --

21 MS. BERZON: The relief that was requested was
22 double. On page 42 there was first relief entering --
23 asking that declaratory judgment be entered determining
24 that the operation of Arizona's title IV-D program
25 violates controlling substantive provisions of Federal law

1 creating rights in plaintiffs, and those provisions are
2 the mandatory, specific, and individual provisions that
3 are in this statute and the implementing regulations --

4 QUESTION: Well, it didn't say that at all. It
5 went on to ask for grant permanent and as necessary and
6 appropriate interlocutory injunctions --

7 MS. BERZON: That's correct.

8 QUESTION: -- prohibiting continued adherence to
9 the aforesaid pattern and practices, and requiring
10 affirmative measures sufficient to achieve as well as
11 sustain substantial compliance with Federal law throughout
12 all programmatic operations.

13 MS. BERZON: That's right, but --

14 QUESTION: Your answer really wasn't very
15 careful.

16 MS. BERZON: I was about to get to that. I'm
17 sorry. I was just --

18 QUESTION: I hope you will.

19 MS. BERZON: I certainly will, and what I was
20 going to say about -- I said it was double, and I was
21 getting to the double part. The double part was a request
22 for an injunction of that kind. However, that is simply
23 the prayer for relief. The Ninth Circuit did not reach
24 any remedial question.

25 The substance of the complaint is with respect

1 to the specific enforceable provisions, and I would
2 suggest that if this case was found to state a cause of
3 action under 1983 and remanded the question of relief and
4 whether that --

5 QUESTION: What is your --

6 MS. BERZON: -- injunction is proper is one that
7 the Court could determine at that point, or the Court
8 could determine now that isn't proper, but --

9 QUESTION: What is your best --

10 MS. BERZON: -- that is not the substance or the
11 core of this case.

12 QUESTION: What is your best authority for the
13 proposition that this suit, which in effect asks for an
14 ongoing regulatory scheme to be implemented by the State
15 of Arizona is not barred by Ex parte Young?

16 MS. BERZON: The best authority is Edelman v.
17 Jordan.

18 QUESTION: Pardon me?

19 MS. BERZON: Edelman v. Jordan. That case is
20 almost on all fours with this one. It was a case in
21 which --

22 QUESTION: Well, Edelman v. Jordan required that
23 a notice be sent out. This requires ongoing supervision
24 of a State administrative scheme. I think that's quite
25 different.

1 MS. BERZON: I did not understand that Edelman
2 v. Jordan required that a notice went out. Later, in
3 Koren v. Jordan, it was determined that notice of
4 relief --

5 QUESTION: Oh, yes, Edelman was --

6 MS. BERZON: Edelman was --

7 QUESTION: Was for retroactive --

8 MS. BERZON: At that time was assuming that the
9 statute was still in effect. At the time of Koren that
10 statute had been reversed, but at the time of Edelman the
11 statute was in effect, and Edelman understood that what
12 the -- that the ongoing injunction was going to remain in
13 effect, that the problem was with retroactive relief, but
14 that an injunction to continue to comply with the statute
15 was quite at the core of what Ex parte Young is about, and
16 the case is really indistinguishable from this one. It is
17 like --

18 QUESTION: Well, this case looks to me very
19 much, frankly, as though the respondents were just asking
20 the Federal court to step into the shoes of the Secretary
21 at the Federal level and compel substantial compliance
22 with the act, just as the Secretary's obligation would be,
23 and to have the Federal court take over the entire
24 administration of this IV-D act, and I never read that act
25 as contemplating such a broad role for the Federal court.

1 Now, that's not to say there may not be certain
2 individual provisions in the act that are specific enough
3 that could require enforcement, as has been discussed
4 already, but the notion that the Federal court could be
5 asked to come in and just take over the whole idea of
6 whether there is substantial compliance in all its
7 details, supervise it, struck me as going beyond any case
8 that this case had ever handed down.

