1996 WL 426258 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Linda J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity, Petitioner,
v.
Cathy **FREESTONE**, et al., Respondents.

No. 95-1441.
October Term, 1995.
July 26, 1996.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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***i** QUESTIONS PRESENTED

The overarching question—whether custodial parents seeking child support from noncustodial parents can sue state officials under 42 U.S.C. § 1983 to redress alleged violations of the Title IV-D child support program agreements between the States and the federal government—may be broken into the following subparts:

1. Whether Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669, which does not explicitly or implicitly provide for a private cause of action, nevertheless creates rights that are enforceable against state officials in a private cause of action pursuant to 42 U.S.C. § 1983.

2. Whether the Eleventh Amendment precludes a § 1983 cause of action against state officials to enforce the provisions of

Title IV-D of the Social Security Act.

3. Whether Maine v. Thiboutot, 448 U.S. 1 (1980), which extended § 1983 to provide a remedy for violations of certain statutes not enacted pursuant to the Fourteenth Amendment, should be reconsidered in light of, among other things, the language and history of § 1983 itself, "clear statement" principles, and this Court's decisions concerning implied causes of action.

*ii PARTIES TO THE PROCEEDING BELOW

Petitioner Linda J. Blessing, Director of the Arizona Department of Economic Security (the "State Director"), has succeeded Charles E. Cowan, who held that position during the proceedings below.

Respondents Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers, and Esperanza Laustaunau (the "Respondents") are proposed class representatives who filed the underlying action individually, on behalf of their minor children, and on behalf of all others similarly situated.

West Headnotes (3)

Civil Rights Child custody, support, and protection; parental rights

Do provisions of Social Security Act, which requires state to adopt plan for child support enforcement in order to participate in Aid to Families with Dependent Children (AFDC) program, but which does not explicitly or implicitly provide for private cause of action, nevertheless create rights that are enforceable against state officials in private cause of action pursuant to federal civil rights statute by custodial parents seeking child support from noncustodial parents to redress alleged violations of Act's child support program agreements between states and federal government? Social Security Act, § 451 et seq., 42 U.S.C.A. § 651 et seq.; 42 U.S.C.A. § 1983.

Federal Courts Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine
Federal Courts Agencies, officers, and public employees

Does Eleventh Amendment preclude cause of action under federal civil rights statute against state officials to enforce provisions of Social Security Act, which requires state to adopt plan for child support enforcement in order to participate in Aid to Families with Dependent Children (AFDC) program? U.S.C.A. Const.Amend. 11; Social Security Act, § 451 et seq., 42 U.S.C.A. § 651 et seq.; 42 U.S.C.A. § 1983.

Civil Rights Rights Protected

Should federal civil rights statute not provide remedy for violations of statutes that are not enacted pursuant to Fourteenth Amendment? U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

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*1 OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 68 F.3d 1141 (9th Cir.1995). Pet. App. 1a-46a. The judgment of the United States District Court for the District of Arizona granting summary judgment in favor of the State Director is not reported. Pet. App. 1b-10b.

JURISDICTION

The court of appeals entered its judgment on October 12, 1995. The court of appeals denied a petition for rehearing and a suggestion for rehearing en banc on December 12, 1995. Pet. App. 1c-2c. The Petition for Writ of Certiorari was filed in this Court on March 8, 1996, and was granted on May 13, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

This matter involves the following provisions, the pertinent texts of which are reprinted as indicated: United States Constitution—Article I, § 8, cl. 1, Eleventh Amendment, and Fourteenth Amendment (Appendix A); federal statutes—42 U.S.C. §§ 601-617 (Title IV-A) (Pet.App.D), 42 U.S.C. §§ 651-669 (Title IV-D) (Pet.App.D), 42 U.S.C. § 1983 (Appendix A); and federal regulations—45 C.F.R. §§ 302.33, 305.20(a)(3), and 305.99 (Pet.App.E).[1]

STATEMENT OF THE CASE

This Court must decide whether the more than 18,000,000 custodial parents throughout the United States may sue state officials under 42 U.S.C. § 1983 to enforce federal laws governing the States' receipt of federal funds ***2** to operate state child support enforcement programs pursuant to Title IV-D of the Social Security Act. Opening this floodgate of potential litigation against already overburdened state child support enforcement programs would necessarily divert operational attention and scarce public funding from delivery of services to litigation defense activities, thereby impairing the programs' abilities to perform the complex series of activities necessary to secure child support in each case and harming the very children that the programs were designed to help.

When Congress established Title IV-D's intricate statutory scheme, it recognized the difficulties posed by absent parents who are determined to avoid their responsibilities, the elaborate and interdependent tasks necessary to establish and enforce those responsibilities, the limited availability of public funding, and the enormous caseloads involved. Accordingly, Congress did not guarantee collection of child support. Instead, Congress dictated only that States, as a condition of receiving federal funds, comply "substantially" (defined as 75% of the time) with Title IV-D's provisions. Congress then vested in the Secretary of the United States Department of Health and Human Services (the "Secretary") both the exclusive authority to audit state programs for substantial compliance and the necessary discretion to suspend financial penalties to allow States an opportunity to reach substantial compliance without suffering funding reductions, which would hurt children.

As set forth below, the court of appeals erroneously attempted to engraft a private cause of action onto Title IV-D, in contravention of Congress' intent, this Court's precedents, and the Constitution.

A. Statutory Background

Title IV-A of the Social Security Act governs the federal welfare program known as Aid to Families with Dependent Children ("AFDC"). 42 U.S.C. §§ 601-617 (1985 & Supp. May 1996). A federal grant-in-aid program ***3** that Congress created pursuant to its power under the Spending Clause, see, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 11-17 (1981) ("Pennhurst I") (citing King v. Smith, 39 U.S. 309, 316 (1968)), Title IV-A establishes "a scheme of cooperative federalism" under which the federal government reimburses States for a portion of the funds that the States distribute to needy, dependent children and the adults who live with and care for them. Bowen v. Gilliard, 483 U.S. 587, 589 n. 1 (1987). Families who are eligible for AFDC assistance receive monthly grants that are intended to make up the difference between their income and available resources and a standard of need that the State has deemed necessary to maintain a hypothetical family at a subsistence level. Shea v. Vialpando, 416 U.S. 251, 253-54 (1974).

In 1975, to complement Title IV-A, Congress enacted the Child Support Enforcement Act as Title IV-D of the Social Security Act. 42 U.S.C. §§ 651-669 (1985 & Supp. May 1996) ("Title IV-D"). Congress simultaneously amended Title IV-A to require that States, as a condition of receiving AFDC funds, adopt plans to provide child support collection services. 42 U.S.C. § 602(a)(27).

Congress enacted Title IV-D as a cooperative federal/state partnership for the public collection of private monies for child support. The purposes of Title IV-D include locating absent parents, establishing paternity, and obtaining and enforcing support obligations that absent parents owe to their families. 42 U.S.C. § 651. Title IV-D agencies provide these services, which are collectively referred to as "child support enforcement" activities, to all who apply, regardless of income level or welfare or nonwelfare status. Id.

Under this intergovernmental program, the participating States are responsible for providing almost all of the direct services, while the federal government oversees implementation and supplies two-thirds of the program's base funding. See 42 U.S.C. § 655(a)(2). In addition to establishing the provisions that States' child support enforcement plans must include to qualify for federal ***4** funding, 42 U.S.C. § 654, Title IV-D sets forth duties that the Secretary must fulfill in monitoring the States' plans.

The Secretary must evaluate implementation of state child support enforcement plans and audit state child support enforcement programs to determine whether the programs are being operated in accordance with Title IV-D's requirements. 42 U.S.C. §652(a)(4). The Secretary must audit all programs at least once every three years. Id. If the Secretary finds that a state program does not substantially comply with Title IV-D, she must impose penalties by ordering that the State's AFDC (as opposed to Title IV-D) funds be reduced in accordance with a statutorily prescribed formula. 42 U.S.C. § 603(h). The Secretary can suspend imposition of the penalty if the State adopts a corrective action plan that the Secretary approves to remedy the deficiencies. Id. The Secretary must audit at least every year the programs of States that have had their AFDC funds reduced for failing to substantially comply with Title IV-D's requirements or that are operating under a corrective action plan. 42 U.S.C. § 652(a)(4). The Secretary also can cut off funds completely from (1) a State that does not operate its AFDC program in accordance with Title IV-A's requirements (including the requirement of having a child support enforcement program that substantially complies with Title IV-D, 42 U.S.C. § 602(a)(27)), 42 U.S.C. § 604(a), and (2) a State whose State plan does not substantially comply with Title IV-D's requirements. 45 C.F.R. §§ 301.10, 304.20(b).

B. Proceedings Below

On February 22, 1993, Respondents filed a class action complaint in the United States District Court for the District of Arizona seeking only declaratory and injunctive relief against the State Director under 42 U.S.C. § 1983. J.A. 41. The five named Respondents represent a ***5** proposed class of approximately 300,000 custodial parents in Arizona who have applied to receive child support enforcement services from the Arizona Department of Economic Security ("ADES") under Title IV-D.[2]

Respondents sought a declaration that (1) the operation of Arizona's child support enforcement program violated rights that Title IV-D and its implementing regulations created on their behalf, and (2) they could enforce these rights in a § 1983 action. Id. They also asked the court for a permanent injunction with continuing supervision of the State to ensure that ADES would achieve and sustain substantial compliance with Title IV-D.

The State Director filed a motion to dismiss, which the district court treated as a motion for summary judgment. Pet. App. 4b. The district court granted summary judgment in favor of the State Director, relying upon the reasoning in Carelli v. Howser, 923 F.2d 1208 (6th Cir.1991), which held that Congress had foreclosed private actions to enforce Title IV-D.

A divided panel of the court of appeals reversed the district court's decision. The majority presumed that § 1983 provides a private cause of action because it believed that Title IV-D creates enforceable rights and Congress has not explicitly or implicitly foreclosed § 1983 enforcement. Pet. App. 9a-10a. Judge Kleinfeld dissented, noting—among other things—that Title IV-D, like the statutory scheme at issue in Suter v. Artist M., 503 U.S. 347 (1992), did not unambiguously confer enforceable rights upon the Respondents, Pet. App. at 39a, and that ***6** the majority's shift of Title IV-D enforcement from the Secretary to federal judges was contrary to Congress' intent. Id. at 37a-38a.

SUMMARY OF ARGUMENT

The question of which federal statutory and regulatory "rights" properly can be enforced against the States through 42 U.S.C. § 1983 poses profound issues concerning separation of powers and the proper relationship between federal courts and state institutions. By authorizing private individuals to sue the State Director to enforce a federal-state cooperative agreement that contains no express private cause of action, the court below exercised functions that are uniquely congressional in nature. This usurpation of legislative authority is doubly questionable because Title IV-D involves Spending Clause legislation, in which the "clear statement" principle counseling judicial restraint is strongest. Yet the court of appeals acted without any authority from the legislative branch. Moreover, by enforcing federally adopted standards through its broad equitable powers, the federal court below assumed responsibility for managing significant state executive and legislative functions. It is against this backdrop—involving some of the most basic issues concerning the proper structure of our constitutional system—that the Court should decide whether § 1983 properly authorizes the lawsuit here, and more fundamentally, whether the Court should reconsider if § 1983 can support the extraordinary authority federal courts have exercised since Maine v. Thiboutot, 448 U.S. 1 (1980).

