UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 22 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KEVIN MASSENGALE,

Plaintiff-Appellant,

v.

ANCHORAGE, Municipality; et al.,

Defendants-Appellees,

and

42 U.S.C. 654 (3); 45 C.F.R 302.34,

Defendants.

No. 19-35755

D.C. No. 3:19-cv-00076-TMB
District of Alaska, Anchorage

ORDER

Before: BYBEE, IKUTA, and OWENS, Circuit Judges.

Upon a review of the record, the response to the order to show cause, and the opening brief received on November 12, 2019, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 3), *see* 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

**DISMISSED.**

APPENDIX A

SM/MOATT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



KEVIN MASSENGALE,

Plaintiff - Appellant,

v.

ANCHORAGE, Municipality; CALIFORNIA 42 U.S.C. 654(3) LOS ANGELES COUNTY CHILD SUPPORT CUSTOMER SERVICE DIVISION; ALASKA 42 U.S.C. 643(3) ANCHORAGE CHILD SUPPORT CUSTOMER SERVICE DIVISION,

Defendants - Appellees,

and

42 U.S.C. 654 (3); 45 C.F.R 302.34,

Defendants.

No. 19-35755

D.C. No. 3:19-cv-00076-TMB
U.S. District Court for Alaska, Anchorage

**TIME SCHEDULE ORDER**

The parties shall meet the following time schedule.

| | |
|---|---|
| **Fri., November 8, 2019** | Appellant's opening brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1. |

**Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

KEVIN MASSENGALE,

Plaintiff,

vs.

CALIFORNIA 42 U.S.C. § 654(3) LOS ANGELES COUNTY CHILD SUPPORT CUSTOMER SERVICE DIVISION, *et al.*,

Defendants.

Case No. 3:19-cv-00076-TMB

## ORDER OF DISMISSAL

Kevin Massengale, representing himself, filed a Civil Rights Complaint (Non-Prisoner) under 42 U.S.C. § 1983, and an Application to Waive the Filing Fee.[1] The Court dismissed the Complaint, explained the deficiencies, and permitted Mr. Massengale to file a First Amended Complaint (FAC).[2] He has filed a FAC with exhibits.[3] Because the Application to Waive the Filing Fee contained incomplete information, Mr. Massengale was allowed to file an Amended Application with complete information;[4] and he has now done so.[5]

[1] Dockets 1, 3, 4.

[2] Docket 5.

[3] Docket 6.

[4] Dockets 3, 5.

[5] Docket 7.

As previously explained in the Court's Order of Dismissal with Leave to Amend,[6] the Court is required to screen the FAC under 28 U.S.C. § 1915(e)(2)(B).

## DISCUSSION

Mr. Massengale's lists three Defendants in his FAC: (1) California 42 U.S.C. 654(3) Los Angeles County Child Support Customer Service Division; (2) Alaska 42 U.S.C. 654(3) Anchorage Child Support Customer Service Division; and (3) the Anchorage Municipality.[7] Mr. Massengale names all Defendants in their personal capacities, seeking money damages.[8] He describes Defendant 1 as a "single and separate unit" of the California Child Support Customer Service Division; Defendant 2 as a "single and separate unit" of the Alaska Child Support Customer Service Division; and Defendant 3, the Anchorage Municipality, as a citizen of Alaska and "employed by" the Anchorage Borough.[9]

In Claim 1, Mr. Massengale alleges that the Child Support Customer Service Division in Los Angeles, California began violating his right to due process in 2005 when it failed to inform him about the legal consequences of signing a document establishing paternity, and that he has been injured by being required to provide

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[6] Docket 5 at 1-3.

[7] Docket 6 at 1.

[8] *Id.* at 2.

[9] *Id.*

the agency with his personal, work, tax, bank and property information in order to make child support payments, thus forcing him into slavery.[10]

In Claim 2, Mr. Massengale alleges that the Alaska Child Support Customer Service Division conspired with Child Support Services in Los Angeles, California in 2012 and 2013 to enforce child support obligations, after he was found through the Federal Parent Locator Service (FPLS).[11] Mr. Massengale again alleges that his child support obligation was secured through wage withholding and tax refunds. in addition to garnishment of his 2013-2018 Alaska Permanent Fund Dividends. injuring him financially, and forcing him into slavery.[12]

In Claim 3, Mr. Massengale alleges that the Anchorage Municipality conspired with California's Child Support Customer Service Division

> to cause injury damaging my children and illegally giving my information away doing business with my social security card name and account number which was issued to me to obtain benefits from certain US Agencies conspiring to make profit off of my injury stealing my hard-earned wages my reward taken against my will association with identify theft to disable my rights the Municipality of Anchorage enforce child support obligations upon myself against my consent depriving me of my guarantee rights that is protected by the US Constitution, 42 USC 1983, 18 USC 241, they stole my entire Permanent Fund dividends, numerous of times, tax refund, unemployment compensation, hard-earned wages from my employment, my child support case she'll be terminated and I want

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[10] *Id.* at 3.

[11] *Id.* at 4.

[12] *Id.*

relief slavery and oppression is for No One But Justice is for all. I want Justice.[13]

Mr. Massengale seeks $15 million in compensatory damages and $15 million in punitive damages.[14]

The Court takes judicial notice[15] that "California 42 U.S.C. 654(3) Los Angeles County Child Support Customer Service Division," and "Alaska 42 U.S.C. 654(3) Anchorage Child Support Customer Service Division," listed in the caption of the FAC as Defendants, are not real entities.[16] As explained in the Court's Order

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[13] *Id.* at 5.

[14] Docket 6 at 6-7.

[15] Judicial notice is the "court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact" *Black's Law Dictionary* (11th ed. 2019); *see also Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1051 n.3 (9th Cir. 2005) ("Materials from a proceeding in another tribunal are appropriate for judicial notice.") (internal quotation marks and citation omitted); *see also* Fed. R. Evid. 201.

[16] *But see* http://csed.state.ak.us/Overview.aspx (State of Alaska, Department of Revenue, Child Support Services Division, explaining: "Congress established the Child Support Services Program in 1975. Lawmakers realized that far too many children were struggling because their mother or father failed to make regular support payments. The new law, adopted as an amendment to the Social Security Act, required states to set up their own Services and collection programs. Alaska created its Child Support Enforcement Agency in 1976. The name of the agency was changed in 2004 to Child Support Services Division."); https://childsupport.ca.gov/ (California Child Support Services, explaining: "There are 49 child support agencies across California that establish and enforce child support and medical support orders... All case services are handled at this county or regional level and all child support-related questions should be first routed to the agency in your county or region of residence.").

at Docket 5, a case cannot proceed without Defendants that are real, existing individuals or entities.[17]

Liberally construing Mr. Massengale's FAC, the Court finds that the pleading fails to state a claim upon which relief may be granted under 42 U.S.C. § 1983, and that the FAC is frivolous. For the reasons explained below, the case is dismissed without leave to amend, because amendment would be futile.[18]

1. **The Plaintiff is Responsible for Establishing this Court's Jurisdiction Over the Case.**

Jurisdiction is "[a] court's power to decide a case or issue a decree[.]"[19] As explained by the United States Supreme Court, "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute."[20] That is, the United States Constitution or a federal statute must generally be at issue to establish this Court's jurisdiction. It is Mr. Massengale's burden, as the plaintiff, to show that this Court has jurisdiction to hear his claims.[21]

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[17] Docket 5 at 12-14.

[18] *See Garmon v. County of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016).

[19] *Black's Law Dictionary* (10th ed, 2014).

[20] *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (citations omitted).

[21] *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1027 (9th Cir. 2011) ("We 'presume[ ] that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.'") (quoting *Kokkonen*, 511 U.S. at 377).

2. **There is No Private Cause of Action under 18 U.S.C. § 241.**

As explained in the Order at Docket 5, page 6, 18 U.S.C. § 241, Conspiracy against Rights, is a criminal statute. Mr. Massengale's Claims 2 and 3, however, are brought under this statute. A private citizen may not sue another person or entity under criminal laws. Criminal laws are enforced by the executive branch of the federal government and prosecuted by the United States Attorney's Office. If Mr. Massengale believes he is the victim of a federal crime, he may contact the U.S. Attorney's Office or a federal law enforcement department. But the Court has no jurisdiction to hear a civil case filed by a plaintiff under 18 U.S.C. § 241.

3. **There is No Private Cause of Action under 42 U.S.C. § 654(c) or its Regulations.**

Mr. Massengale lists "42 U.S.C. 654(3)" as part of the names of his first two Defendants.[22] But, as he was previously informed in the Order at Docket 5, pages 6-8, there are no grounds for a private cause of action under 42 U.S.C. § 654(c).[23]

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[22] Docket 6 at 1, 3, 4.

[23] 42 U.S.C. § 654 ("A State plan for child and spousal support must ... (c) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan"); *see also Clark v. Portage County, Ohio*, 281 F.3d 602, 603-04 (6th Cir. 2001) ("In *Blessing v. Freestone*, 520 U.S. 329 ... (1997), the Supreme Court considered the extent to which Title IV–D gives rise to an individual right of enforcement. In *Blessing*, the Plaintiffs alleged that the Arizona child support enforcement agency failed to take adequate steps to obtain child support payments from non-custodial fathers. *Id.* at 332.... Their specific allegation complained not that the agency violated a specific right, but that it did not substantially comply with Title IV–D. *Id.* Finding that the Title IV–D substantial compliance requirements were not

4. Requirements for filing an action under the Civil Rights Act.

42 U.S.C. § 1983 "provides a cause of action for *state deprivations* of *federal rights*."[24] That is, a plaintiff has "a cause of action against [1] state actors who [2] violate an individual's rights under federal law."[25] A plaintiff must establish a causal link between the state action and the alleged violation of his or her rights.[26] These essential elements *must* be alleged in a § 1983 claim. The Order at Docket 5. pages 10-14, provided Mr. Massengale with a detailed explanation of the requirements for filing a section 1983 claim, and a description of what is required in an amended complaint. Mr. Massengale has failed to comply.[27]

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intended to benefit individual children and custodial parents, the Supreme Court held that the 'substantial compliance' provision did not confer a federal right. *Id.*").

[24] *Nieves v. Bartlett*, ___ U.S. ___, 139 S.Ct. 1715, 1721 (2019) (emphasis added).

[25] *Filarsky v. Delia*, 566 U.S. 377, 380 (2012) (quoting 42 U.S.C. § 1983); *see also Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015) ("To maintain an action under section 1983 against ... individual defendants, [a plaintiff] must ... show: (1) that the conduct complained of was committed by a person acting under the color of *state* law; and (2) that this conduct deprived them of rights, privileges, or immunities secured by the Constitution or laws of the United States.") (citation and internal quotations omitted) (emphasis in original).