9 MS. BERZON: At this juncture the issue in this
10 case, as I understand it, is simply whether there are any
11 enforceable rights of the particular kinds that are
12 alleged here, and I commend again section 143, which
13 really spells out what they are under 1983. The relief
14 available I think is really quite a separate question.

15 QUESTION: Ms. Berzon, I'm happy to talk about
16 the individual rights rather than the whole program.
17 Suppose you have a Federal statute that, let's say,
18 provides for broadcast licenses, and the claim is that the
19 license has been improperly denied.

20 The personsuing under 1983, however, is not the
21 person who would have gotten the license, but rather a hot
22 dog stand across the street from the person who would have
23 gotten the license, who claims that he lost a lot of
24 business, that had the license been issued here, there
25 would have been a lot more traffic and so forth. Would

1 that person have a cause of action under 1983?

2 MS. BERZON: I don't think he would, and I don't
3 think that this bears any resemblance to that. Here we
4 have a statute --

5 QUESTION: Now, wait. So you acknowledge that
6 some exercise must be indulged in in deciding what is a
7 right, deprivation of any rights, privileges, or
8 immunities. Not everyone who is adversely affected by the
9 failure to act has a right, so --

10 MS. BERZON: This Court's cases make that quite
11 clear.

12 QUESTION: So we ask the question here, when
13 1983 was enacted, would these people be deemed to have
14 rights?

15 Now, a brief by an amicus suggests that at the
16 time 1983 was enacted, under contract law third party
17 beneficiaries of a contract between two people would not
18 be able to sue in order to enforce the rights promised to
19 the third party beneficiary, and that's the situation you
20 have here. It's a contract between the Federal Government
21 and the States.

22 The States agree as part of that contract to
23 render certain benefits, services to your clients. Your
24 clients are suing as third party beneficiaries. As I read
25 the law at the time of 1983, third party beneficiaries had

1 no right, no right to sue, just like the hot dog stand
2 owner wouldn't have any right to sue today.

3 MS. BERZON: First of all, this Court has really
4 crossed that bridge a long time ago, beginning with King
5 v. Smith, Rosado v. Wyman, Edelman v. Jordan, Thiboutot
6 itself, Wilder, Wright and so on.

7 All of those cases have exactly the structure of
8 this one. They are cases in which the -- there is a
9 Spending Clause statute in which the State in return, and
10 I should say here for a large amount of money from the
11 Federal Government in a situation in which States that do
12 their job actually come out with a net surplus, have
13 agreed to provide specified rights, and this Court in
14 Bennett v. Kentucky Department of Education --

15 QUESTION: Was this argument made in those
16 cases?

17 MS. BERZON: I'm sorry.

18 QUESTION: Was this argument made and rejected
19 in those cases?

20 MS. BERZON: I don't know whether the third
21 party beneficiary argument was made, but certainly the
22 argument that the only enforcement mechanism available is
23 that within the statute and not the one that specifically
24 expressly provided by 1983 was made, but I would also --

25 QUESTION: Was there not some consideration --

1 MS. BERZON: I'm sorry.

2 QUESTION: Was there not some consideration
3 coming from the third party beneficiary in some of those
4 casess?

5 MS. BERZON: I would say that there was probably
6 a lot less than there is here, and here we have a
7 situation in which the individuals have cognizable rights
8 to the support, and what the statute is doing is assisting
9 them providing services in obtaining the support, and I'd
10 like to say in comment to --

11 QUESTION: Ms. Berzon, there's an anomaly, isn't
12 there, in that at least the Government is insisting that
13 substantial compliance is none of the business of the
14 beneficiaries. That's simply between the Secretary and
15 the State.

16 But your position seems to be, or the
17 Secretary's position seems to be that you can enforce full
18 compliance. Seventy-five percent of collections won't do.
19 You can insist on full compliance. Doing it in 3 days
20 instead of 2 days won't do. You can insist on full
21 compliance.

22 Now, isn't -- how does one rationalize giving
23 the beneficiaries a right to full compliance when all that
24 the Secretary can insist on is substantial compliance?