1. Under the Court's current test and most recent pronouncement, see Suter, 503 U.S. at 355-57, § 1983 cannot be used to enforce the Spending Clause legislation of Title IV-D.

a. The "legitimacy" of Congress' power to legislate pursuant to the Spending Clause "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' " that the States and the federal government ***7** enter into in Spending Clause programs. Pennhurst I, 451 U.S. at 17. This Court has insisted that Congress impose all conditions upon Spending Clause grants "unambiguously" and with a "clear voice" in order for "States to exercise their choice knowingly, cognizant of the consequences of their participation." Id.; see also South Dakota v. Dole, 483 U.S. 203, 207 (1987). Here, Congress did not unambiguously notify States that their acceptance of federal AFDC funds would expose them to § 1983 liability (including attendant attorney's fees under 42 U.S.C. § 1988).

Moreover, Title IV-D does not unambiguously create the binding obligations to, or "rights" for, any individual Respondent that a § 1983 action requires because Title IV-D is satisfied by State compliance in only 75% of the cases. 42 U.S.C. § 652(g)(1)(A); see also 45 C.F.R. § 305.20(a)(3). Congress also provided elaborate financial incentives to encourage States to secure support, and both logic and precedent indicate that such incentives are inconsistent with an interpretation that Congress intended to impose binding obligations. Pennhurst I, 451 U.S. at 17-18.

b. Indeed, Title IV-D's provisions are so nonbinding, and the benefits to any individual Respondent are so vague, amorphous, and speculative, that no Respondent can establish the causation or redressability necessary for Article III standing, much less any statutory "right." See, e.g., Linda R.S. v. Richard D., 410 U.S. 614, 616-19 (1973). The cause of any Respondent's failure to receive support is not the State, but rather the absent parent who is not paying the support. Moreover, Title IV-D does not compel the State to actually secure support from any such absent parent on behalf of any individual Respondent. Section 1983 should not be construed to create a private cause of action for Respondents who lack standing to pursue it. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62, 576-78 (1992); cf. Lewis v. Casey, 64 U.S.L.W. 4587, 4588 (U.S. June 24, 1996).

***8** c. Title IV-D's administrative enforcement scheme precludes judicial recognition of a § 1983 cause of action. See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 15, 20 (1981). The Secretary's frequent and rigorous audits under Title IV-D, along with the availability of financial penalties and funding cutoffs at the Secretary's discretion, demonstrate comprehensiveness that precludes the judicial recognition of supplemental remedies under § 1983.

2. The Eleventh Amendment also bars Respondent's suit. First, Arizona has not unequivocally waived its sovereign immunity in this case. Second, Congress has not unequivocally expressed its intent to abrogate participating States' sovereign immunity, nor could it do so because Title IV-D is Spending Clause legislation that was not enacted pursuant to Congress' power under the Fourteenth Amendment. See Seminole Tribe v. Florida, 116 S.Ct. 1114, 1123, 1125 (1996). Respondents cannot avoid this Eleventh Amendment bar by nominally seeking declaratory and injunctive relief against the State Director alone. The statutory enforcement scheme that Congress provided for Title IV-D stops far short of authorizing broad private actions for declaratory and injunctive relief. See id. at 1132-33.

3. This Court should reconsider Maine v. Thiboutot, 448 U.S. 1 (1980), and modify its holding. First, pursuant to the clear statement principles that federalism requires in interpreting § 1983, see Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989), but which Thiboutot ignored, a law can create a "right" enforceable under § 1983 only if it creates "[a] legally enforceable claim of one person against another." Dennis v. Higgins, 498 U.S. 439, 447 n. 7 (1991) (emphasis added) (citation omitted). Thus, federalism demands, at a minimum, that to establish a "right" against a State under § 1983 based on a statutory violation, a plaintiff should have to show at least what he or she would have to show to sue a private person: an express or implied cause of action under the underlying ***9** statute. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 525-26 (1990) (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, JJ., dissenting).

Second, § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(a)(3), should be construed in pari materia. Such an interpretation, which the circumstances and history of § 1983 strongly support, would limit § 1983 actions seeking statutory enforcement to actions to enforce statutes "providing for equal rights." Id. It would also bring § 1983 into harmony with Seminole Tribe, which holds that Congress must act pursuant to the Thirteenth, Fourteenth, or Fifteenth Amendments (or a later Amendment) to abrogate a State's Eleventh Amendment immunity. 116 S.Ct. at 1128. Title IV-D is Spending Clause legislation, and the spending power is, of course, contained in the pre-Eleventh Amendment Constitution. By allowing § 1983 to enforce alleged rights that are not derived from the Fourteenth Amendment, the court below authorized Congress to do indirectly that which it unquestionably could not do directly under Seminole Tribe: expose the States to federal court litigation and damages actions brought by citizens to enforce noncivil rights.

Stare decisis should not bar these necessary modifications of Thiboutot. Not only is Thiboutot inconsistent with later authority, as well as with fundamental federalism and separation of powers principles, but also the speculative, case-by-case analysis it requires has created an unworkable and ever-expanding judicial quagmire.

Accordingly, this Court should reverse the decision of the court of appeals and order that Respondents' suit be dismissed.

ARGUMENT

This case, concerning whether Title IV-D can be enforced privately against State officials under 42 U.S.C. § 1983, tests the delicate balance of power not only ***10** between the federal government and the States, but also among the coequal branches of the federal government. Each expansion of liability under § 1983 chips away at the pedestal of federalism that undergirds our constitutional structure. Moreover, when such expansion occurs because a federal court has elected to speculate about congressional intent in the face of Congress' failure—whether deliberate or inadvertent—to express its intent clearly, the constitutional principle of separation of powers that limits federal judicial power is weakened, and the distinct lines between the executive, legislative, and judicial functions blur.

Title IV-D authorizes a cooperative agreement between the federal government and participating States. Respondents seek to enforce judicially Title IV-D's numerous provisions and those of the regulations adopted thereunder directly against the State Director by means of § 1983. Principles of federalism and separation of powers, however, counsel against such an expansive interpretation of § 1983 in this case.

Federalism concerns are especially heightened where, as with Title IV-D, Congress acts pursuant to its spending power. As is the case with other federal-state cooperative programs, States choose whether to participate in the AFDC program; if they elect to participate, they agree to comply with all of the terms and conditions placed on the grant of federal funds. One of Title IV-D's terms requires participating States to operate a child support enforcement program. As with all cooperative programs, States still have some latitude to run their Title IV-D programs as they see fit. By replacing State discretion with ongoing federal judicial oversight through the expanded use of § 1983, federal courts have abrogated the States' ability to control their own resources, to the detriment of the very people and goals that these programs were intended to serve. See Thiboutot, 448 U.S. at 23-25 (Powell, J., dissenting); cf. Missouri v. Jenkins, 115 S. Ct. 2038, 2054 (1995).

***11** Judicial use of § 1983 to enforce any and all federal statutory rights has produced a realm of "quasi-implied" causes of action against state officials. Section 1983 creates no rights itself; it merely enforces rights created elsewhere. In the aftermath of the expansive reading that the Thiboutot majority gave the word "laws" in § 1983, courts have examined federal statutes on a case-by-case basis and have speculated as to whether Congress intended each statute to create a "right" for which § 1983 provides a cause of action. This judicial undertaking relieves Congress of its constitutional obligation to make the difficult political choice as to whether to allow a private cause of action. Private causes of action carry significant costs and potential benefits; weighing the relevant interests in devising a proper method of enforcement is a quintessentially legislative process. Providing such a remedy without clear evidence of Congress' intent usurps that legislative role in derogation of basic principles of separation of powers. Judicial addition of a § 1983 remedy that permits private individuals to sue States and allows federal judges to oversee State IV-D programs thus subverts the federal-state contract in violation of Spending Clause, separation of powers, and federalism principles.

I. TITLE IV-D DOES NOT CREATE RIGHTS ENFORCEABLE BY PRIVATE PARTIES IN AN ACTION UNDER § 1983.

Section 1983 "by itself does not protect anyone against anything," or "provide any substantive rights at all." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979). Rather, § 1983 merely provides a vehicle for enforcing rights that other substantive laws and the Constitution explicitly create. See Maher v. Gagne, 448 U.S. 122, 129 n. 11 (1980). Respondents' sole claim is that Title IV-D's funding provisions create rights in them that they ***12** can enforce against State officers in a § 1983 action.[3] However, it is undisputed that Title IV-D creates no express cause of action on Respondents' behalf. Because Congress did not intend to permit private parties to enforce Title IV-D's prescriptions via § 1983, it did not provide the unambiguous notice necessary to bind the States. Therefore, Respondents' argument fails under this Court's precedents that establish the framework for analyzing the type of action that Respondents press here.

Under the existing framework, a plaintiff may not bring suit under § 1983 if "(1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.' " Wilder, 496 U.S. at 508 (quoting Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987)); Suter, 503 U.S. at 355-56. Application of this framework to Title IV-D demonstrates that a § 1983 action should not be available to Respondents.

A. Title IV-D Does Not Create Enforceable Rights.

"Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law." Wilder, 496 U.S. at 509 (emphasis in original) (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)). Thus, the first critical question is whether Congress "unambiguously confer[red]" upon Respondents a right to enforce Title IV-D's provisions. Suter, 503 U.S. at 357 (emphasis added). To establish that Congress has done so, Respondents must show that (1) Title IV-D was "intend[ed] to benefit" them; (2) Title IV-D imposes "binding obligation[s]" on the States; and (3) the interests ***13** that Respondents assert are not so " 'vague and amorphous' " that they are " 'beyond the competence of the judiciary to enforce.' " Wilder, 496 U.S. at 509 (quoting Golden State, 493 U.S. at 106) (other citations omitted). Even if it is assumed that Respondents are among the Act's intended beneficiaries, Respondents cannot satisfy the remainder of this Court's prerequisites.

1. Title IV-D does not impose any " 'binding obligation' on the States that gives rise to enforceable rights." Wilder, 496 U.S. at 510. Although Title IV-D does require certain actions of participating States, the Court "must examine exactly what is required of States by the Act," taking "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created 'enforceable rights, privileges, or immunities within the meaning of § 1983.' " Suter, 503 U.S. at 357-58 (emphasis added) (quoting Wright, 479 U.S. at 423); see also Pennhurst I, 451 U.S. at 19 (examining specific section "in the context of other more specific provisions of the Act"). Thus, the Court's examination of the relevant provisions of the Medicaid Act in Wilder revealed a "binding obligation" that a participating State actually "adopt reasonable and adequate" reimbursement rates for health care providers, not simply assure the Secretary that it had found its rates to be "reasonable and adequate." 496 U.S. at 512-15. Similarly, the Court found in Wright that the Brooke Amendment to the Housing Act's requirement that low-income families "shall pay as rent" no more than 30% of their income "could not be clearer" and that it created a right that low-income families could enforce. 479 U.S. at 419-20, 430. Indeed, both cases involved requirements measurable in hard dollars.

Suter, by contrast, involved the provision of general services under § 671(a)(15) of the Adoption Assistance and Child Welfare Act, which merely required States to make "reasonable efforts" (1) to prevent or eliminate the need to remove a child from his or her home and (2) to return the child to his or her home. The Court found that ***14** the "reasonable efforts" requirement was not definitive enough to create an enforceable right because the manner in which "the State was to comply with this directive ... was, within broad limits, left up to the State."[4] Suter, 503 U.S. at 360.

Title IV-D's requirements for services are more like those at issue in Suter than like the measurable dollars at issue in Wright or Wilder. Title IV-D requires only "substantial compliance" with its requirements. 42 U.S.C. § 602(a)(27). The relevant statutory sections and regulations define "substantial compliance" as compliance in at least 75% of the cases reviewed. 42 U.S.C. § 652(g)(1)(A); see also 45 C.F.R. § 305.20.[5] In other words, neither the ***15** statute nor the regulations require participating States to actually "secure support" or "establish paternity" for any particular applicant. That States are not required to be in compliance with respect to all cases manifests Congress' desire that the States exercise discretion with respect to actions taken in individual cases. Indeed, Respondents can point to no requirement that would assure them individually of enhanced child support recovery or establishment of paternity. See Pet. App. 37a ("[t]he law at issue says, in substance, that states are supposed to try pretty hard, and do a pretty good job, of enforcing child support, and come up with a plan to try harder if the Secretary thinks they have not been trying hard enough") (Kleinfeld, J., dissenting).