[26] *Preschooler II v. Clark Cty. Sch. Bd. Of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

[27] Rule 8 of the Federal Rules of Civil Procedure instructs that a complaint must contain a "short and plain statement of the claim showing that the [complainant] is entitled to relief." Mr. Massengale's complaint fails to include the necessary elements set forth in the Order at Docket 5. Mr. Massengale fails to identify who is causing what specific cognizable harm to him, and when.

5. **The State and its Agencies are Immune from Relief under Section 1983.**

Mr. Massengale appears to have intended to bring claims against the Alaska and California state agencies that have collected child support payments from him.[28] However, as Mr. Massengale was previously told, "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."[29] The Eleventh Amendment bars suits against state departments as well as those where the state itself is named as a defendant.[30] And the Eleventh Amendment bars suit regardless of the relief sought.[31]

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[28] The Court takes judicial notice that the child support agencies that have collected payments from Mr. Massengale are state agencies. *See* footnote 16, *supra*; http://csed.state.ak.us/Overview.aspx (Alaska); https://childsupport.ca.gov/ (California).

[29] *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (citations omitted); *see also Sossamon v. Texas*, 563 U.S. 277, 284 (2011) ("This Court has consistently made clear that 'federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."'") (citations omitted).

[30] *Northern Ins. Co. of New York v. Chatham County, Ga.*, 547 U.S. 189, 193 (2006) ("States and arms of the State possess immunity from suits authorized by federal law.") (citations omitted).

[31] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Buckwalter v. Nevada Bd. of Medical Examiners*, 678 F.3d 737, 740 n. 1 (9th Cir. 2012) ("The Eleventh Amendment proscribes § 1983 claims against the Board itself, whether for damages or injunctive relief."); *but see Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001) ("[T]he Eleventh Amendment does not extend its immunity to units of local government.") (citation omitted).

### 6. The Court Must Dismiss Frivolous Claims.

"[A] complaint . . . is frivolous where it lacks an arguable basis either in law or in fact."[32] Factual frivolousness includes allegations that are clearly baseless, fanciful, fantastic, or delusional.[33] As described in this Order, Mr. Massengale's claims, that two non-existent state entities and a municipality have conspired against him (in violation of criminal law) to enforce his child support obligations, taking his property to enforce his child support obligations without his consent, and forcing him into slavery, are factually and legally frivolous.

### 7. The Statute of Limitations for Filing This 1983 Case is Two Years.

"State law governs the statute of limitations period for § 1983 suits and closely related questions of tolling."[34] In both Alaska and California, the statute of limitations is two years.[35] "Under federal law, a claim accrues when the plaintiff knows or should know of the injury that is the basis of the cause of action.

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[32] *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996); *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

[33] *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (citing *Neitzke*, 490 U.S. at 325).

[34] *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009) (citation omitted).

[35] *See Owens v. Okure*, 488 U.S. 235, 236, 244 n. 8 (1985) ("[W]e [have] held that courts entertaining claims brought under 42 U.S.C. § 1983 should borrow the state statute of limitations for personal injury actions. ... We hold that the residual or general personal injury statute of limitations applies.") (citing "Alaska Stat. Ann. § 09.10.070 (two years for libel, slander, assault, battery, seduction, false imprisonment)" or for personal injury or death ...); *Maldanado v. Harris*, 370 F.3d 945, 954-55 (9th Cir. 2005) (Effective January

Mr. Massengale alleges that he was injured in California in or around 2005-2007, that he became an Alaska resident in 2011, and that California and Alaska child support officials began conspiring to seize his property in approximately 2012-13.[36] He claims to have remained a resident of Alaska, with his Permanent Fund Dividends garnished from 2013-2018.[37] Thus, Mr. Massengale's claims against any individuals or agencies in California, or those in conspiracy with individuals or agencies in California, have most likely lapsed. At this time, however, this issue and the issue of tolling (suspending the limitations period) need not be decided. Regardless, the case must be dismissed.

**IT IS THEREFORE ORDERED:**

1. This case is **DISMISSED**, as frivolous and for failure to state a claim, under 28 U.S.C. § 1915(e)(2)(B).
2. The Amended Application to Waive the Filing Fee, at Docket 7, is **DENIED**.
3. The Clerk of Court will enter a Judgment accordingly.

DATED at Anchorage, Alaska, this 28th day of August, 2019.

*/s/ Timothy M. Burgess*
TIMOTHY M. BURGESS
United States District Judge

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1, 2003, California's personal injury statute of limitations was extended to two years.") (citing Cal. Civ. Proc. Code § 335.1).

[36] Docket 6 at 3-4.

[37] *Id.* at 4.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
FEDERAL BUILDING U.S. COURTHOUSE

| | |
|---|---|
| Kevin Massengale<br><br>Plaintiff<br><br>-vs-<br><br>California 42 U.S.C. 654 (3) Child support customer service division, Alaska 42 U.S.C. 654 (3) Child support customer service division and Anchorage Municipality<br><br>Defendants | 3: 19-cv-00076-TMB |

**AFFIDAVIT**

I, Kevin Massengale, of Anchorage, Alaska, MAKE OATH AND SAY THAT:

1. I Kevin Massengale is not a lawyer and do not practice law but States 100 percent truth only. I Kevin Massengale has been forced to abide by title IV-D of the social security act provisions , Compelling me to associate with title IV-D Agency service, Title IV-D agency Services has caused injury, emotional distress, stress and duress, poverty, and their lustful interest in my real and personal property, disabling all of my rights taking my funds away from my children taking food out of my children's mouth, stopping me from exploring the world stopping me from showing my children the world, uncomfortable in life, worried, restricted, and not free, nor equal, nor has equal protection of the law, I am requesting that child support service division provide proof that I am obligated to pay the debt for this title IV-A loan that I never touched spent nor knew about, and to provide proof that child support is a right, and to provide proof that title IV-D agency is enacted into positive law and to provide proof that child support is a state agency and show proof of the agreement which created this debt.

STATE OF ALASKA

JUDICIAL DISTRICT OF
3rd (Anchorage)

SUBSCRIBED AND SWORN TO BEFORE ME,
on the 23rd day of August,
2019

Signature _____
(Seal)
NOTARY PUBLIC
My Commission expires:
3/21/21

NOTARY PUBLIC
CHRISTIAN YAMBAO
STATE OF ALASKA

_____
(Signature)

Kevin Massengale

U.S. Supreme Court

Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978)

Monell v. Department of Social Services of the City of New York

No. 75-1914

Argued November 2, 1977

Decided June 6, 1978

436 U.S. 658

Syllabus

Petitioners, female employees of the Department of Social Services and the Board of Education of the city of New York, brought this class action against the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor under 42 U.S.C. § 19&3, which provides that every "person" who, under color of any statute,

ordinance, regulation, custom, or usage of any State subjects, or "causes to be subjected," any person to the deprivation of any federally protected rights, privileges, or immunities shall be civilly liable to the injured party. In each case, the individual defendants were sued solely in their official capacities. The gravamen of the complaint was that the Board and the Department had, as a matter of official policy, compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The District Court found that petitioners' constitutional rights had been violated, but held that petitioners' claims for injunctive relief were mooted by a supervening change in the official maternity leave policy. That court further held that Monroe v. Pape, 365 U. S. 167, barred recovery of backpay from the Department, the Board, and the city. In addition, to avoid circumvention of the immunity conferred by Monroe, the District Court held that natural persons sued in their official capacities as officers of a local government also enjoy the immunity conferred on local governments by that decision. The Court of Appeals affirmed on a similar theory.

Held:

1. In Monroe v. Pape, supra, after examining the legislative history of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, and particularly the rejection of the so-called Sherman amendment, the Court held that Congress, in 1871, doubted its constitutional authority to impose civil liability on municipalities, and therefore could not have intended to include municipal bodies within the class of "persons" subject to the Act. Reexamination of this legislative history compels the conclusion that Congress, in 1871, would not have thought § 1983 constitutionally infirm if it applied to local governments. In addition, that history confirms that local governments were intended to be included

Page 436 U. S. 659

among the "persons" to which § 1983 applies. Accordingly, Monroe v. Pape is overruled insofar as it holds that local governments are wholly immune from suit under § 1983. Pp. 436 U. S. 664-689.

2. Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other § 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decisionmaking channels. Pp. 436 U. S. 690-691.

3. On the other hand, the language and legislative history of § 1983 compel the conclusion that Congress did not intend a local government to be held liable solely because it employs a tortfeasor -- in other words, a local government cannot be held liable under § 1983 on a respondeat superior theory. Pp. 436 U. S. 691-695.

4. Considerations of stare decisis do not counsel against overruling Monroe v. Pape insofar as it is inconsistent with this opinion. Pp. 436 U. S. 695-701.

(a) Monroe v. Pape departed from prior practice insofar as it completely immunized municipalities from suit under § 1983. Moreover, since the reasoning of Monroe does not allow a distinction to be drawn between municipalities and school boards, this Court's many cases holding school boards liable in § 1983 actions are inconsistent with Monroe, especially as the principle of that case was extended to suits for injunctive relief in City of Kenosha v. Bruno, 412 U. S. 507. Pp. 436 U. S. 695-696.

(b) Similarly, extending absolute immunity to school boards would be inconsistent with several instances in which Congress has refused to immunize school boards from federal jurisdiction under § 1983. Pp. 436 U. S. 696-699.

(c) In addition, municipalities cannot have arranged their affairs on an assumption that they can violate constitutional rights for an indefinite period; accordingly, municipalities have no reliance interest that would support an absolute immunity. Pp. 436 U. S. 699-700.

(d) Finally, it appears beyond doubt from the legislative history of the Civil Rights Act of 1871 that Monroe misapprehended the meaning of the Act. Were § 1983 unconstitutional as to local governments, it would have been equally unconstitutional as to state or local officers,

Page 436 U. S. 660

yet the 1871 Congress clearly intended § 1983 to apply to such officers and all agreed that such officers could constitutionally be subjected to liability under § 1983. The Act also unquestionably was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights. Therefore, without a clear statement in the legislative history, which is not present, there is no justification for excluding municipalities from the "persons" covered by § 1983. Pp 436 U. S. 700-701.

5. Local governments sued under § 1983 cannot be entitled to an absolute immunity, lest today's decision "be drained of meaning," Scheuer v. Rhodes, 416 U. S. 232, 416 U. S. 248. P. 436 U. S. 701.

532 F.2d 259, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined, and in Parts I, III, and V of which STEVENS, J., joined. POWELL, J., filed a concurring opinion, post, p. 436 U. S. 704. STEVENS, J., filed a

statement concurring in part, post, p. 436 U. S. 714. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, post, p. 436 U. S. 714.