25 MS. BERZON: Actually, it isn't true that that's

1 all the Secretary can insist upon. The structure of this
2 statute includes title IV-A and title IV-D. Title IV-A is
3 the financial assistance provisions, which used to be AFDC
4 and it's presently temporary assistance to needy families.

5 It is in that section and that section alone
6 that the substantial compliance language appears, and it
7 appears in order to delineate a special draconian penalty
8 which says that if there is really, really noncompliance
9 with the statute, not only is the money that's being spent
10 for IV-D at issue, but other money, separate money, money
11 that is not being spent for this program but for a
12 different one is going to be docked as well. In other
13 words, it's a -- really it's a separate and draconian
14 penalty.

15 Substantial compliance does not appear in IV-D.
16 IV-D is -- all of the requirements set out in IV-D are
17 mandatory, specific, universal, run to each child, every
18 child, all children --

19 QUESTION: So then what was the letter following
20 the audit that says you are now in substantial compliance
21 not with everything in the world but with IV-D?

22 MS. BERZON: The letter that -- first of all, I
23 believe, and perhaps the Solicitor General can clarify
24 this, that it was not universal in any event. It was only
25 the specific issues that were determined not to be in

1 substantial compliance earlier.

2 There is no determination at all that at this
3 moment Arizona is in substantial compliance and, indeed,
4 despite the representations that were made earlier,
5 Arizona is dead last among the States with respect to the
6 efficiency of their collections.

7 QUESTION: I don't unfortunately have that
8 particular brief with me, but I'm fairly certain that
9 there was a broad statement that Arizona -- we are pleased
10 to tell you that Arizona is in substantial compliance with
11 the program.

12 MS. BERZON: But in any event, what I was going
13 to go on to say is that the statute as read against Bell
14 v. New Jersey, which has very similar provisions with
15 regard to funding, would permit the Secretary to, for
16 example, recoup misspent money and the regulations -- with
17 regard to IV-D money now, on a full compliance level.

18 And this Court in Bennett v. Kentucky Department
19 of Education specifically rejected a very similar argument
20 that would have read substantial compliance in a penalty
21 provision into the liability or obligations of the statute
22 as a whole, and it rejected that and said it isn't true.
23 It only applies to the particular penalties as to which
24 the substantial compliance language appears, and it does
25 not delineate the obligation when the obligation itself is

1 stated in a mandatory and not limited fashion.

2 So the substantial compliance issue here is
3 largely a red herring. It deals with a very specific
4 penalty. It does not deal with the Secretary's rights as
5 to IV-D money, and it does not deal with the beneficiary's
6 rights as to IV-D money.

7 QUESTION: Why do you think that's more
8 draconian than the relief you ask for in this complaint?
9 I mean, I'm not -- if I were the State administrator I'm
10 not sure that the cutting -- that the monetary penalty
11 from the Federal Government, or the cutting off of Federal
12 Government funds, would be any worse than being subjected
13 to a suit that demands, in effect, every individual get
14 what the act requires.

15 MS. BERZON: Again, I would like to suggest that
16 the case at this juncture is not about relief. It's about
17 whether there is a cause of action under 1983.

18 QUESTION: I understand that, but I'm just
19 questioning your assertion that the substantial compliance
20 provision only applies to some draconian relief. It seems
21 to me that to insist that the State comply with every jot
22 and tiddle of this law with respect to every person who is
23 benefited by the contract with the Federal Government is
24 itself pretty draconian.

25 MS. BERZON: My argument was simply that the

1 statute in terms makes it only available -- only
2 applicable to the relief, and that Bennett v. Kentucky
3 Department of Education makes clear that when that's the
4 case it applies to what it applies to and not to other
5 provisions that do not in terms speak in other than
6 mandatory, specific, and universal terms which the various
7 provisions here do, and I'd like to say --

8 QUESTION: How could I find out which provisions
9 you're talking about? My particular problem is, suppose I
10 thought that some of these provisions -- I take it in 654,
11 where there are 24 listed obligations, suppose I thought
12 that some of them Congress did mean to be mandatory in the
13 sense that they might fall within 1983, but others of them
14 Congress didn't. What should I do here?