That Congress did not intend Title IV-D to impose binding, individually enforceable obligations is further evidenced by the elaborate financial incentive program (involving up to millions of additional dollars a year for individual States) that Congress created to encourage States to secure support. 42 U.S.C. § 658. Congress would not have needed to adopt such incentives if it had already ordered complete compliance. See Pennhurst I, 451 U.S. at 18 ("[s]urely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States"). Like the statute at issue in Pennhurst I (see id. at 20-21), Title IV-D reflects Congress' focus on assisting States in operating and funding child support programs, not on creating rights. See S. Rep. No. 1356, 93d Cong., 2d Sess. 46-48 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8150 (the federal government's role is "[t]o assist and oversee the operations of State child support programs").

***16** Respondents cannot establish that Congress intended to confer an enforceable right upon them, let alone assemble enough evidence to demonstrate that Congress expressed such an intent unambiguously. Suter, 503 U.S. at 357; Pennhurst I, 451 U.S. at 17 ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously") (emphasis added). Congress notified participating States only that their grants were conditioned upon performing their duties to the Secretary's satisfaction, not that they would also be answerable to private litigants and federal judges. See Suter, 503 U.S. at 363. Such a change is clearly material to a State's decision whether to participate.

2. The "rights" that Respondents assert are "too vague and amorphous" to be judicially enforceable. Wilder, 496 U.S. at 509. This is so for three reasons. First, as already discussed, because the State is obligated to apply the designated procedures in only 75% of the cases, a court could not mandate that any action be taken on behalf of a particular Respondent. Second, the State Director did not cause Respondents' true injury; the absent parents' failure (or inability) to take responsibility for their children is the real cause of the injury. Third, the injury is not redressable in a suit against the State Director. Thus, Respondents have no Article III standing, much less any unambiguous statutory rights.[6]

Respondents' position is akin to that of the plaintiff in Linda R.S. v. Richard D., 410 U.S. 614 (1973). There, a custodial parent not receiving child support payments sued Texas alleging that its discriminatory application of the criminal nonsupport statute exempted her child's father from prosecution. This Court observed that plaintiff lacked standing because she had "made no showing ***17** that her failure to secure support payments result [ed] from the nonenforcement, as to her child's father, of [the statute]." Id. at 618 (emphasis added). A lack of causation, a fortiori, follows in the instant case. If, for purposes of standing, child support payments are not directly linked to the criminal laws intended to enforce them, then they certainly cannot be directly linked to Title IV-D, the provisions of which are less severe and more easily evaded. See American Public Welfare Association Amicus Brief ("APWA") at 4 nn. 2-3, 15-16. The direct cause of Respondents' failure to receive unpaid child support is the absent parent, not the State Director.

Similarly, in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), plaintiffs alleged that an IRS Ruling granting a hospital favorable tax treatment encouraged the hospital's policy of not treating indigents. This Court, however, found it "purely speculative whether the denials of service ... fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." Id. at 42-43. Here, again, Arizona is not "encouraging" the absent parents' unlawful conduct, but, to the contrary, is expending tremendous resources to secure relief from that conduct. As in Simon, the real injury stems from personal decisions that the absent parents have made, quite apart from anything that the State does.

In addition to a lack of causation between the State Director's past conduct and Respondents' alleged injury, the prospect that granting Respondents the relief that they seek—substantial compliance with IV-D's provisions—"will, at least in the future, result in payment of support can, at best, be termed only speculative." See Linda R.S., 410 U.S. at 618; see also Allen v. Wright, 468 U.S. 737, 758-59 (1984) ("it is entirely speculative ... whether withdrawal of a tax exemption from any particular school would lead the school to change its policies"). To establish that the requested relief against the State Director will redress their injuries, Respondents must demonstrate ***18** that there is a "substantial likelihood" that the third parties involved will change their behavior to benefit Respondents if the relief is granted.[7] Simon, 426 U.S. at 45. This Court's statement in Lujan is particularly apt with respect to the problem of third parties and redressability:

When ... a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.... [S]tanding is not precluded, but it is ordinarily substantially more difficult to establish.

504 U.S. at 562 (internal quotation marks and citations omitted) (emphasis added).

Redressability is not a matter of alleging that the State could be doing something more to help the Respondents, but rather of alleging that the action demanded of the State Director would be sufficient to correct the behavior of absent parents and other entities, including private employers and other governmental jurisdictions. Respondents cannot meet this burden because granting them the relief that they request will not necessarily ***19** remedy their true injuries—the absent parents' refusal (or inability) to fulfill their responsibility to their children.

One need look no further than the resourcefulness that the absent parents in this case have displayed in evading the State's enforcement efforts. See Pet. App. 5a-6a (fathers changed jobs to avoid meeting their child support obligations). The problem is not unique to Arizona; despite the 75% substantial compliance standard for provision of services, the actual child support collection rate nationally is only 18%. See APWA at 5. The chasm between the efforts and the results is frustrating, not only to Respondents, but also to the State Director and to other States. Respondents, however, must demonstrate something more than frustration at the government's inability to produce better overall results. See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

If Respondents want to increase the amount of resources devoted to child support enforcement and to reorder the priorities of Title IV-D, they have a more appropriate forum than the courts. Indeed, as this Court again recognized just last Term,
[i]t is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

Lewis, 64 U.S.L.W. at 4533. Congress specifically delegated responsibility for enforcing Title IV-D's provisions to the Secretary, not to the courts.

*20 B. Title IV-D's Comprehensive Enforcement Scheme Precludes Use of § 1983.

Respondents would not be able to sue under § 1983 even if Title IV-D did create enforceable rights, because "the statute itself creates a remedial scheme that is 'sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983.' " Wilder, 496 U.S. at 521 (quoting Sea Clammers, 453 U.S. at 20).

The comprehensive remedial scheme that Congress crafted in Title IV-D includes an elaborate auditing operation and a unique financial penalties system and vests enforcement authority in the Secretary alone. Neither Congress' elaborate statutory scheme, 42 U.S.C. §§ 651-669, nor the Secretary's even more detailed regulations, 45 C.F.R. §§ 301-307, contains a provision for federal court supervision of the States. "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." Sea Clammers, 453 U.S. at 15; see also Seminole Tribe, 116 S. Ct. at 1132-33.

1. Congress created an elaborate auditing operation to enforce substantial compliance by the States. For example, Congress designed a specific enforcement unit, the Office of Child Support Enforcement ("OCSE"), and placed it under the direction of the Secretary. 42 U.S.C. § 652(a)(1)-(10). Through the OCSE, the Secretary exercises her power to audit State programs to ensure "substantial compliance" with Title IV-D's requirements and to reduce federal funding to any State that is not in "substantial compliance." 42 U.S.C. § 652(a)(4). The Title IV-D audit provisions are substantially more rigorous than the audit and cutoff provisions that the Court in Wright and Wilder found insufficient to preclude the availability of a § 1983 action.[8] First, Title IV-D mandates ***21** triennial audits of programs that are in substantial compliance and annual audits of programs that are operating under a corrective action plan. 45 C.F.R. § 305.10(b). In contrast, under the provision at issue in Wright, audits only occurred every eight years. 479 U.S. at 428. Second, the audits under Title IV-D are much more substantive and comprehensive than the audit found lacking in Wilder, pursuant to which a State merely made assurances to the Secretary that its rates were "reasonable and adequate," without providing the data underlying its assurances. 496 U.S. at 507-08.

2. Congress also developed a unique system of financial penalties that demonstrates beyond a doubt that Congress considered private enforcement actions inappropriate. First, the system assesses the penalties for noncompliance with the "substantial compliance" standard against the Title IV-A program rather than against the Title IV-D program. (Any § 1983 liability, in contrast, will attach to a State's Title IV-D program, thereby hurting that program in further contravention of Congress' manifest intent.) Second, the financial sanctions can range from funding reductions, 42 U.S.C. § 603(h), to complete cut off of funding for Title IV-A, 42 U.S.C. § 604(a), and Title IV-D, 45 C.F.R. §§ 301.10, 304.20(h). Third, Congress—knowing that child support enforcement caseworkers face daunting tasks—gave the Secretary broad discretion to postpone imposition of any financial penalties to allow States to work their way into compliance.[9]

Indeed, Title IV-D caseworkers typically handle caseloads that would make Sisyphus' lot seem an enviable one. Sisyphus was condemned to roll only one boulder uphill endlessly. Title IV-D caseworkers, with their enormous caseloads and with each case involving countless tasks, must attempt to roll hundreds of boulders uphill simultaneously. See APWA at 5-9 (describing intricacy of ***22** tasks and large caseloads). The Secretary annually submits detailed reports to Congress concerning these incredible responsibilities. It simply defies logic to assume that Congress intended § 1983 liability to attach in these circumstances.

Furthermore, the existence of a statutory private cause of action is not a prerequisite for precluding § 1983 liability. Such private remedies were available in two cases in which this Court found a § 1983 remedy precluded. See Sea Clammers, 453 U.S. at 13; Smith v. Robinson, 468 U.S. 992, 1011-12 (1984). However, the Court did not base its holdings in those cases on that fact alone. Moreover, in finding that the statutes at issue in Wright and Wilder did not contain a comprehensive enforcement scheme, this Court relied upon specific legislative statements and administrative actions which indicated that Congress had anticipated that private rights of action would be available. See Wright, 479 U.S. at 424-25 ("there have also been both congressional and agency actions indicating that enforcement authority is not centralized and that private actions were anticipated"); Wilder, 496 U.S. at 516 ("it is clear that prior to the passage of the Boren Amendment, Congress intended that health care providers be able to sue in federal court"). Respondents can point to no such statements or actions here.

At best, Respondents' suit would be duplicative of Congress' carefully articulated scheme; at worst, it would do serious damage to that scheme. To the extent that Respondents seek "substantial compliance" with Title IV-D's requirements, they mirror the Secretary's mandate. Thus, any action that a court took would merely duplicate what the Secretary was already doing and would be taken without the benefit of the Secretary's special expertise. To the extent that Respondents seek something more than "substantial compliance" with the Act, or that a court's view of "substantial compliance" differs from that of the Secretary, any relief that Respondents obtained in federal court would be inconsistent with supervision by the Secretary, the only person in whom Congress ***23** expressly placed its trust to ensure State compliance. 42 U.S.C. § 652. The conclusion is inescapable that Congress did not intend to allow private actions because such actions pose a significant risk of harm to the enforcement scheme that Congress adopted.

II. THE ELEVENTH AMENDMENT BARS ANY ACTION AGAINST THE STATE OR THE STATE DIRECTOR TO ENFORCE TITLE IV-D.

Even if this Court resolves in favor of Respondents the statutory question whether Title IV-D creates rights that private parties can enforce through § 1983, the constitutional question whether the Eleventh Amendment bars Respondents' suit still remains.[10] It is well settled that Congress did not intend "by the general language of § 1983 to override the traditional sovereign immunity of the States." Quern v. Jordan, 440 U.S. 332, 341 (1979). Although this Court has yet to explore at length the Eleventh Amendment's impact on Thiboutot-type suits,[11] ***24** it is clear that the Amendment's guarantee of sovereign immunity—and the principle of federalism it embodies—precludes Respondents' action.