Mancuso
v.
New York State Thruway Authority
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United States Court of Appeals, Second CircuitJun 13, 1996Full title
86 F.3d 289 (2d Cir. 1996)Copy Citation
WALKER, Circuit Judge:

This appeal raises the question of whether defendant New York State Thruway Authority (the "Thruway Authority") is immune from suit in federal court under the Eleventh Amendment. The district court, in a memorandum and order, held that the Thruway Authority was not immune and denied its motion for summary judgment. See Mancuso v. New York State Thruway Auth., 909 F. Supp. 133 (S.D.N.Y. 1995). The Thruway Authority now appeals, arguing that it is entitled to Eleventh Amendment immunity under the "arm-of-the-state" doctrine. The Thruway Authority also raises several arguments based on state law, including a defense that the plaintiffs' state law causes of action are barred by New York principles of sovereign immunity.

BACKGROUND

This dispute arises out of the Thruway Authority's ownership and use of the North Avenue Drain, a storm sewer that empties into Echo Bay in New Rochelle, New York. The plaintiffs (the "Mancusos") brought this action against the Thruway Authority and the City of New Rochelle, alleging that the defendants have violated the Clean Water Act, 33 U.S.C. §(s) 1251 et seq., by discharging pollutants into Echo Bay through the North Avenue Drain. In addition, the plaintiffs asserted state-law causes of action for gross negligence, nuisance, strict liability, trespass and battery.

In May 1994, the defendants moved for summary judgment. The Thruway Authority argued that it was entitled to Eleventh Amendment immunity under the arm-of-the-state doctrine. The Thruway Authority and the City of New Rochelle both also contended that any discharge from the North Avenue Drain had been exempted from the Clean Water Act's permit requirements and that the district court lacked subject matter jurisdiction over the Mancusos' claims. The district court denied both motions.

On appeal, the Thruway Authority urges its Eleventh Amendment immunity defense. In addition, the Thruway Authority argues that it is entitled to sovereign immunity because the plaintiffs failed to give proper notice of this suit to the New York Attorney General. We affirm the district court's rejection of the Eleventh Amendment and state sovereign immunity arguments. The Thruway Authority also raises several other defenses or limitations as to the Mancusos' state law causes of action, which are not reviewable at this stage of the litigation.

DISCUSSION

I. Appellate Subject Matter Jurisdiction

A federal court of appeals generally only has jurisdiction to hear appeals from those "final decisions of the district courts" that terminate an action. 28 U.S.C. §(s) 1291. In some cases, however, the courts of appeals may hear appeals prior to the termination of an action. See, e.g., 28 U.S.C. §(s) 1292. The Supreme Court, in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949), clarified that the courts of appeals also have jurisdiction under Section(s) 1291 to hear appeals from that small class of district court orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." The district court's memorandum and order is not a final decision that terminates the plaintiffs' action against the defendants, Cohen, 337 U.S. at 545-46, nor are we granted jurisdiction to hear an appeal from that order under any of the statutory exceptions, see 28 U.S.C. § 1292. Nonetheless, we have jurisdiction to hear an immediate appeal from the portion of the district court's order that denies the Thruway Authority's Eleventh Amendment claim of immunity because it falls squarely within Cohen's collateral order exception. Puerto Rico Aqueduct Sewer Auth. v. Metcalf Eddy, Inc., 506 U.S. 139, 144 (1993); Komlosi v. New York State Office of Mental Retardation Developmental Disabilities, 64 F.3d 810, 815 (2d Cir. 1995).

Furthermore, we also have jurisdiction to hear the Thruway Authority's argument that it is immune from the state law causes of action under New York law. In Napolitano v. Flynn, 949 F.2d 617, 621 (2d Cir. 1991), we held that we had jurisdiction to hear the appeal of several police officers who contended that they were immune from the plaintiff's state law causes of action under the Vermont law doctrine of qualified immunity. We reasoned that because the state law claim of qualified immunity, like its federal counterpart, was not "simply a defense to substantive liability," but was "an immunity from suit," it fell within the Cohen exception. Id. Here, the Thruway Authority argues that the Mancusos may not sue it because they failed to serve a copy of the complaint on the New York Attorney General, as required by 11(a) of the New York Court of Claims Act. We find that we have jurisdiction to hear this argument because it is both "separate from the merits of the plaintiff[s'] action" and, if meritorious, would entitle the Thruway Authority not to be subject to suit. Napolitano, 949 F.2d at 621; see Finnerty v. New York State Thruway Auth., 75 N.Y.2d 721, 722-23 (1989); see also Blue v. Koren, 72 F.3d 1075, 1080 n.1 (2d Cir. 1995) (order denying qualified immunity defense as a matter of law immediately appealable); Rodriguez v. Phillips, 66 F.3d 470, 475 (2d Cir. 1995) (same); Hill v. City of New York, 45 F.3d 653, 659-60 (2d Cir. 1995) (same).

We do not have jurisdiction, however, over the Thruway Authority's other defenses or limitations under state law to the Mancusos' action that (1) the Thruway Authority cannot be liable for punitive damages, (2) it may not be subject to an injunction, and (3) it cannot be subject to trial by jury. Although these arguments may be separate from the merits of this action, the district court's failure to grant the Thruway Authority's motion for summary judgment on any of these grounds is not a decision that is "effectively unreviewable if an appeal has to await a final judgment." Napolitano, 949 F.2d at 621. If the district court fails to uphold these defenses in favor of the Thruway Authority and is in error in doing so, the district court's decision is eminently reviewable: we will be able to order a bench trial or to strike that part of a judgment ordering an injunction or awarding punitive damages. If review occurs in the normal course, no unremediable harm will befall the Thruway Authority. Accordingly, we do not have jurisdiction

to adjudicate these defenses under the collateral order doctrine.

The Thruway Authority contends that we still may reach these issues under the doctrine of pendent appellate jurisdiction. The Supreme Court, however, has recently made clear that pendent appellate jurisdiction should be exercised sparingly, if ever, by the courts of appeals. In Swint v. Chambers County Commission, 115 S.Ct. 1203 (1995), the plaintiff brought suit against a county under 42 U.S.C. § 1983 and the county sought summary judgment on the ground that none of the individuals involved was a policy maker and hence the county was not liable under Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978). The district court denied the county's motion, but the Eleventh Circuit, exercising pendent appellate jurisdiction, reversed. The Supreme Court vacated the Eleventh Circuit's decision on the ground that the court of appeals lacked jurisdiction over the county's claim. Swint, 115 S.Ct. at 1208-12. Although the Court refused to decide when, if ever, pendent appellate jurisdiction is appropriate, it did state that there was no jurisdiction in Swint because the county's claim was not "inextricably intertwined" with the other issues, nor was it "necessary to ensure meaningful review" of those issues. Id. at 1212. In this case, the Thruway Authority's additional state law defenses are neither inextricably intertwined with, nor necessary to the resolution of, its immunity claims. Therefore, we refuse to exercise pendent appellate jurisdiction over those issues.

II. Eleventh Amendment

The Eleventh Amendment to 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." U.S. Const. amend. XI. Although the text of the amendment speaks only of suits against a state by persons who are not citizens of that state, the Supreme Court has interpreted the Eleventh Amendment to extend to suits by all persons against a state in federal court. Thus, in Hans v. Louisiana, 134 U.S. 1, 10-11 (1890), the Court rejected the idea that the Eleventh Amendment allowed states, without their consent, to be sued by their own citizens in federal court. The Court noted that such a reading of the Eleventh Amendment would create an "anomalous result" that would be "no less startling and unexpected" than the Court's decision in Chisholm v. Georgia, 2 U.S. 419 (1793), the case that led to the adoption of the Eleventh Amendment. Hans, 134 U.S. at 10-11.

Of course, the Mancusos have not brought suit against the State of New York, but instead against the Thruway Authority, which was created by the state for the purpose of constructing and operating a high-speed, limited-access thruway spanning the state. The Mancusos' decision to sue the Thruway Authority and not the state is not the end of our Eleventh Amendment inquiry, but simply the beginning, for that amendment also bars some suits where "a State is not named a party to the action." Edelman v. Jordan, 415 U.S. 651, 663 (1974). Although the Eleventh Amendment does not apply to suits against counties, municipal corporations, and other political subdivisions, the Thruway Authority is entitled to immunity if it can demonstrate that it is more like "an arm of the State," such as a state agency, than like "a municipal corporation or other political subdivision." Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

# Mason v. Bradley, 789 F. Supp. 273 (N.D. Ill. 1992)

**US District Court for the Northern District of Illinois - 789 F. Supp. 273 (N.D. Ill. 1992)**
**April 20, 1992**

789 F. Supp. 273 (1992)

**Anna MASON, on her own behalf and as next friend of Romeshia Mason and Charles Mason, Plaintiff,**

**v.**

**Phil BRADLEY, in his official capacity as Director of the Illinois Department of Public Aid; Mary Sue Morsch, in her official capacity as Director of the Child Support Division of the Illinois Department of Public Aid; and Jack O'Malley, in his official capacity as the State's Attorney for the County of Cook in the State of Illinois, Defendants.**

No. 91 C 3791.

**United States District Court, N.D. Illinois, E.D.**

April 20, 1992.

*274 Lori J. Polacheck, Gary H. Palm, Mandel Legal Aid Clinic, Chicago, Ill., for plaintiff.

James C. Stevens, Jr., Office of the Atty. Gen., Welfare Litigation Div., Teresa Mary Mooney, Barbara L. Greenspan, Illinois Atty. General's Office, Chicago, Ill., for Phil Bradley and Mary Sue Morsch.

Terry L. McDonald, David Richard Butzen, Cook County State's Atty.'s Office, Chicago, Ill., for Jack O'Malley.

## ORDER

NORGLE, District Judge.

Before the court are the defendants' motions to dismiss. For reasons that follow, the motions are granted.

## FACTS

This lawsuit stems from plaintiff Anna Mason's ("Mason") allegedly unsuccessful efforts to spur the Illinois Department of Public Aid ("IDPA") and the Cook County State's Attorney's office ("State's Attorney") to obtain a child support order from Mason's former husband, Arthur Burrell ("Burrell"). Mason and Burrell were divorced in September 1982, with Mason receiving custody of their two children, Romeshia and Charles. The divorce decree made no provision for support of the children.

The State of Illinois is a participant in the federal Aid to Families with Dependent Children ("AFDC") program, set up under Title IV-A of the Social Security Act, 42 U.S.C. § 601 *et seq.* Illinois is required, as a condition of its AFDC participation, to operate a child support program as provided in Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.* The Title IV-D program in Illinois is overseen by IDPA's Child Support Enforcement Division ("Child Support Enforcement"). That program must offer services to locate absent parents who may be liable for child support payments. 42 U.S.C. § 654(8).