15 It doesn't seem to me that the parties have
16 argued it out provision by provision. I didn't even know
17 what particular provisions you'd be talking about
18 specifically, so what -- I'm quite puzzled. If I thought
19 that perhaps some but not others, what's the proper
20 disposition of the case, and how do I know which are
21 which?

22 MS. BERZON: The -- again, the complaint is
23 quite specific about what provisions it's complaining
24 about.

25 QUESTION: It mostly said regulations. It mostly

1 cited regulations. It didn't cite --

2 MS. BERZON: It mostly cites regulations, but
3 those --

4 QUESTION: So which -- where do I find out which
5 provisions of the statute you're talking about?

6 MS. BERZON: Primarily the provisions of the
7 statute that we're talking about are the ones that derive
8 from 654(4), which is the provision that says that each
9 child is to be provided services with regard to location,
10 paternity, establishment of child support orders,
11 modification, and collection, and then there are various
12 provisions in this statute and in the regulations that
13 spin out exactly what that means, as well as provisions in
14 the statute which spell out the fact that the regulations
15 are binding on the States, and that the Secretary is to
16 issue these very specific timing regulations, which he did
17 do.

18 So I would suggest that what we need to focus on
19 here is the substance of the complaint, and that the
20 relief prayed for is really quite beside the point at this
21 juncture.

22 QUESTION: Well, can you give us at least an
23 example of, if you're right that there is a claim that
24 there is a private right, of relief that would be beyond
25 question within the ordinary judicial realm?

1 MS. BERZON: I think the relief, and I -- we say
2 this in our brief, given the very specificity of the
3 statute and the implementing regulations, it's really not
4 difficult. The relief is, comply with them. That's the
5 relief.

6 QUESTION: Then how does a judge --

7 MS. BERZON: As to the particular -- I mean,
8 obviously the person has to have standing as to whatever
9 they're complaining about, and therefore, for example,
10 Ms. Freestone's problem was that they were not withholding
11 wages from her husband in the way that the statute
12 requires, and the relief --

13 QUESTION: So the direction would then be, go
14 after her husband, and that would be the relief.

15 MS. BERZON: Yes, and this case was pled as a
16 class action and has been certified --

17 QUESTION: But what about, as there are many
18 people similarly situated and we can't identify them all
19 because we don't have the records, go after all defaulting
20 parents?

21 MS. BERZON: If there was a properly certified
22 class action and if it were proven that there was an
23 overall pattern of not doing so after a trial, then
24 ordinary equitable principles would apply. Now, the Ninth
25 Circuit again was --

1 QUESTION: You said, Ms. Berzon, as the statute
2 requires. Technically the statute here doesn't require
3 anything, does it, unless the State enters into a
4 contract. The State says -- what it says is, if you agree
5 to do this, the Federal Government agrees to do the other.

6 MS. BERZON: That's true, but the State has, and
7 this Court has --

8 QUESTION: The State has agreed, so the issue is
9 whether the State's breaking its word with the Federal
10 Government gives the right to people who are not parties
11 to that contract to come in and complain about it.

12 MS. BERZON: Once again, this Court, starting
13 with Rosado v. Wyman, has dealt with this problem and in
14 Rosado and a series of later cases has suggested the
15 nature of relief which might be available here would be
16 conditioned on the State continuing to take the money. If
17 the State at any point decided to opt out the money the
18 requirements would no longer apply.

19 Again, this has been thrashed out, it's been
20 determined, and the cases are there, so any --

21 QUESTION: I don't agree that it's been --

22 QUESTION: Were those class actions? Was Rosado
23 a class action?

24 MS. BERZON: I believe Rosado was a class
25 action.

1 QUESTION: Isn't -- you spoke of general
2 equitable principles of relief applying, and I guess it's
3 not clear to me that they necessarily would, at least I
4 think in the way you intended, because in the usual class
5 action case I think the assumption that we make going into
6 court is that there is no one in effect who is going to
7 act on behalf of the class except these particular
8 plaintiffs who are suing on behalf of the class.