The Eleventh Amendment bars any action against the State of Arizona or ADES, a state agency. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984) ("Pennhurst II"); Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 149-50 (1981) (per curiam). Any waiver by the State of its Eleventh Amendment immunity would have to be "unequivocal," Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n. 1 (1985), and be accomplished "by the most express language." Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 473 (1987) (plurality opinion) (internal quotations omitted). Arizona has not made an explicit waiver with respect to Title IV-D, and it has not constructively waived its sovereign immunity merely by accepting federal funds. See Edelman v. Jordan, 415 U.S. 651, 673 (1974) ("[t]he mere fact that a State participates in a program through which the Federal Government provides assistance ... is not sufficient to establish consent on the part of the State to be sued in the federal courts"); see also id. at 674 (finding no waiver of immunity in the Social Security Act); Jenkins v. Massinga, 592 F. Supp. 480, 493-494 & n. 12 (D.Md.1984) (finding no waiver of immunity in Title IV-D).

Respondents apparently seek to avoid the Eleventh Amendment's preclusive effect by bringing this action for declaratory and injunctive relief against the State Director in her official capacity, as in Ex parte Young, 209 U.S. 123 (1908). This claim must fail as well, however, because (1) the purported claim against the State Director is in reality ***25** a poorly disguised claim against the State itself; (2) Congress did not clearly intend to include a private right of action for declaratory and injunctive relief in the remedial scheme it designed for Title IV-D; and (3) Title IV-D imposes duties upon contracting States and their agencies only, rather than upon individuals.

1. When suits are filed in federal courts against State officers acting in their official capacities, this Court has insisted that "the essential nature and effect of the proceeding" be determined because it is well-established that the Eleventh Amendment bars a suit against State officers when "the state is the real, substantial party in interest" and the officer is being sued merely as a representative of the State. Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 463-64 (1945); Pennhurst II, 465 U.S. at 89. Here, Respondents sued the State Director only in her "official capacity" and sought a permanent injunction that she take "affirmative measures sufficient to achieve as well as sustain substantial compliance with federal law, throughout all programmatic operations at issue." J.A. 42.

Obviously, the State Director cannot single-handedly increase her agency's budget to hire more caseworkers, shift resources from other equally needy and important State programs, or opt out of the federal AFDC and Title IV-D programs. More important (and more distressing) is that the court of appeals openly recognized the true scope of the pleading against the State Director when the court threatened that "the contempt power of the court, as well as other traditional equitable remedies, is likely to be more successful in inducing compliance on the part of state officials, and where necessary, state legislators." Pet. App. 29a. The Complaint did not name any other state officials or any state legislators, yet the court of appeals asserted that it could reach them through this action that is nominally against only the State Director.

Under the Eleventh Amendment, the "principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III." ***26** Pennhurst II, 465 U.S. at 98; see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993); Kentucky v. Graham, 473 U.S. 159 (1985). Federal courts must therefore dismiss suits in which States that have not waived their sovereign immunity are the real parties in interest, regardless of who the named defendants in such suits are. To hold otherwise would be to cause a result that "destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and to make nonsense of the effort embodied in the Eleventh

Amendment to preserve the doctrine of sovereign immunity." Nevada v. Hall, 440 U.S. 410, 441 (1979) (Rehnquist, J., dissenting).

2. The principles in Seminole Tribe bar a § 1983 action in this case. In Seminole Tribe, plaintiff alleged that Florida's governor was committing a "continuing violation of federal law" by failing "to bring the State into compliance" with 25 U.S.C. § 2710(d)(3) of the Indian Gaming Regulatory Act (IGRA). 116 S. Ct. at 1132. As here, the plaintiff sought no monetary relief, but rather sought to mandate the governor's future compliance with the IGRA. This Court rebuffed the plaintiff's attempt to sue the state official, citing the Eleventh Amendment and the IGRA's structure.

"[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Id. Here, Congress prescribed a detailed carrot-and-stick approach to elicit state compliance with Title IV-D's requirements. Title IV-D provides for financial incentive payments to States that meet certain performance standards (42 U.S.C. § 658; see also 45 C.F.R. § 304.12), coupled with a comprehensive audit of each State's child support enforcement program—with the potential penalty of reduced federal funding—to ensure that States achieve certain minimum results. See 42 U.S.C. §§ 652(a)(4), ***27** 603(h); see also 45 C.F.R. § 305, and supra pp. 20-23 (describing remedial scheme).

Even if (contrary to Petitioner's argument in Part I.B.) Title IV-D's remedial scheme is not "comprehensive" enough to establish congressional intent to preclude § 1983 enforcement, it is still sufficient to preclude a private action for declaratory and injunctive relief. Indeed, this Court specifically found in Seminole Tribe that the "remedial scheme" that Congress specified in the IGRA was quite "limited." 116 S. Ct. at 1132-33. The Court nevertheless drew an inference from Congress' "quite modest set of sanctions" that "Congress intended therein not only to define, but also significantly to limit, the duty imposed by" the IGRA. Id. (emphasis added).

As in Seminole Tribe, Congress has prescribed a remedial scheme with respect to Title IV-D that is concededly less rigorous than the one to which the State Director would be exposed if she were subject to the "full remedial powers of a federal court" in a § 1983 action. See Seminole Tribe, 116 S. Ct. at 1133. Indeed, as previously noted, the court below was keenly aware of the coercive effect its Article III powers could have not only over the State Director, but also over the entire State. See Pet. App. 29a. The court of appeals, however, turned Congress' intent and the Eleventh Amendment completely on their heads. See Seminole Tribe, 116 S. Ct. at 1133 ("the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under Ex parte Young strongly indicates that Congress had no wish to create the latter" under Title IV-D) (emphases added); see also Sea Clammers, 453 U.S. at 15 ("[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"). In sum, when dealing with statutory rights, courts must defer to the remedial scheme that Congress has actually enacted and must accept that any remedial scheme that is less demanding ***28** than an Ex parte Young action represents a deliberate choice by Congress.

3. In Seminole Tribe, this Court noted that the IGRA imposed its requirements exclusively upon "the State," but never upon its officers, and cited this as additional support for its conclusion that Congress did not intend to make an Ex parte Young action available. Seminole Tribe, 116 S. Ct. at 1133 n. 17. The same is true here. Title IV-D speaks exclusively in terms of "the State"[12] or "State agencies."[13] By explicitly and exclusively referring to "the ***29** States" or "State agencies" rather than to individual State officers,[14] see id. (providing examples where Congress has specifically referred to State officials), Congress expressed its intent that a suit against State officers, even for declaratory and injunctive relief, would not be available. Id.; see also Pennhurst II, 465 U.S. at 101 ("[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest' ") (citations omitted). At the very least, the statute's ambiguity as to whether Congress intended that a remedy for declaratory and injunctive relief be available requires that such an action not be permitted. See Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) ("where statutory intent is ambiguous," courts should "not attribute to Congress an intent to intrude on state governmental functions").

In essence, the principle employed in Seminole Tribe counsels courts to exercise restraint when identifying any remedy against a State or state officer beyond that which Congress has explicitly provided.[15] Such restraint is ***30** appropriate because it has as its source the principles of federalism and separation of powers embodied in our constitutional structure. Demanding a clear statement from Congress before altering the federal-state balance is hardly unusual in this Court's jurisprudence. See, e.g., Gregory, 501 U.S. at 470; Will, 491 U.S. at 65 (§ 1983 case employing "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute' ") (quoting Atascadero State Hosp., 473 U.S. at 242).

Because Title IV-D speaks only of States and their agencies and its remedial scheme does not incorporate private injunctive relief against State officials, the Eleventh Amendment precludes such relief.

III. MAINE v. THIBOUTOT DOES NOT COMPORT WITH THE MEANING OF § 1983, THIS COURT'S CLEAR STATEMENT PRINCIPLES, OR FEDERALISM AND SEPARATION OF POWERS PRINCIPLES, AND SHOULD BE RECONSIDERED.

One hundred and nine years after § 1983's enactment, this Court, in Maine v. Thiboutot, 448 U.S. 1 (1980), extended § 1983's reach to nonconstitutional "rights" secured solely by federal statutes that had no relationship to the civil rights concerns that plainly animated the post-civil War Congress' enactment of § 1983. Suits brought under § 1983, such as the one here, in which the "right" ***31** allegedly secured by statute is the right to potential government benefits or services, were not permitted before Thiboutot because the "right" at issue did not create an implied private cause of action and was based on Congress' spending power, not the Fourteenth Amendment.

Since Thiboutot (and in conflict with that decision), this Court has been quite forceful in demanding clear statements from Congress before inferring or creating private causes of action that are missing from a statute's express terms. Such reticence is firmly grounded in separation of powers principles because this Court has recognized that the creation of statutory causes of action is a quintessentially legislative task. In the context of § 1983, however, federalism concerns provide an additional reason for courts to be reluctant to expand congressional remedies. See Board of Regents of the Univ. of N.Y. v. Tomanio, 446 U.S. 478, 492 (1980) ("[c]onsiderations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983"). It is thus ironic that it has become easier to sue a State official under a Thiboutot action than it is to sue a private individual under the Court's test for implied causes of action. See Cort v. Ash, 422 U.S. 66 (1975). This is so because the Thiboutot-Wright test eliminates a putative plaintiff's burden of demonstrating three of the four Cort factors. Wilder, 496 U.S. at 525-26 (Rehnquist, C.J., dissenting).

The State Director respectfully suggests that the Thiboutot Court misconstrued the explicit language of § 1983 and interpreted it more broadly than is warranted. The text of § 1983 and the structure of the Act from which it derives admit of two possible interpretations. Neither of these interpretations supports the broad interpretation that the Thiboutot Court adopted: (1) because § 1983 provides a cause of action against state actors for "deprivation of rights ... secured by ... laws," § 1983 is limited to providing a cause of action only for those statutory rights that already have some private cause of action associated with them, which Title IV-D does not (see supra p. 12 n. 3), ***32** or (2) § 1983 is restricted by the scope of the Fourteenth Amendment and § 1983's complementary jurisdictional provision, 28 U.S.C. § 1343(a)(3), to providing a cause of action for deprivations of equal or civil rights, which Title IV-D does not protect.

In light of the Thiboutot Court's erroneous and overbroad construction of § 1983 and the resulting unworkable standards arising out of that decision, the State Director respectfully asks this Court to reconsider its decision in Thiboutot.

A. The Only Statutory Rights to Which § 1983 Applies Are Those Under Which the Individual Plaintiff Has Been Granted a Cause of Action.

In Thiboutot, this Court claimed to apply a plain meaning construction to § 1983. See 448 U.S. at 4. By focusing only on the phrase "and laws," rather than on the statute as a whole,[16] the Court missed the plain meaning of § 1983 in its entirety. Section 1983 provides a federal cause of action against state actors who deprive a "person ... of any rights ... secured by ... laws." 42 U.S.C. § 1983. Thus, the only violations of federal law that are actionable under § 1983 are those that involve deprivations of personal statutory rights that are secured by law to an individual. See Golden State, 493 U.S. at 106. Thiboutot ignored what it means for a personal "right" to be "secured" by a law, and, in the process, conferred a sweep to § 1983 that was completely unintended by Congress. Consequently, this Court has never addressed the argument set forth below.