Federal regulations required that, prior to October 1, 1990, attempts to locate absent parents must have been made within 60 days of an application for such services. 45 C.F.R. § 303.3. Current regulations require that such attempts must be made within 75 days after it is determined that such services are necessary. *Id.* When location attempts have failed, repeat attempts must be made quarterly, but if new information is received, immediate repeat attempts are required. *Id.* If an absent parent is located or paternity is established, the state's Title IV-D agency must either issue, or initiate legal proceedings seeking, a child

support order within 90 days. 45 C.F.R. § 303.4(d). Continued federal funding of a state's AFDC program requires "substantial compliance" with the regulations, which is defined as 75 percent compliance in cases audited by the federal Department of Health and Human Services. 45 C.F.R. § 305.20.

Mason receives AFDC payments from IDPA on behalf of her children. Those payments are conditioned upon Mason's assignment of her child support rights to IDPA, which can utilize money collected from absent parents to recoup amounts paid out in AFDC or related benefits. The first $50 of any amounts collected from an absent parent each month, however, must be paid to the custodial parent without affecting the level of aid to the parent or children. 42 U.S.C. § 657(b) (1).

About June 30, 1987, Mason went to a Child Support Enforcement office to request services to locate Burrell. Child Support Enforcement and other responsible state agencies, however, allegedly failed to follow the federal regulations. Not all available resources were used to find Burrell and repeat efforts were not made in a timely manner, according to Mason's complaint. There have allegedly been no enforcement actions taken against Burrell since the summer of 1987, and no child support order has been entered against Burrell. IDPA allegedly failed to follow-up adequately after identifying two of Burrell's employers in 1990, and after Mason's attorney informed IDPA of Burrell's then-current job around February 15, 1991.

*275 Mason filed the present lawsuit on June 19, 1991 asserting two claims. Count I asserts an action directly under Title IV-D for the defendants' alleged failure to follow the requirements of that statute and the allegedly resultant emotional distress and financial hardship Mason has suffered. Count II asserts that Mason's 14th Amendment due process rights were violated by the defendants' failure to provide her with child support services to which she is entitled under federal law and the Illinois Public Aid Code, Ill.Rev.Stat. ch. 23, ¶ 10-1 *et seq*. The complaint seeks a declaration that Mason's rights were violated, an order directing the defendants to provide Mason with child support services in a timely manner, and an injunction barring future violations of Mason's rights, as well as other relief.

## DISCUSSION

Defendants Phil Bradley and Mary Sue Morsch, respectively the director of IDPA and the administrator of IDPA's Child Support Enforcement Division, together filed a motion to

dismiss under Federal Rules of Civil Procedure 12(b) (1) and 12(b) (6). They contend that Mason lacks standing, and her complaint should therefore be dismissed under Rule 12(b) (1) for lack of subject matter jurisdiction. Alternatively, they seek dismissal under Rule 12(b) (6) for failure to state an actionable claim, arguing that Title IV-D creates neither a private right of action nor rights actionable under 42 U.S.C. § 1983. Defendant Jack O'Malley, the State's Attorney of Cook County, filed a separate motion to dismiss under Rule 12(b) (6) on essentially the same grounds as those argued by Bradley and Morsch.

On a motion to dismiss under both Rule 12(b) (1) for lack of subject matter jurisdiction and under Rule 12(b) (6) for failure to state a claim, the court should decide the 12(b) (1) issues first and, only if it finds jurisdiction, proceed to the 12(b) (6) issues. *Winslow v. Walters,* 815 F.2d 1114, 1116 (7th Cir. 1987); *Oliphant v. Bradley,* No. 91 C 3055, slip op. at 9 (N.D.Ill. Feb. 19, 1992).

The court therefore turns first to the jurisdiction/standing issue. Federal judicial power is limited under Article III of the Constitution to adjudication of "cases and controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471, 102 S. Ct. 752, 757, 70 L. Ed. 2d 700 (1982). That limitation includes a requirement that the plaintiff have standing to bring the action, which in turn requires that the plaintiff "personally has suffered some actual or threatened injury." *Id.* at 471-72, 102 S. Ct. at 758 (quoting *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 99 S. Ct. 1601, 1607-08, 60 L. Ed. 2d 66 (1979)).

Analysis of a party's standing is "gauged by the specific common-law, statutory or constitutional claims that a party presents.... [with] `careful judicial examination ... to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*'" *International Primate Protection League v. Administrators of Tulane Educ. Fund,* ____ U.S. ____, 111 S. Ct. 1700, 1704, 114 L. Ed. 2d 134 (1991) (emphasis in original) (quoting *Allen v. Wright,* 468 U.S. 737, 752, 104 S. Ct. 3315, 3325, 82 L. Ed. 2d 556 (1984)). Where, as here, the claims are based on statutorily created rights, "the standing question ... is whether the ... statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin,* 422 U.S. 490, 500, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975). Moreover, the plaintiff must have suffered, or be about to suffer, a "demonstrable, particularized" injury, *Id.* at 508, 95 S. Ct. at 2210, which is "fairly traceable" to the defendants' alleged conduct. *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1925-26, 48 L. Ed. 2d 450 (1976). The plaintiff must also show that the requested relief will likely redress the alleged injury. *Allen,* 468 U.S. at 751, 104 S. Ct. at 3324-25.

Standing for Mason on Count I her direct claim under Title IV-D therefore turns on whether that statute created *276 an express or implied private right of action. *Warth,* 422 U.S. at 501, 95 S. Ct. at 2206. A private right of action can only be created if the federal statute in question creates enforceable rights, *Pennhurst State Sch. and Hosp. v. Halderman,* 451 U.S. 1, 24-25, 101 S. Ct. 1531, 1543-44, 67 L. Ed. 2d 694 (1981), and Congress did not intend to foreclose private enforcement by the statute's terms, such as by creating a comprehensive remedial scheme. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1, 14, 101 S. Ct. 2615, 2623, 69 L. Ed. 2d 435 (1981). Mason's standing on Count II her § 1983 claim for violation of her rights under Title IV-D turns on whether Title IV-D created an enforceable right, privilege or immunity for Mason. *See Suter v. Artist M.,* ____ U.S. ____, ____, 112 S. Ct. 1360, 1365-66, 118 L. Ed. 2d 1 (1992) (discussing availability of § 1983 to redress alleged federal statutory violations). Therefore, if Title IV-D did not create any enforceable rights for persons in Mason's position, Mason will lack standing to pursue either Counts I or II.

An enforceable right is created if "the provision in question was intend[ed] to benefit the putative plaintiff," unless the provision expresses a mere Congressional preference for particular conduct rather than a binding obligation on a governmental unit to behave in a prescribed manner. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S. Ct. 2510, 2517, 110 L. Ed. 2d 455 (1990) (quoting *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 110 S. Ct. 444, 448, 107 L. Ed. 2d 420 (1989)).

The Seventh Circuit has not yet addressed whether Title IV-D created an enforceable right for AFDC recipients such as Mason and her children, or whether such recipients were intended beneficiaries of the statute. Two other circuits, however, have split on these issues. The Eleventh Circuit has held that Title IV-D did not create any enforceable rights because "it was not enacted for the `especial benefit' of AFDC families." *Wehunt v. Ledbetter,* 875 F.2d 1558, 1565 (11th Cir.1989), *cert. denied,* 494 U.S. 1027, 110 S. Ct. 1472, 108 L. Ed. 2d 609 (1990). More recently, the Sixth Circuit reached an opposite conclusion, finding that Title IV-D was intended to benefit both "the public fisc" by reducing welfare costs and AFDC families. *Carelli v. Howser,* 923 F.2d 1208, 1211 (6th Cir.1991). The *Carelli* court nonetheless ordered the complaint dismissed for failure to state an actionable claim because the requested relief was already being ordered as a result of a federal audit of the state Title IV-D programs at issue. *Id.* at 1215-16.

At least four district courts have agreed with *Carelli* that Title IV-D was intended to benefit AFDC families. *Oliphant,* slip op. at 14-15 (but finding no enforceable right because no binding obligation on states participating in AFDC program); *Howe v. Ellenbecker,* 774 F. Supp. 1224, 1229-30 (D.S.D.1991) (and finding enforceable right because language

mandatory); *Behunin v. Jefferson County Dept. of Social Serv.*, 744 F. Supp. 255, 257-58 (D.Colo. 1990) (same); *Beasley v. Harris,* 671 F. Supp. 911, 921 (D.Conn.1987) (and finding an enforceable right).

After reviewing the relevant portions of Title IV-D, we agree that Congress evinced an intent to benefit both AFDC families and local welfare budgets. The former purpose is evident particularly in the $50 pass-through provision entitling AFDC families to the first $50 collected each month by a Title IV-D agency from a delinquent child support payer. 42 U.S.C. § 657(b) (1).

Nonetheless, Title IV-D must also provide "unambiguous notice" of particular, mandatory obligations upon the states to create enforceable rights for Mason. *Suter,* ____ U.S. at ____, 112 S. Ct. at 1366. In this regard, the court agrees with the finding in *Oliphant,* slip op. at 16, that Title IV-D does not clearly require participating states "to provide effective, prompt child support services to all AFDC applicants...." Illinois, like other states which have voluntarily agreed to participate in the AFDC program, are required to offer child support services as a condition of federal funding. The implementing regulations *277 provide some specific time frames for the states to follow, such as the 75-day period in which efforts to locate absent parents must be made after such efforts are deemed necessary. 45 C.F.R. § 303.3. Total compliance, however, is not required. The regulations specify that only "substantial compliance," defined as 75 percent compliance in cases federally audited, is required. 45 C.F.R. § 305.20. Full compliance with the regulations in every case is clearly not required. Therefore, there is no clear requirement that every applicant be provided with prompt child support services, and Mason has no enforceable right to such services.

In sum, the lack of an enforceable right in Title IV-D for AFDC families such as Mason's requires the conclusion that Congress neither expressly nor impliedly intended to create a private right of action under that statute, and also did not create rights entitled to protection under the Fourteenth Amendment due process clause and 42 U.S.C. § 1983. Mason has failed to show that she has standing to pursue the claims contained in either Counts I or II of her complaint, and the complaint is therefore dismissed in its entirety under Fed. R.Civ.P. 12(b) (1) for lack of subject matter jurisdiction.

## CONCLUSION

The defendants' motions to dismiss are granted; Counts I and II of the plaintiff's complaint are dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Joy D. Wehunt, Plaintiff, v. James G. Ledbetter, in His Official Capacity As Commissionerof the Georgia Department of Human Resources Andlouis Sullivan, Defendants-appellees.gwendolyn Brown, Intervenor-appellant, 875 F.2d 1558 (11th Cir. 1989)

Joy D. Wehunt, Plaintiff, v. James G. Ledbetter, in His Official Capacity As Commissionerof the Georgia Department of Human Resources Andlouis Sullivan, Defendants-appellees.gwendolyn Brown, Intervenor-appellant, 875 F.2d 1558 (11th Cir. 1989)

US Court of Appeals for the Eleventh Circuit - 875 F.2d 1558 (11th Cir. 1989)
June 27, 1989
Kay A. Giese, Athens, Ga., John Riemer, Gainesville, Ga., Phyllis J. Holmen, Atlanta, Ga., Nancy R. Lindbloom, Georgia Legal Services, Athens, Ga., for Gwendolyn Brown.