9 But that's not so in a case like this, because
10 here we have a Federal agency which presumably is in
11 business to do precisely what the class relief is
12 requesting, and that is to look at the big picture and to
13 sort of take the mega enforcement action, so I would have
14 thought that even on general equitable principles the only
15 relief that it would be appropriate for a court to decree
16 as opposed to leaving it to the National Government to
17 demand would be the specific relief of those who claim
18 that they have a particular entitlement quite apart from
19 whatever in the main the State's failure or success may
20 be, which is the business of the National Government.

21 MS. BERZON: Again, this Court's cases have
22 never drawn that distinction. Many of the cases --

23 QUESTION: Why shouldn't we draw the
24 distinction?

25 MS. BERZON: -- under the Social Security Act

1 have been class actions.

2 QUESTION: Why shouldn't we draw the
3 distinction? In other words, why should a court in effect
4 take over an obligation which has been pretty clearly
5 delineated to be that of the Secretary here, as opposed to
6 doing what courts usually do in nonclass action cases
7 where there's nobody to act on behalf of a class if the
8 court and the plaintiffs don't, and that is simply to
9 provide the specific --

10 MS. BERZON: I guess because it would be
11 difficult to find -- certainly it would be difficult to
12 find any exception in 1983 which would preclude --

13 QUESTION: Well, 1983 doesn't say anything one
14 way or the other. 1983 provides in effect jurisdiction to
15 provide equitable relief, and the question that I'm
16 raising is really one of equitable relief principles and
17 that is, when you have somebody who in effect can do the
18 work of the class action, i.e., the Secretary, why should
19 a court do anything other than do the work that the
20 Secretary cannot do well?

21 MS. BERZON: I guess because the individuals in
22 question who are class representatives, if they can prove
23 a classwide relief, are simply doing what a class action
24 proposes.

25 Now, again I'd like to reiterate --

1 QUESTION: I think you've answered the question,
2 Ms. Berzon.

3 MS. BERZON: Thank you very much.

4 QUESTION: Your time has expired.

5 Ms. Millett, we'll hear from you.

6 ORAL ARGUMENT OF PATRICIA A. MILLETT
7 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE RESPONDENTS

9 MS. MILLETT: Mr. Chief Justice, and may it
10 please the Court:

11 Before I make my points, I would like to clarify
12 Arizona's status with respect to substantial compliance.
13 It is incorrect to say that we have found them in
14 substantial compliance in their overall operations. The
15 1994 letter to which Justice Ginsburg referred states only
16 that we have found them in substantial -- and this is at
17 page 1 of the reply to the cert petition, that appendix.
18 The program has achieved substantial --

19 QUESTION: Where are you reading from,
20 Ms. Millett?

21 MS. MILLETT: I'm sorry. It's the reply to --
22 the cert reply, at the cert stage, appendix --

23 QUESTION: Reply by whom?

24 MS. MILLETT: The reply by Arizona.

25 QUESTION: Whose reply?

1 MS. MILLETT: Their cert petition reply.

2 QUESTION: Arizona's?

3 MS. MILLETT: Yes. They filed -- the reply at
4 the cert page, and app 1 -- at app 1 the letter states
5 that the program has achieved substantial compliance with
6 the unmet criteria cited in our March 1992 penalty notice.
7 There's no broad finding of substantial compliance, and in
8 fact we have not made that yet.

9 We do not know what -- I'm not suggesting this
10 has happened by Arizona. We don't know. As I said, we
11 have investigated, but it would -- it's not uncommon in
12 these circumstances for agencies to focus on -- State
13 agencies to focus on the unmet criteria, and then that
14 takes resources away from another one.