Congress enacted § 1983 (or, more accurately, its predecessor, § 1 of the Ku Klux Act of 1871) to provide a federal court cause of action against state actors. ***33** Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("the very purpose of § 1983 was to interpose the federal courts between the States and the people"); Monroe v. Pape, 365 U.S. 167, 174 (1961) (§ 1983 was intended "to provide a federal remedy where the state remedy ... was not available in practice"). General federal question jurisdiction was not introduced until the Judiciary Act of 1875. 18 Stat. 470, 470-73 (pt. 3) (1875); see R. Fallon, D. Meltzer, and D. Shapiro, Hart and Weschler's The Federal Courts and the Federal System 880-81 (4th ed. 1996). Thus, § 1983 was needed not only to provide a federal forum, but also to limit the Eleventh Amendment immunity and state law defenses that State defendants would otherwise enjoy. Without § 1983, causes of action that existed elsewhere under federal statutory law and that could be used against private individuals could not be used against state actors. Section 1983 was, at most, an equalizer—to the extent that any private actor would be liable to an individual for violating a statutory right, so would a state actor.[17] The key principle, however—and the one that the Thiboutot Court overlooked—is that the "right" must be one that is already "secured" by another, substantive law; i.e., the right must be based upon a cause of action that some plaintiff could already bring against some defendant. See Chapman, 441 U.S. at 617 ("[n]o matter how broad the § 1 cause of action may be, the breadth of its coverage does not alter its procedural character.... [O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything") (emphasis added).

Section 1983 merely enforces individual rights secured elsewhere. See id. When faced with a statute that does not itself provide a person with an express private ***34** cause of action, courts are still left with the task of determining whether Congress intended to create a personal "right" that § 1983 could enforce. Thus, the courts' role in the § 1983 context should not differ at all from their role in discerning the extremely rare circumstance in which Congress intended to create an implied cause of action in a particular statute. Both inquiries attempt to divine Congress' intent to create a private cause of action. See Sea Clammers, 453 U.S. at 13 ("[t]he key to the inquiry is the intent of the Legislature"); Pennhurst I, 451 U.S. at 15; Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527, 532-33 (1989); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979); Wilder, 496 U.S. at 525-26 (Rehnquist, C.J., dissenting); Wright, 479 U.S. at 432-33 (O'Connor, J., dissenting). Yet, paradoxically, under Thiboutot, the Court requires less of a plaintiff seeking to sue a state actor under § 1983 than it demands of a plaintiff seeking to sue a private individual under an implied cause of action. Wilder, 496 U.S. at 525-26 (Rehnquist, C.J., dissenting) (test under § 1983 eliminates burden of demonstrating three out of four Cort factors).

Thiboutot is plainly inconsistent with this Court's more recent precedents that require Congress to state clearly its intention to create any new private cause of action. In particular, this Court recently reemphasized the important role that federalism plays by requiring that Congress provide an "unmistakably clear" statutory statement of intent to abrogate the States' sovereign immunity, even when Congress acts pursuant to its power under section 5 of the Fourteenth Amendment. Seminole Tribe, 116 S. Ct. at 1123-24. Indeed, this Court has insisted that Congress express its intent clearly, especially when, as here, the statute provides an administrative scheme for enforcement. See, e.g., Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102-05 (1991); Karaholios, 489 U.S. at 532-33; Thompson v. Thompson, 484 U.S. 174, 179 (1988).[18]

***35** Against this backdrop, Thiboutot's presumption that a § 1983 action is available unless Congress has clearly withdrawn the remedy (Wilder, 496 U.S. at 508 n. 9) is astonishing and wrong. Section 1983 provides a remedy only if a person has an enforceable "right" that has already been "secured" by another substantive statute. A statute can hardly be said to "secure" a "right" to a "person" if that person cannot sue under the statute. As this Court stated in Golden State, a "claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights, privileges, or immunities' in the particular plaintiff." 493 U.S. at 107 n. 4. Rather, the proper test for what constitutes a "right" in §1983 is whether the underlying law creates "[a] legally enforceable claim of one person against another." See Dennis, 498 U.S. at 447 n. 7 (emphasis added). This interpretation of § 1983 is reinforced by the Court's adoption of clear statement principles to interpret § 1983. There is no reason to reverse the Court's clear statement principles when determining if a § 1983 action was intended. See Will, 491 U.S. at 65 (§ 1983 case requiring Congress to make its intention "unmistakably clear" and "clear and manifest" (citations omitted)). However, that is precisely what Thiboutot and its progeny have improperly done. See Wright, 479 U.S. at 423-24 (" '[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a ***36** remedy' for the deprivation of a federally secured right") (quoting Smith, 468 U.S. at 1012).

Interpreting § 1983 to insert private causes of action into federal statutes when Congress did not clearly authorize the actions is unreasonable. A more appropriate construction would interpret § 1983, in light of both its clear language and its history, to apply at most only to statutes that already contain some form of private right of action in federal court.[19]

Reconsidering Thiboutot is not, however, the only way to redress the ironic asymmetry between the standards for creating an implied private right of action and for enforcing a statutory right under § 1983. The asymmetry may be effectively resolved by reconsidering the inferences to be drawn from limited express remedies for statutory rights. In the context of an implied cause of action against a private person, this Court has consistently held that it is improper for a court to supplement express statutory remedies even if they are limited. As this Court unanimously held in Karahalios, it is "an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." 489 U.S. at 533. The critical question under Karahalios is whether the statute provides "a remedy," not whether it confers a remedy a court might view as "comprehensive." See id. In deciding whether a statute is enforceable under § 1983, however, this Court has taken precisely the opposite approach to express remedies. The Court has held that a § 1983 remedy will be available to enforce a statute unless the statute establishes a remedy that "can ... be considered sufficiently comprehensive." ***37** Wilder, 496 U.S. at 522; see also Wright, 479 U.S. at 428. The short answer to Wilder and Wright is that where Congress has enacted remedies, it has concluded that those remedies are "sufficiently comprehensive" (or else it would have provided additional remedies), and a court has no license to second-guess Congress' determination. Where Congress has created an enforcement scheme, courts "are compelled to conclude that Congress provided precisely the remedies it considered appropriate." Sea Clammers, 453 U.S. at 15.

As this Court held last Term in Seminole Tribe, the fundamental principle of judicial restraint and statutory construction applies whenever a court is faced with an attempt to supplement and thus evade a congressional remedy in favor of some other remedy beyond that created in the underlying statute. 116 S.Ct. at 1132. This Court should reject the expansive approach of Wilder and Wright and follow the traditional rule applied in Karahalios and Sea Clammers and reaffirmed in Seminole Tribe.

B. Section 1983's Application to "Laws" Is Limited to the Enforcement of Equal or Civil Rights.

1. Section 1983 and 28 U.S.C. § 1343(a)(3) should be read in pari materia.

The Thiboutot Court rejected the argument that § 1983 is limited to civil rights or equal protection laws. 448 U.S. at 6-8. An examination of that statute and its corresponding jurisdictional provision suggests that the Thiboutot Court erred in its statutory conclusions.

This Court has consistently reaffirmed the principle that statutory construction is a "holistic endeavor" that requires courts to evaluate all portions of an original piece of legislation together to preserve the legislation's textual integrity. United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); see also John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 523 (1993) (courts must " 'look to the provisions of the whole law, and to its object and policy' " (quoting ***38** Pilot Life, 481 U.S. at 51)). Thus, to implement Congress' actual intent, it is vital that the Court read § 1983 in light of its complementary jurisdictional provision, § 1343(a)(3), which provides jurisdiction only over constitutional claims and claims based on "any Act of Congress providing for equal rights." (Emphasis added.)

2. The circumstances and history of § 1983 confirm this interpretation.

Congress intended § 1983 to be interpreted consistent with its antecedents.[20] As Appendix B illustrates, §§ 1983 and 1343(a)(3) both have their origins in the Civil Rights Act of 1871, also known as the Ku Klux Act.[21] Act of Apr. 20, 1871, 17 Stat. 13. That statute, in turn, was based upon previous Civil Rights Acts passed in 1866 and 1870. Act of Apr. 9, 1866, 14 Stat. 27; Act of May 3, 1870, 16 Stat. 144. Congress enacted the Civil Rights Act of 1866 to implement the then-recently enacted Thirteenth Amendment. Act of Apr. 9, 1866, 14 Stat. 27. Section 1 of the 1866 Act guaranteed citizens a host of enumerated civil rights: "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." (Emphasis added.) Section 2 of the Act made deprivation under color of state law of any of the rights "secured or protected by this act" a misdemeanor.

***39** Congress enacted The Enforcement Act in 1870 to protect black citizens' right to vote. Act of May 3, 1870, 16 Stat. 144.

Section 16 of that Act essentially mirrored the language of § 1 of the Civil Rights Act of 1866 (although it omitted references to the right to buy and sell property). Section 17, in turn, paralleled § 2 of the 1866 Act, making it a misdemeanor to deprive under color of state law any rights "secured or protected by the last preceding section of this act."

The Ku Klux Act of 1871 was intended to implement the Fourteenth Amendment. This "purpose is plain" from the Act's title, " 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,' " Monroe, 365 U.S. at 171 (quoting 17 Stat. 13), and is confirmed by debate on the House floor.[22] Section 1 of the 1871 Act addressed the deprivation of rights secured "by the Constitution" only; i.e., "laws" were not mentioned. There was no question, however, that the more general language of the 1871 Act embodied the same set of rights enumerated in the earlier legislation.[23] In fact, § 1 engendered little debate and ***40** passed without modification, in contrast to other sections of the Act, such as those granting the executive branch and federal courts broad powers to deal with conspiracies. See Monroe, 365 U.S. at 181.

3. The legislative history confirms that Congress intended no change when it added "and laws" in 1874.

In 1866, President Andrew Johnson appointed a commission to begin the overwhelming task of reorganizing all federal laws into one Act. Section 2 of the authorizing statute permitted alterations only insofar as they were necessary "to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." Act of June 27, 1866, § 2, 14 Stat. 74, 75. Six years later, Congress authorized the Joint Congressional Committee on the Revision of the Laws to assume the work of translating the product of two successive commissions into a bill. Act of Mar. 3, 1873, 17 Stat. 579. The committee "endeavored to eliminate from this everything that savors of change in the slightest degree of the existing statutes." 2 Cong. Rec. 129 (daily ed. Dec. 10, 1873) (statement of Rep. Butler).[24]

Sections 563(12), 629(16), and 1979 of the Revised Statutes of 1874 all listed § 1 of the Ku Klux Act as a source. See Appendix B. Section 563(12) supplied the district courts with jurisdiction over all suits redressing deprivation of rights "secured by the Constitution of the United States, or of any right secured by any law of the United States." The circuit court provision, § 629(16), provided jurisdiction over claims regarding deprivation under color of law of any rights "secured by the Constitution of the United States, or of any right secured by any ***41** law providing for equal rights" (emphasis added). The substantive provision— § 1983's forerunner—addressed rights "secured by the Constitution and laws" of the United States. Rev. Stat. § 1979 (emphasis added).

When revised § 1979 was read to the entire body of Representatives so that members could raise their concerns, Representative Lawrence stated, "it is possible that the new consolidated section may operate differently from the three original sections in a very few cases. But the change, if any, cannot be objectionable, but is valuable as securing uniformity." 2 Cong. Rec. 828 (daily ed. Jan. 21, 1874) (emphasis added). No Member of the House objected to, or at least warned of, a change in scope of the law. As this Court has noted in a similar context, "Congress' silence in this regard can be likened to the dog that did not bark." Chisom v. Roemer, 501 U.S. 380, 396 n. 23 (1991). Thus, the legislative history makes clear that the addition of "and laws" was not intended to enlarge § 1983's scope.

Moreover, when the Judicial Code of 1911 eliminated the circuit court's original jurisdiction, Congress rephrased what is now the district court jurisdictional provision, 28 U.S.C. § 1343(a)(3), to provide a federal forum for all causes of action based on "any right, privilege or immunity secured by the Constitution ... or by any Act of Congress providing for equal rights ..." (emphasis added). This language was intended to reflect the "present" and "existing" jurisdiction of the district courts. S. Rep. No. 388 (pt. 1), 61st Cong., 2d Sess. 1, 2, 15 (1910). "[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight." United States v. Winstar Corp., 64 U.S.L.W. 4739, 4754 (U.S. July 1, 1996) (plurality opinion) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974)). Thus, the current § 1343(a)(3), like its antecedents' history, demonstrates that Congress never intended the reference to "laws" in § 1983 to extend beyond statutes providing for equal rights.