Paula Roberts, Center for Law & Social Policy, Washington, D.C., for amicus Center for Law & Social Policy.

Mary Foil Russell, State of Ga. Law Dept., Atlanta, Ga., for defendants-appellees.

Robert E. Keith, Office of Gen. Counsel, HHS, Washington, D.C., for Bowen.

Susan Hoffman, Hogan & Hartson, Washington, D.C., for amicus Center for Law & Social Policy.

Nancy Ebb, Children's Defense Fund, Washington, D.C., for amicus Children's Defense Fund.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and CLARK, Circuit Judges, and GUIN* , District Judge.

PER CURIAM:

Presently before the court is a challenge to the program established under the Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 651 et seq. (1982 & Supp. III 1985), by recipients of its benefits. The challenge seeks to require the State of Georgia and the Department of Health & Human Services to administer and enforce the provisions of Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 et seq. (hereinafter The Act). In separate orders, the district court dismissed the plaintiffs' various claims. For the reasons which follow, we affirm the district court.

Background

The AFDC program, also known as Title IV-A of The Act, is a federal-state welfare program for poor families deprived of support of one parent due to that parent's absence, death, or incapacity. 42 U.S.C. § 601 et seq. States administer program benefits in accordance with federal requirements, and the Department of Health & Human Services (HHS), which is responsible for program oversight,1 withholds or reduces federal matching funds if a state fails to comply with those requirements.2

In 1975 Congress amended The Act to require a state operating an AFDC program to establish a separate child support enforcement unit to serve both AFDC and non-AFDC families.3 Pub. L. 93-647, Sec. 101(d) (5) (c) et seq., 88 Stat. 2351 (1975) (codified at 42 U.S.C. § 602(27)). The law made provision to locate absent parents, establish paternity and support obligations on behalf of children in need of those services, and enforce child support obligations assigned to the enforcement unit.4 In 1984 Congress passed the Child Support Enforcement Amendments, Pub. L. 98-378, 98 Stat. 1305, by which states were to implement the child support enforcement mechanisms specifically enumerated in the statute to "increase the effectiveness" of the programs administered by the states. The states are required to create a system of wage withholding which can automatically recover child support and arrearages. 42 U.S.C. § 666(a) (1), (8) and Sec. 666(b). Procedures by which the state child support enforcement agency and the state shall provide for enforcing a support order follow: require the parent to post security or a bond;5 impose liens on real or personal property;6 withhold the amount of an arrearage from tax returns;7 and, report significant arrearages to credit reporting agencies.8

The AFDC program is a contractual arrangement by which the federal government and the states work together. The program is funded by both, with the federal government making payments to the states by set formula.9 The Secretary is empowered to evaluate the implementation of state programs and conduct audits of the plans to assure conformity with the requirements.10 If the evaluation and audit show nonconformity, the Secretary must reduce or suspend payment to the noncomplying state until such time as the state program is found to be in substantial compliance.11 As a condition for receiving AFDC benefits, an applicant must assign to the state any support rights the family has and must cooperate with the state agency's efforts to establish paternity and collect support unless such cooperation is against the best interests of the child.12 Except for the first fifty dollars of child support collected each month, which is paid to the family and does not affect the family's AFDC eligibility or decrease any amount otherwise payable as assistance to such family, the state retains support collections to help offset welfare expenditures on the family's behalf.13 If a support collection exceeds the family's AFDC grant, "the State will determine if such collection, when treated as if it were income, makes the family ineligible for an assistance payment." In such event the family receives the full amount of the support payment.14

Congress again amended The Social Security Act in 1988 to replace the AFDC program with a comprehensive program of mandatory child support and work training. Pub. L. 100-485, 102 Stat. 2345 (1988). The revisions are designed to emphasize parental responsibility and strengthen the child support enforcement system. States are required to establish guidelines which must be used in setting child support awards.15 Additionally, they are required to provide mechanisms to facilitate the periodic updating of child support awards, and to institute a system of immediate wage withholding for all new or revised child support cases. The bill provides for the establishment of a commission on interstate enforcement, the establishment of an automated tracking and monitoring system, and the use of parents' social security numbers for identification purposes at birth, among other things. Under II. General Discussion of the Bill, the Senate Report states:

We need now to fashion a firm and effective welfare structure, one that addresses the needs of all

areas of the country.

The bill reported by the Committee on Finance seeks to do this. It builds upon a strong consensus, joined in by liberals and conservatives alike, that the Nation's welfare system must stress family responsibility and community obligation, enforce the principle that child support must in the first instance come from parents, and reflect the need for benefit improvement, program innovation, and organizational renewal at every level in the system.

Id.

One of the major elements in the revision of The Act is to strengthen the child support system by improving all stages of the enforcement process. It requires the Secretary "to set standards specifying time limits in which a state must respond to requests for service, including requests to locate absent parents, establish paternity, or initiate proceedings to establish and collect support." This addition eliminates the possibility of a time delay inherent in the system as it was at the time the instant suit was filed.

Gwendolyn Brown is the mother of three minor children. The oldest child, Kateia Nicole Pinkston, was born out of wedlock January 22, 1977. Except for short periods of time when she was able to obtain employment, Ms. Brown received AFDC benefits under the Georgia Title IV-A program for Kateia from 1978 through 1987. As a condition to receive AFDC, pursuant to the enacting legislation, Ms. Brown was required to cooperate with the state in establishing Kateia's paternity and securing a support order for her.16 She was further required to assign to the state her right to support monies paid on Kateia's behalf.17

Although the Georgia Department of Human Resources (the IV-D agency) has the responsibility of locating Kateia's father, establishing paternity for her, and obtaining a support order on her behalf, the Georgia IV-D agency has yet to do so.

In 1977, Ms. Brown was married. The two children of the marriage are Crystal Sabrina Brown, born January 4, 1979, and Jeriquces Blane Brown, born November 1, 1980. When their father deserted the family, Ms. Brown applied for and received AFDC for these two children as well as Kateia.18

Ms. Brown was divorced from Mr. Brown in November 1982. The divorce decree ordered Mr. Brown to pay twenty dollars per week as support for each of his children. The Georgia IV-D agency has failed to collect the payments.

Joy Wehunt Lewallen, the original plaintiff in this action, brought suit to obtain IV-D agency assistance in establishing the paternity of and support for her youngest child Tiffany, born in December 1983. Although she had received intermittent AFDC payments it was not until suit was filed in May 1985 that the Georgia IV-D agency took steps to determine paternity and secure child support for Tiffany.19

Brenda White, one of the intervenors, mother of three minor children, receives no paternal support for two of her children. Ms. White has received intermittent AFDC payments from about

1969 onward. During this period of time, although she has cooperated with the agency, as have Ms. Brown and Ms. Lewallen, the agency has taken no action to secure support for her children.

This action was brought by Lewallen on May 9, 1985, in the Federal District Court for the Northern District of Georgia. Lewallen asserted a claim under 42 U.S.C. § 1983 against the Commissioner of the Georgia Department of Human Resources hereinafter the Commissioner seeking declaratory and injunctive relief with respect to defendant's violation of her rights under two Social Security Act programs, the AFDC, 42 U.S.C. §§ 601, et seq. (Title IV-A), and the Child Support and Establishment of Paternity Act, 42 U.S.C. §§ 651, et seq. (Title IV-D). The Title IV-A claims against the Commissioner were settled after he adopted a revised policy as to the definition of "child support." This definition was incorporated into a consent order agreed to by all parties and adopted as the order of the district court on January 20, 1987. Thus, the Title IV-A claim is not at issue in the instant appeal. Lewallen's remaining claim against the Commissioner centered around his failure to provide her with the services necessary to locate the father of her child, establish paternity of that child, and establish and enforce a support obligation for that child, in violation of the Child Support and Establishment of Paternity Act. Plaintiff Lewallen also sued the Secretary, asserting that he had failed in his duty to oversee Georgia's operation of its state plans under Titles IV-A and IV-D and in his obligation to enforce compliance by the Commissioner with the conditions of participation in the AFDC program.

On October 23, 1985, the district court granted the motion of Brenda White and Gwendolyn Brown to intervene as plaintiffs and to file an amended complaint. Plaintiffs then moved for class certification and for leave to file a second amended complaint to clarify certain class allegations. In their second amended complaint, plaintiffs made clear that the class injury for which they sought redress was the Commissioner's systematic failure to (1) implement and operate a statewide child support enforcement program which diligently sought to establish paternity, locate absent parents, establish child support obligations and collect child support, as required by Title IV-D and its implementing regulations; and (2) assure that the Georgia IV-D program operated in compliance with the statute and regulations. Leave to file a second amended complaint was granted, and the plaintiffs initiated discovery as to both defendants.

At plaintiffs' request, a status conference was held April 23, 1986. At that time the court directed that any motions under Fed. R. Civ. P. 12 be filed within thirty days. The court also stayed discovery, deferred plaintiffs' motions to compel discovery and class certification, granted plaintiffs the opportunity to redefine their class, and stated its intention to extend discovery if plaintiffs' case survived any Rule 12 motions. The Commissioner and the Secretary filed motions to dismiss under Rule 12, claiming the plaintiffs had failed to state claims upon which relief could be granted. The plaintiffs responded to the defendants' motion to dismiss, and also moved for leave to file a third amended complaint.

On October 1, 1986, the court entered an order holding that, under Brown v. Housing Authority of McRae, 784 F.2d 1533 (11th Cir. 1986), vacated pending reh'g en banc, 804 F.2d 612 (11th Cir. 1986), on reh'g, 820 F.2d 350 (11th Cir. 1987), the plaintiffs' claim against the Commissioner under 42 U.S.C. § 1983 and their claim against the Secretary under 42 U.S.C. §§ 651 et seq., had to be dismissed under Rule 12(b) (6). The district court reasoned that Congress had foreclosed private enforcement of Title IV-D and there was no implied right of action under

the statute. In its order, the district court granted the plaintiffs' motion for leave to file a third amended complaint, and denied as moot the plaintiffs' motion for class certification.