15 QUESTION: Ms. Millett, as to the criterion, the
16 Government's brief said something about three different
17 kinds of provisions. They said, there are some that are
18 not judicially enforceable at all, some that are
19 judicially enforceable, and some that are not judicially
20 enforceable to the same degree as others, so you laid out
21 those three categories but you didn't fill any of them.

22 So looking at this, the dozens and dozens of
23 quite specific requirements, how does a court say which
24 ones are not judicially enforceable at all, which ones are
25 fully judicially enforceable, and which ones are

1 judicially enforceable somewhat?

2 MS. MILLETT: I think you have to look at the
3 plain language of the statute and the regulations. Parts
4 of the statute --

5 QUESTION: Well, you've looked at them.

6 MS. MILLETT: Right.

7 QUESTION: So can you give --

8 MS. MILLETT: Yes.

9 QUESTION: Since you set out those categories,
10 can you fill them for us?

11 MS. MILLETT: Certainly. Examples of the types
12 of things we just don't think are judicially enforceable
13 at all because they don't create rights are some of the
14 sort of macroadministrative mechanisms under the statute,
15 things such as, we discussed the substantial compliance
16 requirement, which is just a penalty provision that we
17 administer, the existence of a computer system writ large.

18 The general scheme for operating, the tools for
19 operating this are not the types of things that would be
20 judicially enforceable because they do not run to
21 individuals as rights.

22 Specific things that are judicially enforceable,
23 just in the statute itself -- the regulations we think
24 creates many, many more, but the statute itself talks
25 about, as Justice O'Connor already mentioned, the

1 requirement the States distribute proceeds collected in a
2 specific manner and under the new act between certain
3 specific times frames is a specific enforceable right that
4 runs to the individual. It's their money, and Congress
5 has said you have a right to get it in a certain amount of
6 time, and --

7 QUESTION: Congress hasn't said that. It's not
8 really a right. If the State had chosen not to go into
9 this program nobody would have any rights to anything
10 here. If there is any entitlement to it, it is through
11 the contract between the State and the Federal Government,
12 isn't it?

13 MS. MILLETT: Your --

14 QUESTION: It's too misleading to refer to it
15 casually as a right. It may be a right, or it may not be
16 a right, and that's part of the issue. It arises out of
17 this contract, and that's what makes it difficult to
18 decide these Government grant and benefit program cases,
19 as distinguished from those cases in which the Federal
20 Government does create rights. Automatically it says the
21 States must do this.

22 MS. MILLETT: Well, some --

23 QUESTION: Then you have a 1983 right, and it's
24 easy to talk cavalierly about rights, but every time you
25 say right, I -- you know, I think that's really what's at

1 issue here.

2 MS. MILLETT: Sometimes Congress creates things
3 that are recognized as rights outside the contract
4 context, such as a Clean Water Act, a Clean Air Act, that
5 don't apply to States until they choose to enter into an
6 activity that is covered. This would be the same way.

7 Yes, if no one gets into this program, although
8 all 50 States are, there are no rights, but once you get
9 in you are bound by the Federal law that you have
10 voluntarily chosen to submit to and been paid
11 substantially to comply with.

12 This Court's decisions, previous decisions
13 involving these types of contract cooperative
14 relationships have all recognized that once you're in we
15 can decide whether or not the Federal law you have now
16 agreed to comply with creates rights, and we believe that
17 to underscore this with respect to the Social Security
18 Act, Congress acted after this Court's decision in Suter
19 and passed 42 U.S.C. section 132a-2, and that underscored
20 Congress' intent that under 1983 this type of
21 relationship, once it's entered into, can create rights.

22 QUESTION: Yes, but there may be very few so-
23 called privately enforceable rights here because the
24 statutory scheme is one that essentially wants the States
25 to be involved in a program to substantially carry out the

1 Federal vision, and to be involved in substantially trying
2 to help people collect child support, but clearly it's not
3 going to be effective in every case.