***42** 4. Construing §§ 1983 and 1343(3) coextensively is consistent with this Court's decisions.

When a statute's text is ambiguous, courts should construe the statute in light of its manifest purposes. See Reves v. Ernst & Young, 494 U.S. 56, 60-61 (1990). Thus, it is not surprising that until Thiboutot, this Court repeatedly interpreted § 1983 as being closely connected to the Fourteenth Amendment.[25]

In addition, prior to Thiboutot, this Court had consistently viewed §§ 1343 and 1983 as coextensive in scope. See, e.g., Lynch v. Household Fin. Corp., 405 U.S. 538, 543-44 n. 7 (1972) ("[d]espite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction and both sections are construed identically") (emphasis added) (citing Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943)). In fact, in the Term just before the Court decided Thiboutot, it acknowledged that § 1343(3) is the "jurisdictional counterpart" of § 1983. Chapman, 441 U.S. at 615-16. Thus, in casting § 1983 away from its jurisdictional mooring, Thiboutot created an unprincipled break from sound statutory interpretation and this Court's previous precedents. See ***43** Thiboutot, 448 U.S. at 19-22, 26-33 (Powell, J., dissenting); see generally Heck v. Humphrey, 114 S. Ct. 2364, 2374 (1994) (Thomas, J., concurring) ("[i]t has long been recognized that we have expanded ... § 1983 far beyond the limited scope [it] was originally intended to have"). The Court should return § 1983 to its original vital, but more modest, sweep.

An interpretation returning § 1983 to its Fourteenth Amendment roots also has the benefit of bringing § 1983 into harmony with the Court's most recent interpretation of the Eleventh Amendment. Under Seminole Tribe, Congress has the authority to abrogate a State's immunity pursuant only to the powers that the Thirteenth, Fourteenth, Fifteenth or later Amendments confer. This, of course, makes sense given that the Eleventh Amendment trumps all powers conferred in the body of the original Constitution and the later Amendments trump the Eleventh Amendment as long as Congress acts expressly. By allowing § 1983 to enforce rights that are not derived from the Fourteenth Amendment, the court below authorized Congress to do indirectly that which it unquestionably could not do directly under Seminole Tribe: expose the States to federal court litigation and damages actions brought by citizens to enforce noncivil rights. The Court should end this constitutional sleight of hand, which has exposed the States to so much needless litigation. By limiting § 1983 to enforcing rights that are derived from the Fourteenth Amendment alone, the Court will fully restore the Eleventh Amendment protection that it recognized in Seminole Tribe.

Once the Court properly interprets § 1983 as limited to equal or civil rights, it can readily dispose of this case. There is no question that Title IV-D does not create, protect, or enforce any equal or civil rights laws. Rather, it is based solely upon Congress' spending power.

*44 C. Stare Decisis Should Not Deter This Court from Reconsidering Thiboutot.

This Court is naturally reluctant to reconsider its previous decisions. But "[s]tare decisis is not an inexorable command," Payne v. Tennessee, 501 U.S. 808, 828 (1991), and the Court has not felt constrained to follow decisions, such as Thiboutot, that "are unworkable or are badly reasoned." Id. at 827; see also Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) (stare decisis may be abandoned when prior decision has "proved to be unworkable in practice").

Because § 1983 has a "constitutional dimension," Monroe, 365 U.S. at 222 (Frankfurter, J., dissenting), this Court's "decisions construing the civil rights legislation of the Reconstruction era have repudiated 'blind adherence to the principle of stare decisis.' " Thiboutot, 448 U.S. at 33 (Powell, J., dissenting) (quoting Greenwood v. Peacock, 384 U.S. 808, 831 (1966)). Indeed, reconsideration of Thiboutot would certainly not be this Court's first departure from stare decisis in the § 1983 context. See, e.g., Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 695-701 (1978) (overruling holding of Monroe, 365 U.S. at 187-92, that municipality is not a "person" within the meaning of § 1983).

Principles of stare decisis are particularly weak when a prior decision has not "engendered substantial reliance." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2115-16 (1995); see also Payne, 501 U.S. at 828. There is no evidence that potential plaintiffs such as Respondents rely on their ability to bring Thiboutot actions. Indeed, the pervasive confusion and uncertainty concerning just when Thiboutot actions are available would make any reliance on this remedial measure not merely unlikely, but also speculative. In contrast, when States choose to participate in AFDC, they expect that they will have to justify their actions to the Secretary, but they do not expect to be subject to potentially hundreds of thousands of Thiboutot actions in federal court.

*45 D. Thiboutot Has Proven Completely Unworkable in Practice.

The conclusion is inescapable that Thiboutot has spawned excessive litigation and that its standards have been utterly unworkable. Both facts argue for its reconsideration. Justice Powell's concerns about the floodgates that Thiboutot opened have proven to be understated. Thiboutot, 448 U.S. at 22-26 (Powell, J., dissenting). See Appendix C. As this Court's cases confirm, the Thiboutot test can only be applied on a case-by-case basis. Resolution of the instant dispute on narrow grounds will not pull the judiciary out of this quagmire. Standing behind Title IV-D are a host of other complex federal-state cooperative programs that will require an exhaustive, albeit speculative, examination to determine whether they demonstrate a legislative intent to create an enforceable right. Of course, persons making this inquiry are ultimately akin to astronomers searching for a quark because Congress has long since abandoned any express or serious effort to confront the difficult policy issues that creating private causes of action to enforce social legislation pose, particularly when the cause of action would be against the State. Only by abandoning the expansive gloss of Thiboutot will Congress resume its proper constitutional role when it enacts new legislation.

In the lower courts, Thiboutot problems—including circuit splits and reversals of district court judgments—are legion. Appendix C provides a sampling of statutes through which plaintiffs have claimed a cause of action under Thiboutot. Each statute under which a court has permitted the suit to proceed represents another instance in which federal courts have become intertwined in the running of state government,[26] thereby altering the ***46** balance of federalism and overriding the constraints of the separation of powers.[27] Moreover, each statute listed in Appendix C also represents a problem that this Court may yet have to resolve.

Thiboutot does more than generate an endless stream of litigation. It also creates intractable puzzles and absurdities. First, Thiboutot has created, not surprisingly, confusion between § 1983 actions and implied causes of action. Some courts have treated implied private rights of action as precluding Thiboutot actions. See, e.g., Chuhran v. Walled Lake Consol. Schs., 839 F. Supp. 465, 475 (E.D.Mich.1993) (IDEA), aff'd, 51 F.3d 271 (6th Cir.1995); Ruth Anne M. v. Alvin Indep. Sch. Dist., 532 F. Supp. 460, 473-76 (S.D.Tex.1982) (Rehabilitation Act). Others have treated the denial of a private right of action as precluding a Thiboutot action. See, e.g., Home Health Servs. v. Currie, 706 F.2d 497, 498 (4th Cir.1983) (per curiam) (rejecting the existence of an implied private right of action under 42 U.S.C. § 1395a of the Medicare Act and stating that this rejection ***47** "compels the conclusion that Home Health likewise has no cause of action under [§] 1983").[28]

Second, Thiboutot's presumption that § 1983 is available unless the statute's remedial scheme is "sufficiently comprehensive and effective" (Wright, 479 U.S. at 425) has allowed § 1983 to supplant numerous statutory enforcement schemes, leading to excessive, duplicative, and inconsistent enforcement. For example, guided by the principle of Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), that exhaustion of state remedies is not a prerequisite for a § 1983 action, courts generally presume that exhaustion of statutory remedies is not a prerequisite for a Thiboutot action, absent "firm evidence of congressional intent." Alacare, Inc.-North v. Baggiano, 785 F.2d 963, 967 (11th Cir.), cert. denied, 479 U.S. 829 (1986); see also Krebs v. Rutgers, 797 F. Supp. 1246, 1257 (D.N.J.1992). Courts have not only held that exhaustion is unnecessary with respect to state administrative remedies required by federal law (see, e.g., id.), but have also held that it is unnecessary with respect to federal administrative procedures. See Mrs. W. v. Tirozzi, 832 F.2d 748, 758 (2d Cir.1987) (EHA); Krebs, 797 F. Supp. at 1257 (Family Education Rights and Privacy Act); Hendrickson v. Griggs, 672 F. Supp. 1126, 1132 (N.D.Iowa 1987) (Juvenile Justice and Delinquency Prevention Act).

Third, jurisprudence concerning the availability of § 1983 is so confusing that congressional attempts to provide answers to the questions that it engenders under ***48** the current judicial framework can themselves breed further confusion. For example, Congress recently enacted 42 U.S.C. § 1320a-2 in response to this Court's decision in Suter. See supra p. 14 n. 4. Although Congress intended to "overturn ... any ... grounds applied in Suter ... but not applied in prior Supreme Court decisions respecting such enforceability," Congress gave no hint what it thought Suter's "grounds" were or what "grounds" it thought existed pre-Suter.[29] It did not take long at all for courts to develop conflicting constructions of the Suter amendment. Cf. LaShawn A. v. Barry, 69 F.3d 556 (D.C.Cir.1995) (§ 1320a-2 has no effect on determination of when Thiboutot actions may be found), vacated on other grounds, No. 94-7044, 1996 WL 378608 (D.C.Cir. July 9, 1996), with Jeannie B. by Blondis v. Thompson, 877 F. Supp. 1268, 1283 (E.D.Wis.1995) (§ 1320a-2 overrules Suter); Harris v. James, 883 F. Supp. 1511, 1520 (M.D.Ala.1995) (same). Thus, even when Congress has addressed the availability of § 1983 actions in light of its understanding of the judicial standard, it has failed to clarify the issues involved.

In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), this Court justified its restriction of the judicial protections that the States would receive under the Tenth Amendment by pointing to the inherent political power that the

States could wield in Congress. But a decision like Thiboutot, which shifts authority for imposing extraordinary burdens on the States from Congress to an unelected judiciary, renders illusory whatever political power the States might possess to protect against unwarranted federal encroachment. If the promise of Garcia is to ***49** have any meaning, it is vital that the Court return § 1983 to its original understanding and thereby require Congress to act directly and expressly when it seeks to impose liability on the States and their actors to further national interests. See Gregory, 501 U.S. at 464 (citing L. Tribe, American Constitutional Law §§ 6-25, p. 480 (2d ed. 1988)). Accordingly, the Court should reconsider its decision in Thiboutot and limit the sweep of § 1983 so that it is consistent with the Eleventh Amendment, § 1343(a)(3), and implied right of action precedent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court below and order that Respondents' suit be dismissed.

*1a APPENDIX A

PERTINENT TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, § 8, cl. 1 of the Constitution provides in pertinent part: "The Congress shall have Power To ... provide for the ... general Welfare of the United States."

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

3. Section 1 of the Fourteenth Amendment of the Constitution provides in pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

4. 42 U.S.C. § 1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*2a APPENDIX B

LEGISLATIVE HISTORY OF § 1983 TRACED BACK TO CIVIL RIGHTS ACT OF 1866

Contents: Page

CIVIL RIGHTS ACT OF 1866

(14 Stat. 27)

"SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and ***3a** equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

[Subsequent statutes developed from this Section: (1) § 16 of the Enforcement Act of 1870; (2) §§ 1977, 1978 of the Revised Statutes of 1874.]

"SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

[Subsequent statutes developed from this Section: (1) § 17 of the Enforcement Act of 1870; (2) § 1 of the Ku Klux Act of 1871; (3) §§ 563(12), 629(16), 1979, 5510 of the Revised Statutes of 1874; (4) 8 U.S.C. § 43; (5) 42 U.S.C. § 1983.]