On October 17, 1986, plaintiffs filed their third amended complaint, asserting claims against the Secretary under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. [hereinafter APA], and for mandamus relief pursuant to 28 U.S.C. § 1361. In addition, in order to appeal, plaintiffs sought entry of a judgment based on the October 1, 1986, order under Fed. R. Civ. P. 54(b). In light of the fact that the Eleventh Circuit Court of Appeals had vacated its decision in Brown v. Housing Authority of McRae, pending rehearing en banc, the plaintiffs also moved in the district court for an order setting aside the October 1, 1986, order. In an addendum to that motion plaintiffs brought to the district court's attention the Supreme Court's decision in Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987), which implicitly overturned parts of the Brown decision.20

The Secretary answered the plaintiffs' third amended complaint and on December 3, 1986, filed a motion under Fed. R. Civ. P. 12, alleging that the plaintiffs had failed to state a claim upon which relief could be granted. On January 14, 1987, plaintiffs moved for class certification on the APA and mandamus claims. The district court entered an order March 11, 1987, granting the Secretary's motion to dismiss and denying the plaintiffs' motion for class certification. The district court held that the plaintiffs lacked standing under the APA. The court also denied the plaintiffs' motion to set aside the October 1, 1986, order, concluding that its previous decision was not changed by Wright and Brown. Ms. Brown filed a notice of appeal as to both the state and federal defendants on May 8, 1987, and the appeal was docketed on May 29, 1987. Neither Lewallen nor White has appealed.

The first issue on appeal is whether the complaint states a cause of action against the state defendant under 42 U.S.C. § 1983. In Maine v. Thiboutot, 448 U.S. 1, 8, 100 S. Ct. 2502, 2506, 65 L. Ed. 2d 555 (1980), the Supreme Court held that violation of a federal statute is cognizable under 42 U.S.C. § 1983. Since Thiboutot, however, the Court has delineated two exceptions to this general rule. Section 1983 does not encompass claims based on statutory violations if (1) Congress has foreclosed private enforcement in the enactment of the statute, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21, 101 S. Ct. 2615, 2626-27, 69 L. Ed. 2d 435 (1981), or (2) Congress has not created enforceable rights in the relevant statutory provisions. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 24-25, 101 S. Ct. 1531, 1544-44, 67 L. Ed. 2d 694 (1981).

The analysis here requires a determination of whether plaintiff has a "right" under a federal statute and if so whether the federal statute precludes beneficiaries from seeking enforcement of those rights in a private cause of action. The Commissioner urges that Title IV-D of the Act does not afford plaintiff an enforceable right as defined by the Supreme Court in Pennhurst. We agree and therefore find it necessary only to discuss that issue.

The State contends that Title IV-D was enacted to recoup welfare expenditures, to ease the burden on the state and federal fiscs, to check the rising tide of families forced to resort to public assistance, and to reward states which maintain "cost-effective and efficient child support recovery operations." By achieving net savings for federal, state, and local governments' welfare

appropriations Title IV-D will benefit the general public.

Although state participation in the Social Security Act itself is mandatory, participation by a state in the IV-D program is voluntary. It is enacted pursuant to the spending power of Congress. Case law interpretation of Congress' power to legislate pursuant to the spending power has recognized that when Congress fixes the terms on which it shall disburse federal money to the state, it is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. Pennhurst, 451 U.S. at 17, 101 S. Ct. at 1540, 67 L. Ed. 2d at 707.21 Pennhurst held that a funding statute that did not clearly condition the receipt of federal money on the implementation of certain procedures did not create any enforceable rights.

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

451 U.S. at 17, 101 S. Ct. at 1540, 67 L. Ed. 2d at 707 (citations and footnote omitted).

In Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26, 36 (1975), the Supreme Court enunciated four factors to determine whether a statute creates a private cause of action.

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," ...--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? ... And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted).

The District of Columbia Circuit in Edwards v. District of Columbia, 821 F.2d 651 (D.C. Cir. 1987), affirmed the lower court's holding that public housing tenants did not have rights against constructive demolition of a housing project. In reaching its decision the court addressed the issue of when federal statutes create rights enforceable under Sec. 1983 and discussed the Ash factors in reaching its conclusion.

This question comprises the first of four factors used to determine whether to imply a cause of action from a federal statute.... Although now the second factor of the Cort test, which emphasizes a more direct and rigorous search for congressional intent, is given the greatest weight, see Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S. Ct. 3229, 3234 n. 9, 92 L. Ed. 2d 650 (1986) (listing post-Cort Supreme Court cases stressing strict fidelity to congressional intent in implied cause of action field), the first factor of the Cort test does look to whether "the plaintiff [is] 'of the class for whose especial benefit the statute was enacted' ...--that is, does the statute create a federal right in favor of the plaintiff?" ... Supreme Court cases that employed the Cort test initially emphasized this first factor, and concentrated particularly on

whether or not the statute in question speaks in terms of specific right and duties. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 690 n. 13, 99 S. Ct. 1946, 1954-55 n. 13, 60 L. Ed. 2d 560 (1979)....

We believe the analogy to be sound despite the Court's subsequent movement in implied cause of action jurisprudence away from Cort's first factor and toward its second factor. This movement toward an exclusive focus on whether Congress intended to create a private cause of action indicates the Court's growing realization that it ought not conflate the question of whether a statute creates rights with the question of whether it creates a private cause of action to enforce those rights. However, in a case like ours, where a separate congressionally created cause of action, Sec. 1983, clearly exists, then the focus on whether the statute creates rights is appropriate, and the value of the first Cort factor is retained.

821 F.2d at 655 n. 4 (citations omitted).

Title IV-D does not create any enforceable right: it was not enacted for the "especial benefit" of AFDC families. A Title IV-D program operates under a separate legislative and regulatory framework than that of a Title IV-A program. Title IV-A provides funds from the public treasure to support children in need. Title IV-D seeks to recover those funds and restore the Treasury balance by enforcement of support obligations owed by the absent parents of these children. The driving force behind the program is recovery of welfare payments and a parallel commitment to remove and keep families from the necessity of welfare dependence by establishing and enforcing support obligations. The legislative history indicates that in enacting Title IV-D Congress was primarily concerned with collecting child support in order to reduce the welfare rolls.

The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving Aid to Families With Dependent Children (AFDC), 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home.

The Committee believes that all children have the right to receive support from their fathers. The Committee bill, like the identical provision passed by the Senate (H.R. 3153) last year, is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S.Rep. No. 93-1356, 93rd Cong., 2d Sess., reprinted in [1974] U.S.Code Cong. & Admin.News 8133, 8145-46 (beginning paragraphs of "Section IV. Child Support").

The above-quoted language indicates the concern Congress felt over the welfare problem. Its reading indicates the goal of Title IV-D was to immediately lower the cost to the taxpayer as well as to lessen the number of families enrolling in welfare in the future--benefits to society as a whole rather than specific individuals. This reading is consistent with the concern evidenced by

Congress in "Section II. Social Services" entitled "Rapid rise in Federal funds for social services," and "Federal funds for social services limited in 1972." which precedes the section on child support.

Even before then, the legislative history preceding passage of Title IV-D indicates the concern Congress felt for increasing collection of support payments and thereby reducing the amount expended for welfare. The Report of the Committee on Finance of the United States Senate to accompany H.R. 3153 contains a section under "VII. Child Support (Sec. 151 of the bill)" entitled "Incentives for Localities To Collect Support Payments." The language indicates reimbursement of welfare costs is the incentive for states and localities to collect support payments.

Under present law, when a State or locality collects support payments owed by a father, the Federal Government is reimbursed for its share of the cost of welfare payments to the family of the father; ...

In most States, however, local units of government, which would often be in the best position to enforce child support obligations, do not make any contribution to the cost of AFDC payments and consequently do not have any share in the savings in welfare costs which occur when child support collections are made. Since such a fiscal sharing in the results of support collections could be a strong incentive for encouraging the local units of government to improve their support enforcement activities, the bill would provide that if the actual collection and determination of paternity is carried out by local authority, the local authority would receive a special bonus based on the amount of any child support payments collected which result in a recapture of amounts paid to the family as AFDC.

S.Rep. No. 93-553, 93rd Cong., 1st Sess., Social Security Amendments of 1973, reprinted in Senate Miscellaneous Reports on Public Bills VII (emphasis added).

Title IV-D is also not a legal assistance program. AFDC recipients do not apply for nor request support enforcement services. They assign their child support rights to the state22 and are required to cooperate (unless good cause for refusing to do so is determined to exist) in whatever legal action the state undertakes.23 By assigning their child support rights in return for AFDC aid, they give the states the opportunity to recoup the financial drain imposed by the welfare system on the state and federal treasuries. As was its intent, as evidenced by the language of the statute and the legislative history, diminishing the welfare outlay benefits society as a whole. Consistent with that intent we cannot hold that Title IV-D creates enforceable rights under Pennhurst.

The plaintiffs also sued the Secretary of the Department of Health and Human Services alleging a failure to enforce Title IV-D. That claim was brought either under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.,24 or under Title IV-D itself. The district court found that the plaintiffs lacked standing to sue the Secretary and that no private cause of action could be implied under Title IV-D. Since we find that the appellant has no article III standing to sue the Secretary, we necessarily find that she cannot sue under the APA or Title IV-D.

In order to have standing to sue under the APA, the plaintiffs must be injured in fact, and "the interest sought to be protected ... [be] arguably within the 'zone of interests' to be protected or regulated by the statute." Clarke v. Securities Industry Assn., 479 U.S. 388, 394, 107 S. Ct. 750, 755, 93 L. Ed. 2d 757, 766 (1987).25 We need not, however, consider whether the appellant is within the zone of interests protected by Title IV-D because we find that she lacks article III standing.

Federal courts may only decide actual cases and controversies. The doctrine of article III standing determines whether the plaintiff is entitled to have the court decide the merits of a dispute. Allen v. Wright, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556, 569 (1984). There is a core constitutional requirement that a plaintiff allege some actual or threatened injury that is fairly traceable to the defendant and can be remedied by an order directed against the defendant. Id. In this case, the plaintiff alleges two distinct injuries: the loss of fifty dollars in support and the failure to establish her child's paternity. These injuries are sufficiently distinct to be judicially cognizable. 468 U.S. at 755-58, 104 S. Ct. at 3327-3330, 82 L. Ed. 2d at 571-74 (claim of injury from government's noncompliance with law too general to be judicially cognizable but injury of diminished ability to receive integrated education is cognizable).

There must also be a nexus between the injury and the action of the defendant. The injury must both be caused by the defendant and be remediable by the defendant. In Allen v. Wright, the Supreme Court found that parents had no standing to challenge the Internal Revenue Service's administration of guidelines concerning the tax status of racially discriminatory private schools. The Court held that the injury alleged by the plaintiffs (the reduced ability to receive an integrated education) was caused directly by the school's policy of discrimination and was only indirectly encouraged by the IRS policy. The Court held that the causal connection between the IRS's application of their guidelines was too attenuated to allow the plaintiffs to sue the IRS because granting relief against the IRS would not guarantee that the schools would forego their racially discriminatory practices. 468 U.S. at 759, 104 S. Ct. at 3328-29, 82 L. Ed. 2d at 574; see also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-44, 96 S. Ct. 1917, 1926-27, 48 L. Ed. 2d 450 (1976) (claimed injury of reduction in hospital services not sufficiently traceable to IRS revenue ruling to confer standing).