4 There are deadbeats who are never going to be
5 located or who don't have the money. You can't squeeze
6 blood out of a turnip, and you've never going to get it,
7 and Congress surely didn't contemplate here that for most
8 of these provisions that there are individual rights which
9 the statute never contemplated the State would be required
10 to carry out in every single case. It was seeking broadly
11 substantial compliance. There may be some individual
12 exceptions within the act, such as where money has in fact
13 been collected and not paid over, but I think those might
14 be few and far between.

15 MS. MILLETT: Your Honor, we would disagree.
16 Congress wants full compliance. The fact that it has a
17 penalty provision in IV-A and not in IV-D, in IV-A, in
18 terms of substantial compliance is no different. The old
19 AFDC program had a substantial compliance penalty
20 provision, too. They concede that that was enforceable.

21 QUESTION: Does the Secretary have authority to
22 do anything other than those draconian things, either
23 suspend payment or dock payments? Could the Secretary
24 seek the kind of relief these plaintiffs are seeking?

25 MS. MILLETT: We think that the Secretary and

1 the United States generally has the same right under a
2 contract as any other party to seek specific
3 performance --

4 QUESTION: And how about the Secretary herself?
5 Suppose that -- we have a letter talking about 1992,
6 written in 1994. Suppose the plaintiffs say the real
7 problem is the Secretary. She is just letting the States
8 get away with murder, so we want to sue the Secretary for
9 insufficiently monitoring this program, not simply in
10 Arizona. There may be States that are much worse than
11 Arizona. How about that? Would there be a claim? What
12 is the Government's position? Could the Secretary be sued
13 for abysmal lack of enforcement?

14 MS. MILLETT: I think that you would have -- a
15 plaintiff would have serious standing problems that sound
16 a lot like Simon v. Eastern Kentucky Welfare Rights
17 Organization, where they were trying to sue the
18 Commissioner of Internal Revenue to change a rule which
19 would then require -- supposedly require hospitals to
20 change their conduct which then might result in benefits
21 to the plaintiffs. That would be the same sort of
22 attenuated scenario.

23 QUESTION: I don't see that, because here the
24 Secretary can take away they money. There the question
25 was, how would the hospitals respond?

1 MS. MILLETT: We could take away the money. As
2 a second tier we also think that our audit and penalty
3 things are committed to agency discretion so there would
4 be a second problem beyond that, and there's nothing in
5 the statute that would allow a court to determine --

6 QUESTION: So your answer is that there would
7 be -- there is standing against the State Department of
8 Welfare but there would be no standing against the
9 Secretary?

10 MS. MILLETT: Right, because the person that --
11 because what they want is services, and we don't deliver
12 the services, and this was the same problem again in
13 Simon. You need to sue the person who can give you what
14 you want, to make it very simple.

15 QUESTION: Can I ask about -- I just have one
16 question in this case which stems from your idea that some
17 of these are enforceable and others are not. That's why I
18 wanted to find out which one they're talking about, and
19 they say they're talking about 654(4) primarily, and if I
20 look at that, that provision says that the State has to
21 promise it will undertake to establish the paternity of
22 the child, and that the State will undertake to secure
23 support for the child.

24 Now, those are the two provisions. It seems to
25 me those are awfully vague and general. So now -- I'm

1 sure that's what they'll say. I want to know what is it
2 that leads you to think that those words that I just quote
3 are meant to give a specifically enforceable right to an
4 individual?

5 MS. MILLETT: I think it's those words in
6 combination with others. We don't think that every single
7 stage of paternity or support services is enforceable.
8 You have to look at the statute regs and see if it spells
9 it out. Let me give you an example.