"SEC. 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several ***4a** States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendants shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or ***5a** criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty."

[Subsequent statutes developed from this Section: (1) § 18 of the Enforcement Act of 1870; (2) §§ 563(12), 629(16) of the Revised Statutes of 1874.]

ENFORCEMENT ACT OF 1870

(16 Stat. 144)

"SEC. 16. And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void."

[Subsequent statute developed from this Section: § 1977 of the Revised Statutes of 1874.]

***6a** "SEC. 17. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

[Subsequent statutes developed from this Section: (1) § 1 of the Ku Klux Act of 1871; (2) §§ 563(12), 629(16), 1979, 5510 of the Revised Statutes of 1874; (3) 8 U.S.C. § 43; (4) 42 U.S.C. § 1983.]

"SEC. 18. And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act."

[Subsequent statutes developed from this Section: (1) §§ 563(12), 629(16) of the Revised Statutes of 1874.]

***7a 1871**

THE KU KLUX ACT

(17 Stat. 13)

“SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled “An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication”; and the other remedial laws of the United States which are in their nature applicable in such cases.”

[Subsequent statutes developed from this Section: (1) §§ 563(12), 629(16), 1979 of the Revised Statutes of 1874; (2) 8 U.S.C. § 43; (3) 42 U.S.C. § 1983.]

***8a** REVISED STATUTES OF 1874

“SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. [See § 858.]”[1]

Margin annotation: “Equal rights under the law.”

“SEC. 1978. All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

Margin annotation: “Rights of citizens in respect to real and personal property.”

“SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the ***9a** jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit. in equity, or other proper proceeding for redress. [See §§ 563, 629.]”

Margin annotation: “Civil action for deprivation of rights.”

[Subsequent statutes developed from this Section: (1) 8 U.S.C. § 43; (2) 42 U.S.C. § 1983.]

“SEC. 563 The district courts shall have jurisdiction as follows:

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof. [See §§ 1977, 1979.]”

Margin annotation: “Suits to redress deprivation of rights secured by the Constitution and laws to persons within jurisdiction of United States.”

***10a** "SEC. 629 The circuit courts shall have jurisdiction as follows:

Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. [See §§ 1977, 1979.]"

Margin annotation: "Suits to redress deprivation of rights secured by the Constitution and laws to persons within jurisdiction of United States."

"SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both. [See § 1979.]"

Margin annotation: "Depriving citizens of civil rights under color of State laws."

***11a UNITED STATES CODE OF 1925 (1st ed.)**

"8 U.S.C. § 43. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. § 1979.)"

[Subsequent statute developed from this Section: 42 U.S.C. § 1983.]

UNITED STATES CODE OF 1953 (5th ed.)

"42 U.S.C. § 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. § 1979.)"

[1979 amendment of § 1983 added the words "or the District of Columbia" following "Territory." Pub. L. 96 170.]

***12a Appendix B**

LEGISLATIVE HISTORY

ROOTS OF § 1983 TRACED BACK TO CIVIL RIGHTS ACT OF 1866

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

***13a APPENDIX C**

SAMPLING OF STATUTES AND CASES RAISING THIBOUTOT ISSUES

I. STATUTES THAT HAVE ENGENDERED CIRCUIT SPLITS ON THE AVAILABILITY OF § 1983 TO ENFORCE THEIR PROVISIONS.

A. The Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. §§ 8621-8629.
• Permitting § 1983 action: Crawford v. Janklow, 710 F.2d 1321 (8th Cir.1983).

• Not permitting § 1983 action: Cabinet for Human Resources v. Northern Ky. Welfare Rights Ass'n, 954 F.2d 1179 (6th Cir.1992); Hunt v. Robeson County Dept. of Social Servs., 816 F.2d 150 (4th Cir.1987).

B. The Model Cities Act of 1966, 42 U.S.C. §§ 3301 et seq.

• Permitting § 1983 action: Bridgeport Housing Auth. Police Force v. City of Bridgeport, 646 F.2d 55 (2d Cir.), cert. denied, 454 U.S. 897 (1981).

• Not permitting § 1983 action: Former Special Project Employees Ass'n v. City of Norfolk, 909 F.2d 89 (4th Cir.1990).

C. Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-699.

• Permitting § 1983 action: Freestone v. Cowan, 68 F.3d 1141 (9th Cir.1995); Albiston v. Maine Comm'r of Human Servs., 7 F.3d 258 (1st Cir.1993); Howe v. Ellenbecker, 8 F.3d 1258 (8th Cir.1993), cert. denied, 114 S. Ct. 1373 (1994).

• Not permitting § 1983 action: Carelli v. Howser, 923 F.2d 1208 (6th Cir.1991); ***14a** Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir.1989), cert. denied, 494 U.S. 1027 (1990).

D. The Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021-2027.

• Permitting § 1983 action: Boyle v. Burke, 925 F.2d 497 (1st Cir.1991).

• Not permitting § 1983 action: Grady v. El Paso Community College, 979 F.2d 1111 (5th Cir.1992).

II. STATUTES FOR WHICH THE COURTS OF APPEALS HAVE FACED THE QUESTION WHETHER A § 1983 REMEDY IS AVAILABLE.

A. Statutes for Which the Courts of Appeals Have Permitted § 1983 Actions.
1. The Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq. Kerr-McGee Chem. Corp. v. City of West Chicago, 914 F.2d 820, 824-25 (7th Cir.1990).

2. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. Playboy Enters., Inc. v. Public Serv. Comm'n of Puerto Rico, 906 F.2d 25 (1st Cir.), cert. denied, 498 U.S. 959 (1990).

3. The Consolidated Farm and Rural Development Act, 7 U.S.C. § 1926. Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir.1994), cert. denied, 115 S. Ct. 2000 (1995).

4. A federal highway construction statute, 23 U.S.C. § 301. Clallam County v. Department of Transp., 849 F.2d 424 (9th Cir.1988), cert. denied, 408 U.S. 1008 (1989).

5. The Housing Act of 1949, 42 U.S.C. § 1455(c)(1) (1982). ***15a** Pietroniro v. Borough of Oceanport, 764 F.2d 976 (3d

Cir.), cert. denied, 474 U.S. 1020 (1985).

6. The Housing and Community Development Act of 1974, 42 U.S.C. § 5310. Chan v. City of New York, 1 F.3d 96 (2d Cir.), cert. denied, 114 S. Ct. 472 (1993).

7. The Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519 (8th Cir.1993).

8. The Rehabilitation Act of 1973, 29 U.S.C. §§ 721(a)(8)—(9). Marshall v. Switzer, 10 F.3d 925 (2d Cir.1993).

9. The Social Security Act, tit. IV-E, 42 U.S.C. §§ 670 et seq. Lynch v. Dukakis, 719 F.2d 504 (1st Cir.1983).

10. The Supplemental Food Program for Women, Infants, and Children, 42 U.S.C. § 1786. Alexander v. Polk, 750 F.2d 250 (3d Cir.1984).

11. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4625 (1971). Pietroniro v. Borough of Oceanport, 764 F.2d 976 (3d Cir.), cert. denied, 474 U.S. 1020 (1985).

B. Statutes for Which the Courts of Appeals Have Not Permitted § 1983 Actions.

1. The Civil Rights Act, tit. VII, 42 U.S.C. §§ 2000e et seq. (1964). Poison v. Davis, 895 F.2d 705 (10th Cir.1990).

2. The Comprehensive Employment Training Act, 29 U.S.C. § 801 et seq. (1977). Davis v. Mobile Consortium of CETA, 857 F.2d 737 (11th Cir.1988).

***16a** 3. The Federal Aviation Act of 1958, 49 U.S.C. §§ 1305, 1349 (1982). Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir.), cert. denied, 479 U.S. 872 (1986).

4. The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 et seq. Almond Hill Sch. v. United States Dep't of Agriculture, 768 F.2d 1030 (9th Cir.1985).

5. The Housing Act of 1949, 42 U.S.C. §§ 1437, 1441, 1441a. Perry v. Housing Auth. of the City of Charleston, 664 F.2d 1210 (4th Cir.1981).

6. The Housing Act of 1937, 42 U.S.C. §§ 1437d(c)(3)(ii), 1437d(c)(4)(A)(1983). Phelps v. Housing Auth. of Woodruff, 742 F.2d 816 (4th Cir.1984).

7. The Justice System Improvement Act, 42 U.S.C. § 3789g. Polchowski v. Gorris, 714 F.2d 749 (7th Cir.1983).

8. The Medicare Catastrophic Act of 1988, 42 U.S.C. § 1396a(c)(1). Audette v. Sullivan, 19 F.3d 254 (6th Cir.1994).

9. The Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396a(c)(1). Stowell v. Ives, 976 F.2d 65 (1st Cir.1992).

10. The National Bank Act, 12 U.S.C. § 85. First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195 (8th Cir.1980), cert. denied, 450 U.S. 1042 (1981).

11. The National Labor Relations Act, 29 U.S.C. §§ 157, 159. Hobbes v. Hawkins, 968 F.2d 471 (5th Cir.1992).

12. Restatement of the Bill of Rights for Mental Health Patients, 42 U.S.C. § 10841. ***17a** Monahan v. Dorchester Counseling Ctr. Inc., 961 F.2d 987 (1st Cir.1992).

13. The Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq. Mattoon v. City of Pittsfield, 980 F.2d 1 (1st Cir.1992).

14. The Social Security Act, 42 U.S.C. § 422. Smith v. Kirk, 821 F.2d 980 (4th Cir.1987).

15. The Social Security Act, 42 U.S.C. § 602(a)(4). Clifton v. Schafer, 969 F.2d 278 (7th Cir.1992).

16. The Social Security Act, 42 U.S.C. § 602(h). Stanberry v. Sherman, 75 F.3d 581 (10th Cir.1996).

17. The Social Security Act, 42 U.S.C. § 1395a. Home Health Servs., Inc. v. Currie, 706 F.2d 497 (4th Cir.1983) (per curiam).

III. STATUTES OVER WHICH THE COURTS OF APPEALS HAVE REVERSED THE DISTRICT COURTS OVER THE AVAILABILITY OF § 1983.

A. Statutes for Which the Court of Appeals Permitted a § 1983 Action.
1. The Federal Aid in Fish Restoration Act, 16 U.S.C. §§ 777-7771. Buckley v. City of Redding, 66 F.3d 188 (9th Cir.1995).

2. The Hawaiian Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). Price v. Akaka, 928 F.2d 824 (9th Cir.1990), cert. denied, 502 U.S. 967 (1991).

B. Statutes for Which the Court of Appeals Did Not Permit a § 1983 Action.

1. The Agricultural Credit Act of 1987, 12 U.S.C. §§ 2001 et seq. ***18a** Harper v. Federal Land Bank, 878 F.2d 1172 (9th Cir.1989), cert. denied, 493 U.S. 1057 (1990), reversing 692 F. Supp. 1244 (D.Ore.1988).

2. The Education Amendments of 1992 (Title IX), 20 U.S.C. §§ 1681 et seq. Lakoski v. James, 66 F.3d 751 (5th Cir.1995).

3. The Frost-Leland Amendment to a Department of Housing and Urban Development appropriations bill, Pub. L. No. 100-202, tit. IV, sec. 415, 101 Stat. 1329-213, Resident Council of Allen Parkway Village v. HUD, 980 F.2d 1043 (5th Cir.), cert. denied, 114 S. Ct. 75 (1993).

4. The Older Americans Act of 1965, 42 U.S.C. § 3025(a)(2)(C). City of Chicago v. Lindley, 66 F.3d 819 (7th Cir.1995).

5. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987. Garcia v. Cecos Int'l, Inc., 761 F.2d 76 (1st Cir.1985).

