

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: SUE SUTER, ET AL., Petitioners V.

ARTISTS M., ET AL.

CASE NO: 90-1488

PLACE: Washington, D.C.

DATE: December 2, 1991

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   SUE SUTER, et al.,                   :

4                   Petitioners                   :

5                   v.                   :   No. 90-1488

6   ARTIST M., ET AL.                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Monday, December 2, 1991

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:01 a.m.

13   APPEARANCES:

14   CHRISTINA M. TCHEN, ESQ., Special Assistant Attorney  
15                   General of Illinois, Chicago, Illinois; on behalf of  
16                   the Petitioners.

17   JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General,  
18                   Department of Justice, Washington, D.C.; as amicus  
19                   curiae, supporting the Petitioners.

20   MICHAEL DSIDA, ESQ., Chicago, Illinois; on behalf of the  
21                   Respondents.

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 90-1488, Sue Suter v. Artist M.  
5 Ms. Tchen.

6 ORAL ARGUMENT OF CHRISTINA M. TCHEN

7 ON BEHALF OF THE PETITIONERS

8 MS. TCHEN: Mr. Chief Justice, and may it please  
9 the Court:

10 This case raises the question of whether the  
11 Federal Adoption Assistance Act and Child Welfare Act of  
12 1980, specifically the provision commonly referred to as  
13 the reasonable efforts clause, creates rights that may be  
14 enforceable under 42 USC section 1983. The reasonable  
15 efforts clause states that in order to be eligible for  
16 Federal foster care reimbursement funds, that States must  
17 have a plan approved by the secretary that provides that  
18 in each case reasonable efforts will be made to keep or  
19 return a child home.

20 The reasonable efforts clause does not provide  
21 any further definition or explanation of reasonable  
22 efforts. In light of that, the Seventh Circuit Court of  
23 Appeals below misapplied this Court's decision in Wilder  
24 v. Virginia Hospital Association when it held that this  
25 clause was sufficiently specific and definite to create an



1 enforceable right.

2           The State of Illinois maintains that although  
3 the Adoption Assistance Act is mandatory and benefits the  
4 plaintiffs here, that it is simply too vague and amorphous  
5 to create a Federal right.

6           This Court has stated that in order to create  
7 Federal rights upon the States, Congress must speak with a  
8 clear voice because of the values and concerns inherent in  
9 our system of Government, and that clear voice and clear  
10 statement is simply lacking here.

11           One of the elements of determining whether a  
12 clear statement has been provided by Congress under  
13 section 1983 is whether the interest asserted by the  
14 plaintiffs is too vague and amorphous such that it is  
15 beyond the competence of the judiciary to enforce.

16           What the Seventh Circuit did here was to take  
17 this notion of competence of the judiciary in the  
18 abstract. It never looked at the statute at issue here and  
19 simply said, that because courts have proved competent to  
20 enforce a reasonableness terms in other statutes that have  
21 no relation to the statute at hand here, that therefore,  
22 courts are competent to enforce this particular reasonable  
23 efforts clause.

24           But this reasonable efforts clause stands in  
25 stark contrast, for example, to the clause construed by .

1 this Court in Wilder v. Virginia Hospital Association. In  
2 Wilder this Court held that the Boren amendment to the  
3 Medicaid act created a Federal right to reasonable and  
4 adequate Medicaid reimbursement rates, but it did so after  
5 a lengthy and extensive analysis of the statute at hand.

6 And what this Court found was that the Boren  
7 amendment there set forth a lengthy list of specific  
8 factors, specific objective benchmarks defining what meant  
9 reasonable. There are no such benchmarks or factors  
10 here, and what we are left with is a reasonable efforts  
11 clause with no definition supplied by Congress that will  
12 subject the States to a substantive right to reasonable  
13 efforts that will be defined not by Congress but by  
14 individual judges applying their own notions of  
15 reasonableness.

16 QUESTION: What about the Sherman Act? Doesn't  
17 the Sherman Act do the same thing in spades? We preempt  
18 State laws regularly on the basis of a determination that  
19 the courts are supposed to make, that there has been an  
20 unreasonable restraint of trade.

21 MS. TCHEN: But what is missing here, Justice  
22 Scalia, is a specific designation that Congress intended  
23 to create a Federal right. What we are trying to do here  
24 is we must -- there is no specific designation of a  
25 Federal right or Federal intent to create a national

1 standard of child welfare or to Federalize child welfare.

2 QUESTION: Well, I may agree with you on that,  
3 but not because it is too vague. I mean, what does  
4 vagueness have to do with whether the right exists or not?  
5 You cannot create the right unless it is highly defined?

6 MS. TCHEEN: What this Court has said in Wilder  
7 is to set out a three-part test for when under section  
8 1983 this Court can infer a congressional intent to create  
9 a Federal right, and the third element of that test is  
10 whether the interest is too vague and amorphous. Here we  
11 have a statute that we agree is mandatory, benefits  
12 plaintiffs, but it is simply too vague, and what this  
13 Court has said in Wilder is that there cannot be a Federal  
14 right unless there is a specific objective benchmark  
15 provided by Congress that measures what is reasonable, and  
16 that's what is lacking here.

17 I think it is important to note that the  
18 reasonable efforts that we are talking about here --

19 QUESTION: Let me ask you on that point, is it  
20 so vague that the Secretary could never enforce this  
21 provision?