10 QUESTION: The regs? You mean you're saying the
11 regs are what are enforceable?

12 MS. MILLETT: No. There's statutory provisions
13 and regulations both. Let me -- I can give you a couple
14 of examples of statutory provisions in the -- that might
15 affect these plaintiffs. First of all, there's the
16 distribution one that's already been discussed. Section
17 654(8) requires that when someone seeks location
18 services --

19 QUESTION: Yes.

20 MS. MILLETT: -- you must use a Federal --

21 QUESTION: Okay, I got -- I understand your
22 point now. But then what am I supposed to do if I think
23 you have made the -- I'm not sure about 654(4) and I don't
24 feel they've argued that specifically. Maybe you have.
25 But what do I -- what am I supposed to do if I think some

1 were not argued, particularly not 654(4), with enough
2 detail for me to decide? Some you may be right on.
3 Others you may be not. What am I supposed to do with this
4 case?

5 MS. MILLETT: I believe a remand --

6 QUESTION: Yes.

7 MS. MILLETT: I believe a remand would be
8 appropriate. Thank you.

9 QUESTION: Thank you, Ms. Millett.

10 Mr. Delaney, you have 3 minutes remaining.

11 REBUTTAL ARGUMENT OF C. TIM DELANEY

12 ON BEHALF OF THE PETITIONER

13 MR. DELANEY: Thank you, Your Honor. I have
14 just three quick points.

15 QUESTION: You'd better hurry up and make them.

16 (Laughter.)

17 MR. DELANEY: Ms. Berzon was talking about
18 looking at the substance of the complaint. If you look at
19 paragraph 132(t), they complain about the extraordinary
20 staff personnel shortages as the paramount cause of
21 noncompliance with IV-D requirements.

22 Then at 133, paragraph 133, they complain that
23 Linda Blessing lacks the authority to direct the legal
24 work of the AG's office, and at 134 they complain about
25 the fact that title IV-D at the State level incurs

1 problems with clerks in the Superior Court.

2 What they're asking for here is not a structural
3 injunction. They're asking for a restructural injunction
4 because they want a Federal judge to come in and tell
5 Arizona how to redo its State government activities, and
6 as the SG's representative just said, you need to sue the
7 person who can grant the relief.

8 Linda Blessing cannot redo what the Arizona
9 legislature's budgetary concerns are. Linda Blessing
10 cannot go out and reconfigure the lines of Arizona State
11 government so that she can control the AG's office, and
12 she cannot go out and rewrite Arizona government in terms
13 of having to make the counties comply.

14 So it really boils down to, what's a Federal
15 court going to do here? Is it going to duplicate what the
16 Secretary's done, or will it be imposing new duties beyond
17 whatever the Congress has passed?

18 My second point gets to one that Justices Breyer
19 and Ginsburg have raised, which is, how do I know which
20 are which? The SG has just told us, well, we can look at
21 them provision by provision, and some are and some aren't.
22 We have to guess and hope that we come up with the answer.

23 We believe that the Constitution says otherwise.
24 The Spending Clause as this Court has interpreted says
25 that the States have to know unambiguously what is

1 enforceable and what is not. We have to know in advance
2 so that we can make the determination whether we want to
3 accept this agreement or not, and the Constitution
4 requires that it be spelled out by Congress and not by
5 judges who have to guess which ones are --

6 QUESTION: But their argument will be, when I
7 look at 644(4) and look at all the regs, I'll discover
8 it's very, very specific, and if it is?

9 MR. DELANEY: Again, we think that that should
10 be something that they do across the street rather than
11 out at the various district courts or even at State courts
12 to be guessing, well, this one looks like it is, and this
13 one looks like it isn't. Instead of having a Nation-wide
14 uniform system we're going to wind up with a judge in
15 Phoenix looking at something different than one in
16 Massachusetts and saying that the same provision is or is
17 not enforceable. Congress should be doing that.

18 And my final point, just racing through here,
19 Justice Ginsburg, you had asked a question about the --

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
21 Delaney. The case is submitted.

22 QUESTION: Two out of three ain't bad.

23 (Laughter.)

24 (Whereupon, at 11:05 a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

LINDA J. BLESSING, DIRECTOR, ARIZONA DEPARTMENT OF ECONOMIC SECURITY, Petitioner v. CATHY FREESTONE, ETC., ET AL.
CASE NO. 95-1441

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Nani Federico

(REPORTER)