6. The River and Harbor Improvements Act, 33 U.S.C. §§ 540-633. Boatowners and Tenants Ass'n v. Port of Seattle, 716 F.2d 669 (9th Cir.1983).

7. The Social Security Act, 42 U.S.C. § 602(g). Maynard v. Williams, 72 F.3d 848 (11th Cir.1996).

8. The Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4652. Ackerley Communications v. Henderson, 881 F.2d 990 (11th Cir.1989).

Footnotes

FN
* Counsel of Record

[1] All citations to the Code of Federal Regulations are to the 1995 edition.

2 The Complaint alleged in 1993 that approximately 275,000 Title IV-D cases existed. J.A. 19. The Secretary's published figures for 1994 (the latest available figures) put the number at 307,060 open case files. See U.S. Department of Health and Human Services, Child Support Enforcement Nineteenth Annual Report to Congress, 41-49 (1995). The number fluctuates constantly as ADES closes existing cases and new custodial parents request services.

3 Respondents correctly have made no attempt to argue that there is an implied cause of action under Title IV-D itself under the test of Cort v. Ash, 422 U.S. 66 (1975), and its progeny. See also Pet. Reply at 6 n. 2.

4 In 1994, Congress enacted 42 U.S.C. § 1320a-2, Pub. L. No. 103-382, § 555(a), 108 Stat. 3518, 4057-58, in response to this Court's decision in Suter. See Pet. 12 n. 7. The amendment provides in part that it is "not intended to limit or expand the grounds for determining the availability of private actions [under the Social Security Act] to enforce State plan requirements other than by overturning any such grounds applied in Suter ... but not applied in prior Supreme Court decisions respecting such enforceability." Congress, however, gave no hint what it thought the "grounds" of Suter were, or what "grounds" existed pre-Suter.

The court below indicated that "Suter represents an elaboration and amplification of the Wilder test rather than an unannounced and unacknowledged departure." Pet. App. 13a-14a. Thus, Petitioner believes that Suter is still good law for the propositions and rationale upon which Petitioner relies. For further discussion of the Suter amendment, see infra p. 48.

5 To the extent that the court of appeals relied upon the Secretary's regulations to support the creation of enforceable rights (see Pet. App. 15a-18a), its reliance implicates separation of powers concerns. See Wright, 479 U.S. at 438 (O'Connor, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ., dissenting) ("I am concerned ... that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.... Such a result, where determination of § 1983 'rights' has been unleashed from any connection to congressional intent, is troubling indeed") (emphasis in original).

6 The State Director's point is not that the individual Respondents in this particular case lack standing, but instead that no one seeking Title IV-D assistance could satisfy Article III, making it inconceivable that Congress intended to allow Respondents privately to enforce Title IV-D's provisions.

7 Success in Title IV-D cases depends upon more than the absent parents' willingness to accept responsibility for their children. It often also depends upon the cooperation of entities in the executive and judicial branches and the private sector. See APWA at 8. In some cases, the entities upon whom success depends are entities (including Title IV-D agencies) that are located in other States. See id. at 12 (reporting that although interstate cases make up 30% of the national caseload, collections in such cases make up only 8% of the national total). Title IV-D agencies have little or no control over any of these outside entities, and none of the entities is before the courts in the instant case.

8 See Wright, 496 U.S. at 428; Wilder, 496 U.S. at 522.

9 The penalties provision is not a "dead letter," however, because the Secretary has issued sanctions against States. See APWA at 25-26.

10 Under Eleventh Amendment jurisprudence, "each State is a sovereign entity in our federal system" and " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' " Seminole Tribe, 116 S. Ct. at 1122

(quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890) (other citations omitted)).

11 The Eleventh Amendment was not an issue in Thiboutot itself because the plaintiffs there brought their suit in state court. See Thiboutot, 448 U.S. at 2, 9 n. 7. Eleventh Amendment issues were presented in the petition for certiorari in Sea Clammers, but they were not "within the scope of the questions on which review was granted" and thus the Court did not consider them. Sea Clammers, 453 U.S. at 8 n. 12. It appears that the state officials in Wilder raised an Eleventh Amendment defense in the lower courts, but not before this Court. Wilder, 496 U.S. at 504 n. 4. The Wilder majority's only other discussion of the Eleventh Amendment concerned Congress' earlier attempts to require States to waive their Eleventh Amendment immunity in the context of the Medicaid Act. Id. at 516-18. The Court did not pass on whether Congress' belief in the necessity of a waiver was correct. The majority opinions in Livadas v. Bradshaw, 114 S. Ct. 2068 (1994), Suter, Wright, Golden State Smith, and Pennhurst I make no mention of the Eleventh Amendment at all.

12 See, e.g., § 654(4) ("[a] State plan ... must ... provide that such State will undertake" to establish paternity and secure enforcement) (emphasis added); § 657(b) ("[t]he amounts collected as support by a State pursuant to a plan approved under this part ... shall ... be distributed as follows ...") (emphasis added); § 666(a) ("each State must have in effect laws requiring the use of the following procedures ...") (emphasis added); § 667(a) ("[e]ach State ... must establish guidelines for child support award amounts within the State") (emphasis added); § 667(c) ("each State shall furnish the Secretary with copies of its guidelines") (emphasis added).

13 See, e.g., 42 U.S.C. § 652(f) ("[t]he Secretary shall issue regulations to require that State agencies administering the child support enforcement program ... petition for the inclusion of medical support as part of any child support order ...") (emphasis added); 42 U.S.C. § 654(3) ("[a] State plan ... must ... provide for the establishment or designation of a single and separate organizational unit ... to administer the plan"); § 654(8) ("[a] State plan ... must ... provide that the agency administering the plan will establish a service to locate absent parents") (emphasis added); § 654(19)(B) ("[a] State plan ... must ... provide that the agency administering the plan ... shall enforce any ... child support obligations which are owed by ... an individual" collecting unemployment compensation) (emphasis added); § 663(b) ("the State agency ... will ... receive and transmit to the Secretary requests" for parent locator information) (emphasis added).

Congress' command to "the State" and "State agencies" stands in sharp contrast to Congress' explicit reference to various federal officials, rather than simply to "the Federal Government" or to "the Department of Health and Human Services." See, e.g., 42 U.S.C. § 652(a) ("[t]he Secretary shall establish ...") (emphasis added); § 655(a)(1) ("the Secretary shall pay to each State ..."); § 653(e)(2) (requiring any "individual who is the head of any department, agency, or instrumentality of the United States" to search through files "promptly" when requested by the Secretary) (emphasis added). See also 42 U.S.C. § 659(c) (providing immunity from liability to any "[f]ederal employee" who discloses information within the scope of his duties).

14 Indeed, Congress' only explicit references to State actors are its permission for "authorized persons" of the State to request and receive parent locator information from the Secretary, § 653(c), or to notify an official in the uniformed services of an active serviceperson's delinquency in child support payments, § 665(a)(1), § 665(b).

15 The Court has employed similar restraint before finding additional remedies available against federal officials. In Schweiker v. Chilicky, 487 U.S. 412 (1988), cited approvingly by the Court in Seminole Tribe (116 S. Ct. at 1132), the Court held that Title II of the Social Security Act precluded damage actions against federal officials under the doctrine of Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), because "[t]he Act ... makes no provision for remedies in money damages against officials...." Schweiker, 487 U.S. at 424.

16 " '[I]n expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (citations omitted).

17 Section 1983 also expanded the remedies available to a plaintiff suing a state actor by subjecting the state actor "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

18 This Court should refuse to indulge in excessive speculating about what Congress intended and—relying upon core separation of powers principles—insist that no private cause of action to enforce a federal statute exists unless Congress plainly provides. As Justice Powell observed: "When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting). Otherwise, "[r]ather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide." Id. at 743.

19 Construing § 1983 in the way that Petitioner proposes would have no effect on a putative plaintiff's ability to use § 1983 as a vehicle for redressing violations of constitutional rights by state actors because the Constitution itself creates causes of action. See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

20 "[T]he duty, both of interpretation and construction, so often devolving on courts, is or may be, aided much by the time, history, and attendant circumstances of the original enactment of the statute now newly arranged.... The original arrangement of the words, sentences, clauses, and sections of an act is valuable in ascertaining their meaning." 2 Cong. Rec. 826 (Remarks of Rep. Lawrence) (daily ed. Jan. 21, 1874).

21 See also Monroe, 365 U.S. at 172-83; Chapman, 441 U.S. at 623-44 (Powell, J., concurring).

22 Mr. Shellabarger stated in his introduction of the new legislation that "[t]hese provisions of the fourteenth amendment are wholly devoted to securing the equality and safety of all the people, as is this section [§ 1], and, indeed, the entire bill." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871); see also Cong. Globe App. 73 ("[t]hese rights, privileges, and immunities are recited in ... the first section of the fourteenth article of amendments to the Constitution") (statement of Rep. Blair).

23 "The model for [§ 1 of the Ku Klux Act] will be found in the second section of the act of April 9, 1866.... That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (statement of Rep. Shellabarger) (emphasis added).

24 Indeed, the Joint Committee directed its attorney that "whenever the meaning of the law had been changed, to strike out such changes." 2 Cong. Rec. 646 (daily ed. Jan. 14, 1874) (statement of Rep. Poland).

25 See, e.g., Chapman, 441 U.S. at 611 ("prime focus" of § 1983 was to ensure "a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto"); District of Columbia v. Carter, 409 U.S. 418, 425 (1973) (finding "great significance" in the fact that §1983's purpose was to redress violations of Fourteenth Amendment rights, as distinguished from earlier civil rights laws that had been based on the broader Thirteenth Amendment); Mitchum v. Foster, 407 U.S. 225, 238 (1972) (§ 1983 "was enacted for the express purpose" of enforcing the Fourteenth Amendment); Monroe, 365 U.S. at 180 (finding it "abundantly clear" that Congress enacted § 1983 in part to provide a federal right for violations of rights that the Fourteenth Amendment guaranteed).

26 What makes this intrusion worse is that it often tends to entangle the federal judiciary in the political differences between coequal branches of state government. See B.H. v. McDonald, 49 F.3d 294, 302-04 (7th Cir.1995) (Easterbrook and Goodwin, JJ.,

concurring). Thus, if the executive branch believes that the legislature has been too stingy in appropriating funds for the Title IV-D program, the executive might welcome a § 1983 lawsuit from private parties and look to settle the suit regardless of the legal merits by a binding federal court consent decree that required the legislature to appropriate more money. Such a distortion of the state political process should not be encouraged.

27 In addition, because of § 1988's availability in all § 1983 actions, Thiboutot, 448 U.S. at 8-11, each successful plaintiff—or, more accurately, each successful plaintiff class—is awarded attorney's fees, thus creating a wholesale shift away from the "American Rule" concerning litigation costs. Id. at 24-25 (Powell, J., dissenting); see also Dennis, 498 U.S. at 464 (Kennedy, J., dissenting) (noting significance of § 1988 as incentive to bring cause of action under § 1983).

28 Thiboutot also restricts courts' ability to provide purely injunctive relief. Courts generally cannot find that an implied private right of action for injunctive relief against state officials or political subdivisions is available without also finding that § 1983 damages relief is available. As a result, courts generally cannot discern congressional intent to provide purely injunctive relief against such actors unless it is stated explicitly. See Golden State, 493 U.S. at 119 (Kennedy, J., dissenting) (suggesting that scope of § 1983 should be limited to give courts greater freedom to find injunctive and declaratory relief as the sole remedy).

29 In fact, Congress expressly declined to overrule the actual holding of Suter. See 42 U.S.C. § 1320a-2 ("this section is not intended to alter the holding in Suter ... that section 671(a)(15) of [the Social Security Act] is not enforceable in a private right of action").

1 Brackets and citations therein appeared in original Revised Statutes of 1874.

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