In this case the appellant alleges the inaction by the Secretary has allowed the State of Georgia to ignore the Title IV-D requirements and has resulted in the injury to the plaintiffs. She relies on little more than the remote possibility, unsubstantiated by allegations of fact, that her situation might have been better had the defendant acted otherwise, and that her situation might improve were the court to afford relief. Appellant's injury is directly related to the absence of the fathers who have deserted their families to welfare--not because she assigned her rights to support payments in return for AFDC aid. The court might add that had she been receiving support payments from the father it would not have been necessary for her to assign her support rights to the State of Georgia. The assignment directly benefited her financially.

The nexus that the appellant alleges between the injury and the Secretary is attenuated at best since the injury is directly caused by a third party who is not a party to the lawsuit, namely the absent father. The attenuation and lack of redressability are clear since the appellant concedes that even rigorous enforcement of the child support laws does not guarantee that any father will

be located and if so that any child support will be collected. The chain is even more attenuated, however, since the plaintiffs seek to sue the Secretary because nothing the Secretary can do will actually remedy the injury suffered by these plaintiffs. The only weapon of the Secretary is to withhold a portion of the federal funds if Georgia does not comply with the statute. It is far from certain that the withholding of the funds will result in more vigorous enforcement of the Georgia child support laws. It is clear that the plaintiffs "rely on little more than the remote possibility ... that their situation might have been better had the [Secretary] acted otherwise, and might improve were the Court to afford relief." Warth v. Seldin, 422 U.S. 490, 507, 95 S. Ct. 2197, 2209, 45 L. Ed. 2d 343 (1975).

We find that the appellant has failed to prove the challenged practices harm her and that she would benefit in a tangible way from the court's intervention. We find that Title IV-D was not enacted to confer a private cause of action on the appellant or any other person similarly situated. Where a federal statute provides its own comprehensive enforcement scheme, as here, the requirements of that enforcement procedure may not be bypassed by bringing suit directly. A ruling to the contrary would open the door for multitudinous suits to be decided by federal court adjudication. It is not the function of the judiciary to direct the Secretary in the fulfillment of his role as overseer of the IV-D program. Such could not have been the intent of Congress.

"Carried to its logical end, [appellants'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."

* * *

" [a] federal court ... is not the proper forum to press" general complaints about the way in which government goes about its business.

Allen v. Wright, 468 U.S. at 759, 104 S. Ct. at 3329, 82 L. Ed. 2d at 575-76.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

I respectfully dissent from the majority's discussion of the plaintiff's right to sue the state defendants. I object both to the analysis employed in determining whether section 1983 provides a cause of action for the violation of Title IV-D and also to the majority's interpretation of Title IV-D. The state defendants have not established that Title IV-D precludes reliance on section 1983 by private plaintiffs to ensure that the state is in compliance with the statute.

Section 1983 expressly gives individuals the right to sue a state for its noncompliance with a federal statute. Maine v. Thiboutot, 448 U.S. 1, 8, 100 S. Ct. 2502, 2506, 65 L. Ed. 2d 555 (1980). Although the Supreme Court has found two exceptions to this general rule, it recently held that the burden of proving that private enforcement is precluded rests with the state.

Under these cases, if there is a state deprivation of a "right" secured by a federal statute, Sec. 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.

Wright v. City of Roanoke Redevelopment Authority, 479 U.S. 418, 423, 107 S. Ct. 766, 771, 93 L. Ed. 2d 781 (1987) (emphasis added). The burden is placed on the state actor because courts should not "lightly conclude that Congress intended to preclude reliance section 1983 as a remedy." Id. (quoting Smith v. Robinson, 468 U.S. 992, 1012, 104 S. Ct. 3457, 3469, 82 L. Ed. 2d 746 (1984)).

Instead of placing the burden of proof on the defendant in this case, the majority relies at least partially on case law concerning whether a private cause of action can be implied under a federal statute. In Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975), the Supreme Court announced a strict four part test to determine whether Congress intended a private cause of action. Under the Cort test, however, the plaintiff must affirmatively prove that Congress intended to allow a private cause of action.

The majority's confusion of the two different lines of case law is extremely significant in this case. The factors considered under each test are similar. But, the fact that the burden of proof is on a the state in a section 1983 suit and on a plaintiff in an implied cause of action suit is of fundamental importance. Therefore to the extent that the majority's reliance on the implied right of action cases reflects a misunderstanding of the burden of proof on this issue, the foundation of the majority's analysis evaporates.

Furthermore, I dissent because the majority has misinterpreted Title IV-D and misread its legislative history. While no one can deny that the statute helps recover some of the money spent on AFDC, there is nothing in the statute or its legislative history which supports a finding that fiscal conservation was the goal of the statute. Rather, Congress made clear that it was concerned about the rising number of children who were abandoned by their fathers. The statute's clear intent to benefit the children and their families creates enforceable rights under section 1983.

A. Aid to Families with Dependent Children (AFDC)

AFDC (Title IV-A of the Social Security Act), is a federal-state cooperative effort administered by the states. The AFDC program, created by the Social Security Act of 1935, provides monetary payments from the state to financially needy families which include children deprived of parental support due to death, disability, or desertion. 42 U.S.C. § 601. States are not required to participate in the AFDC program, but if they choose to do so, they must operate a program which meets the statutory requirements in 42 U.S.C. § 602, as well as the provisions of detailed federal regulations promulgated by the Secretary. See 45 C.F.R. Secs. 201, et seq. An explicit condition for the receipt of any federal AFDC money is that participating states have in effect a plan for child support collection which meets the standards set forth in Title IV-D of the Social Security Act, 42 U.S.C. §§ 651, et seq. The state must operate a child support recovery program in substantial compliance with that plan. 42 U.S.C. § 602(a) (27).

The federal government has made efforts since 1950 to require that absent parents support their children. The Social Security Act Amendment of 1950, Ch. 809, Sec. 321(b), 64 Stat. 549 (codified as amended at 42 U.S.C. § 602(a) (1)), required welfare workers to inform law enforcement officials of cases in which AFDC was needed due to abandonment by a parent. In 1967, Congress began requiring that states set up formal child support recovery programs, with the federal government providing half the funding. Social Security Act Amendment of 1967, Pub. L. No. 90-248 Sec. 211, 81 Stat. 896 (codified as amended at 42 U.S.C. § 602(a) (17)). However, despite the federal funding, state programs for child support recovery were near-complete failures and federal oversight was almost non-existent.

Therefore, in 1974, Congress enacted the Social Security Amendments of 1974 (the 1974 amendments), Pub. L. No. 93-647, 88 Stat. 2351, (codified as amended at 42 U.S.C. §§ 652 et seq.). Designed "to assure an effective program of child support," the 1974 amendments were a radical revision of the previous law. S.Rep. No. 93-1356, 93rd Cong., 1st Sess., reprinted in 1974 U.S.Code Cong. & Admin.News 8133, 8148-8149. The 1974 amendment increased the federal matching funds from 50% to 75% as an incentive for the states to develop the appropriate programs (one of which was a Title IV-D agency). Similarly, incentive payments were available to any local governmental units which improved their enforcement of support orders. Noting that "the enforcement of child support obligations is not an area of jurisprudence about which this country can be proud," id., reprinted in 1974 U.S.Code Cong. & Admin.News at 8146, the primary focus and intended beneficiary of the Act was the child and the family unit.

Before the 1974 amendments, any child support paid to the AFDC family was counted dollar-for-dollar in reducing the amount of the AFDC grant. The 1974 amendments provided that the state require individuals to assign to the state their right to receive child support payments as a condition of receiving the AFDC grant. Pub. L. No. 93-647, Sec. 101(e) (5), 88 Stat. 2351 (codified at 42 U.S.C. § 602(a) (26) (A)). Thus the families were assured of receiving a set amount of money each month regardless of the personal vicissitudes of the absent parent.

After minor intervening amendments, a second sweeping set of changes in the child support enforcement requirements of the Social Security Act was instituted with the Child Support Enforcement Amendments of 1984, Pub. L. 98-378 (the 1984 amendments), 98 Stat. 1305 (codified at 42 U.S.C. §§ 651, et seq.). In strengthening the Title IV-D requirements, Congress again focused on the needs and rights of families and children and the benefits to them of a strong, efficient, and effective child support recovery program. The 1984 amendments required the states to pass laws allowing for mandatory wage withholding and continuing garnishments, voluntary wage assignments, and the use of liens, 42 U.S.C. §§ 654(20), 666. In addition, more federal cooperation was extended through federal tax withholding availability, 42 U.S.C. § 664, and extending access to the federal Parent Locator Services, 42 U.S.C. § 663.

These amendments were intended to ensure that "all children in the United States who are in need of assistance in securing financial support from their parents will receive assistance regardless of their circumstances." S.Rep. No. 98-387, 98th Cong., 2d Sess., at 1, reprinted in 1984 U.S.Code Cong. & Admin.News, 2397, 2397 (emphasis added). Congress mandated that Title IV-D child support recovery and paternity establishment services be provided to both

AFDC and non-AFDC recipients. 42 U.S.C. §§ 651, 654(6).

Within days of the passage of the 1984 amendments, Congress also passed the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369 Sec. 2640, 98 Stat. 1145. One of the provisions in DEFRA, section 2640, provided that, when a non-custodial or absent parent of children receiving AFDC makes support payments to the state, the first fifty dollars collected would be paid to the family without affecting its eligibility for assistance or decreasing the amount of assistance it received. 42 U.S.C. §§ 657(b) (1), 602(a) (8) (A) (vi).

The law prior to 1988 required states, on penalty of the withholding of AFDC funds, to have in effect and operate a child support enforcement program which meets the requirements of Title IV-D of the Social Security Act. 42 U.S.C. § 602(a) (27); see 45 C.F.R. Secs. 302.12, 303.20. The state must undertake the establishment of paternity and the establishment and enforcement of support obligations for all AFDC children unless it is against the best interests of the child to do so. 42 U.S.C. § 654(4); 45 C.F.R. Secs. 303.4(b), 303.5, 303.6. The state must provide Parent Locator Services, 42 U.S.C. § 654(8), and must comply with all other requirements and standards of the Secretary. 42 U.S.C. § 654(13). These services must be available for nonrecipients of AFDC as well. 42 U.S.C. §§ 651, 654(6); 45 C.F.R. 302.33(a). In addition, the state is under an obligation to publicize the availability of such services. 45 C.F.R. Sec. 302.30.

In 1988 Congress increased the obligations of the states. Pub. L. No. 100-485, 102 Stat. 2346 (1988). Of particular significance is that Congress directed the Secretary to promulgate regulations establishing the time frame within which states must respond to requests to enforce child support orders or establish paternity. Pub. L. No. 100-485, Sec. 121, 102 Stat. 2351. This was to insure action on the part of the states--the particular action being sought by plaintiffs in this case.

The plaintiffs brought this suit against the state defendants under 42 U.S.C. § 1983 alleging that Georgia has not complied with the requirements of Title IV-D. It is clear that section 1983 encompasses claims based on purely statutory violations of federal law. Maine v. Thiboutot, 448 U.S. at 8, 100 S. Ct. at 2504-05 (1980). There are, however,

"two exceptions to the application of Sec. 1983 to statutory violations." ... First, if Congress has foreclosed private enforcement of the statute in question in the enactment of the statute itself, then Sec. 1983 is unavailable to enforce federal rights under the statute.... For example, " [w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under Sec. 1983." ... Second, if Congress has not created enforceable rights in the relevant statutory provision, there is no cause of action available under Sec. 1983.

Silver v. Baggiano, 804 F.2d 1211, 1216 (11th Cir. 1986) (quoting Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21, 101 S. Ct. 2615, 2626-27, 69 L. Ed. 2d 435 (1981)).

A. Does Title IV-D Create Enforceable Rights?

In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981), the Supreme Court held that section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et seq., did not create substantive rights in favor of the disabled. Section 6010, which was called the "bill of rights" provision of the Act, provided that Congress made certain "findings": (1) that persons with developmental disabilities have a right to appropriate treatment, services, and rehabilitation; (2) that the treatment for a person with developmental disabilities should be designed to maximize the developmental potential of the individual and should be provided in the least restrictive setting; and (3) that the federal government and the states both have an obligation to assure that public funds are not provided to any institution which does not provide treatment appropriate to the needs of the person or does not meet federal standards.

The Court found that Congress did not intend to create a substantive right to appropriate treatment in the least restrictive environment. 451 U.S. at 32, 101 S. Ct. at 1547. The Court considered both the language of the statute and the legislative history and concluded that the Act was meant to "assist" the states in improving the care and treatment of the mentally disabled. Id. at 18, 101 S. Ct. at 1540. In determining Congressional intent, the Court concluded that section 6010 was merely a "general statement of 'findings' " and therefore "too thin a reed" to support the notion that it created substantive rights. Id., 101 S. Ct. at 1541. The Court also reasoned that section 6010 did not impose any conditions on states for receipt of federal funds and that federal regulations explicitly provided that federal funds could not be withheld for failure to comply with section 6010. Finally, the Court noted that the relatively small amount of federal money given to states confirmed that Congress had a limited purpose in enacting section 6010. Id. at 24, 101 S. Ct. at 1543.

In determining whether a statute creates enforceable rights, therefore, the key to the inquiry is the intent of the legislature. The question focuses on whether Congress intended to mandate state compliance with specific conditions or whether it merely intended to encourage state behavior. This intent is discerned from the plain language of the statute, for Congress must explicitly set out the conditions placed on federal aid. The use of mandatory rather than precatory language is an important factor. Pennhurst, 451 U.S. at 20, 101 S. Ct. at 1541; see Gonzalez v. Pingree, 821 F.2d 1526, 1528 (11th Cir. 1987) (mandatory language in Food Stamp Act creates rights enforceable under Sec. 1983). Additionally, the clarity with which the conditions are set out may be an important consideration for the enforceability of conditions relies on the knowing and voluntary assumption of the conditions by the state. Pennhurst, 451 U.S. at 17-18, 101 S. Ct. at 1539-40; Edwards v. District of Columbia, 821 F.2d 651, 656 (D.C. Cir. 1987).1 Furthermore, a review of the legislative history of the statute and other traditional aids of statutory interpretation helps determine the legislative intent. Pennhurst, 451 U.S. at 23-28, 101 S. Ct. at 1543-45.

Unlike section 6010, the provision at issue in Pennhurst, Title IV-D is cast in mandatory terms. As a condition of receiving matching AFDC funds, states "must" have and operate a Title IV-D plan. 42 U.S.C. § 602(a) (27). Moreover, Title IV-D requires that state child support plans "must provide" that the state "will undertake" to "establish the paternity" of a child born out of wedlock and "secure support for such child from his parent" unless it is against the best interests of the child to do so. 42 U.S.C. § 654(4)-(5). In addition, Title IV-D requires states to notify families "at least annually" of the amount of child support collected in their behalf, 42 U.S.C. § 654(5),

and give to families the first fifty dollars in child support collected each month, 42 U.S.C. §§ 602(a) (8) (A) (vi), 657(b) (1). The section also expressly conditions the receipt of federal funds on the state submitting a IV-D plan. 42 U.S.C. § 602(a) (27). Additionally, a subsequent failure to substantially comply with Title IV-D results in the mandatory withholding of a percentage of matching AFDC funds unless the state submits corrective action for achieving compliance. 42 U.S.C. § 603(h).

The mandatory nature of the conditions therefore set this statute apart from the one considered in Pennhurst. Title IV-D is further distinguishable from 42 U.S.C. § 6010 interpreted in Pennhurst because it does not merely express a general preference for more vigorous enforcement of support orders; rather it requires states to adopt specific procedures for enforcement. In addition to requiring the state to create a system to locate delinquent parents, the states must allow for judicial determination of paternity until child reaches eighteen. 42 U.S.C. § 666(a) (4). The states must also adopt laws providing for expedited procedures for obtaining and enforcing support orders. 42 U.S.C. § 665(a) (2). Additionally, and perhaps most significantly, the states are required to pass laws creating specific remedial devices to ensure more effective enforcement of the child support awards. States are required to establish a system of wage withholding, reduction in tax returns of a delinquent parent, the use of liens against real and personal property, the posting of security or a bond, and procedures for reporting significant arrearages to credit reporting agencies. 42 U.S.C. § 666(a) (1)-(7). 45 C.F.R. Sec. 302.70.2 Although the use of the remedial devices other than wage withholding are somewhat discretionary to the State, the wage withholding provisions and the establishment of an expedited system of obtaining and enforcing the support obligations are mandatory. Indeed, section 666(b) explicitly sets out the criteria a wage withholding plan must contain. The specificity of these requirements belies any comparison with the generalized "findings" in section 6010 in Pennhurst.3 To paraphrase Pennhurst, "it strains credulity to argue that participating states" did not know of their obligations under those sections.

The state attempts to contradict the language in Title IV-D by arguing that the legislative history indicates that in enacting Title IV-D Congress was primarily concerned with collecting child support in order to reduce the welfare rolls. Nothing could be further from the truth. In 1974 the Senate Finance Committee stated that " [t]he immediate result [of Title IV-D] will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup." S.Rep. No. 93-1356, reprinted in 1974 U.S.Code Cong. & Admin.News at 8146 (emphasis added).

Because Title IV-D child support services are available to both AFDC and non-AFDC families, Congress' purpose was not simply to save money on welfare. Title IV-D is unambiguously phrased in terms of benefit to children and families. Title IV-D was passed

[f]or the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for aid under part A) for whom such assistance is requested [.]

42 U.S.C. § 651 (emphasis added). The legislative history echoes this purpose. In recommending the passage of Title IV-D, the Senate Finance Committee stated that "all children have the right to receive support from their fathers" and that Title IV-D was "designed to help children attain this right, including the right to have their fathers identified so that support can be obtained." S.Rep. No. 93-1356, reprinted in 1974 U.S.Code Cong. & Admin.News at 8146 (emphasis added).

Moreover, nothing cited by the majority contradicts this expression of Congressional intent. The majority finds the motivation of the Congress to be fiscal conservation based on two general discussions of the monetary benefit of the programs and two subtitles to portions of the Senate report. The majority does not evaluate the Senate report as a whole. The report did note that welfare costs had risen, but the report nowhere stated that the bill was intended to reduce welfare costs.4 To the contrary, the 1974 amendments increased the federal share of Social Security funding from 50% to 75%. Indeed, the clear intent was to provide more services to the public, since the report made clear that the increase in funding was to go to new services and was not to replace the state funds for existing services. S.Rep. No. 93-1356, reprinted in 1974 U.S.Code Cong. & Admin.News at 8134.5

Additionally, nothing in the 1984 amendments reveals an intent merely to recover the cost of AFDC.6 The amendments were passed because the states had not complied with existing law. The Senate therefore made the requirements more specific for the states and increased federal monitoring. The increased specificity of the conditions on the receipt of federal funds supports a finding that the statute creates enforceable rights.7 The increased monitoring by the federal government is not relevant to the question of whether the statute creates rights, but rather to the second exception under Maine v. Thiboutot. Federal supervision is relevant to the question of whether, despite the creation of rights, the statute shows an intent to preclude private enforcement through section 1983. That issue is discussed infra.

The defendants also argue that the statute creates no enforceable rights because it only requires the state to operate an effective system for recovering child support obligations and establishing paternity. The defendants claim that the statute does not create a right to actually receive support or a determination of paternity. But that is not what the plaintiffs are claiming. This case is not about whether Mr. Brown pays Mrs. Brown the child support he owes, but rather whether the State of Georgia has complied with the requirements of Title IV-D and established a system of identifying absent parents and enforcing their support obligations. The State of Georgia agreed to establish such procedures when it took the federal AFDC money. The statute in mandatory language created an obligation on the part of the state to establish a certain procedure as already discussed.

The defendants may also be arguing that the plaintiffs should not be able to sue to force compliance with Title IV-D because the noncompliance does not affect them. The argument is that since the plaintiffs have assigned their right to support to the state, the failure to set up a recovery system under Title IV-D only hurts the state. This argument ignores several vital aspects of the statute. First, a family does receive the first fifty dollars in support collected. Second, non-AFDC recipients who wish to make use of a Title IV-D program certainly are

It is by definition every judge and every member of the courtroom must carry out and enact and uphold all of the fundamental ideals of the Constitution of the United States as it is their duty. It is not frivolous seeking justice against a private, non-state agency, that has not been enacted into positive law, that has infringed upon my rights to due process. If an officer arrest a citizen without reading them their Miranda rights regardless of the punishment a citizen have the rights to take that officer to court. My entire complaint is based off rights that is protected by the Constitution of the United States of America. Numerous of my rights has been violated, anything goes against the supreme law of the land is unconstitutional.

I have been injured financially and suffered lost sleep and missed meals, forced further into poverty, intentional emotional distress, stress duress and coercion from a , foreign entity to my life intruded into my life after the birth of my child and acting under the color of law as if child support was a right and an obligation, but it is only by proper due process of law. I am not free I am not independent and I am not equal and I have the right to be free from government, state, and non-state agency, intrusion upon my guaranteed rights as a U.S. citizen. In the amended complaint Kevin allege plausible facts that defended have adopted and enforced unconstitutional policies and forceful provisions that interfere with the thirteenth and fourteenth Amendment etc. Did the district court error when, in deciding an order to dismiss, it ignored Kevin allegations and instead relied upon its own facts to conclude that defendants policies are Constitutional and are a state agency.