22 MS. TCHEEN: No, what the Secretary does and the  
23 Congress has specifically delegated to the Secretary the  
24 authority to approve a plan, to make sure that it provides  
25 reasonable efforts or to withdraw funds if not.

1 QUESTION: Well, suppose it -- you have a plan  
2 approved such as this one and then assume the State or  
3 whatever the agency is, did absolutely nothing to  
4 implement it, could the funds be withdrawn?

5 MS. TCHEN: The funds -- the Secretary would  
6 have the discretion to withdraw the funds.

7 QUESTION: But would it be following  
8 a -- enforcing a Federal right if he did so?

9 MS. TCHEN: No. I think it would be enforcing a  
10 Federal statute. Again, section 1983 does not exist  
11 simply to remedy statutory violations. Section 1983  
12 exists to remedy deprivation of Federal rights, and what  
13 we have to find here is whether there is a Federal right  
14 that exists, not merely a mandatory Federal statute that  
15 may be violated.

16 I think it is important to note, we can always  
17 state the most egregious case where a statute we would all  
18 agree has been clearly violated, but that doesn't answer  
19 the question of whether there is a Federal right that is  
20 created.

21 QUESTION: Why can't you use the same test to  
22 ask whether a Federal right has been violated, but where  
23 nothing at all is being done?

24 MS. TCHEN: What we need, Justice Stevens, is a  
25 benchmark that governs not only the easy case that you



1 have posed, which is where there is simply no efforts at  
2 all that are being exerted by the State, but also the  
3 harder case, which I submit is this case.

4 QUESTION: But that is what Justice Scalia's  
5 question was directed to, is that reasonableness is a  
6 standard that is judicially enforceable in other contexts,  
7 but you say not in this context.

8 MS. TCHEN: I say not in this case because for  
9 example, in this case, this is not the case where the  
10 State was making no reasonable efforts at all, never  
11 assigning --

12 QUESTION: But this case will decide that case  
13 as well.

14 MS. TCHEN: I think that is true, and I think  
15 the problems in this case demonstrate the problems with  
16 having a reasonable efforts clause that is not defined by  
17 Congress. In this case, what the district court below  
18 found was that after the State of Illinois instituted a  
19 remedial plan to assign caseworkers more quickly, 83  
20 percent of the time the district court found the State of  
21 Illinois was assigning a caseworker within 10 calendar  
22 days, less than 2 weeks.

23 Nonetheless, and we don't know why, the district  
24 court found that to be unreasonable. The State further  
25 provided specific evidence on why there may be instances

1 in which a delay in assigning a caseworker would be  
2 reasonable.

3 For example, the State of Illinois is under  
4 another consent to create another Federal case that  
5 requires the State to provide a Spanish-speaking  
6 caseworker only to Spanish-speaking families and children.  
7 But a Spanish-speaking caseworker may not be available  
8 within the 3 days that the injunction requires or even the  
9 10 days in which 83 percent of the cases were assigned.

10 There are other instances. We had testimony in  
11 the preliminary injunction action that a 3-day across the  
12 board rule such as was imposed by the district court here  
13 requires us to assign a caseworker to a case with less  
14 risk, the truant teenager case, as quickly as we assign a  
15 case to the severely burned infant.

16 It is simply -- it's an intrusion by the Federal  
17 court on that very specific decision making that child  
18 welfare administrators are supposed to make and what  
19 Congress intended child welfare administrators to make.

20 QUESTION: Is there anything about the subject  
21 matter of the judgment which makes the Secretary more  
22 competent, or perhaps I should say a more appropriate  
23 person to make the judgment about reasonableness than a  
24 court?

25 MS. TCHEN: I think so, Justice Souter. This is

1 particularly an area where we don't know what works with  
2 abused and neglected children, and I think it's important  
3 to note that at the time the act was passed in 1980, this  
4 whole concept of requiring States to make reasonable  
5 efforts to keep abused children in abusive homes was  
6 somewhat new to the States, which is why there was a  
7 delayed effective date, and which is why the Secretary in  
8 promulgating regulations specifically stated that he made  
9 the determination it was better to leave the flexibility  
10 to the States and to allow States to make their  
11 determinations of how they were going to meet the  
12 reasonable efforts clause, allow the States to make the  
13 policy decisions of how to balance scarce resources and  
14 allocate scarce resources in this very difficult area.

15 It is, again, I think important to note,  
16 reasonable efforts -- these are not reasonable efforts to  
17 conduct negotiations around a collective bargaining  
18 agreement. They are --

19 QUESTION: I am sorry, I thought you have  
20 finished.

21 MS. TCHEN: They are not even reasonable  
22 efforts, I think, to set reasonable rates or reasonable  
23 rents, as in the Wright case, which are monetary  
24 calculations that could be measured against a marketplace,  
25 and in addition, this Court required specific lengthy

1 factors in the statute.

2 Here we have no marketplace for reasonable  
3 efforts, and we have a much more difficult decision than  
4 determining what are reasonable rates or reasonable rents,  
5 and yet the plaintiffs ask us to find a Federal right in a  
6 statute that provides not only less guidance than the  
7 Boren amendment or the regulations in Wright, but  
8 absolutely no guidance whatsoever.

9 QUESTION: Ms. Tchen, do you acknowledge that  
10 the statute requires the State to make reasonable efforts  
11 in each case?

12 MS. TCHEN: We agree. We recognize that the  
13 statute requires reasonable efforts in each case.

14 QUESTION: Where does it require that?

15 MS. TCHEN: Well, it states --

16 QUESTION: As I read it, the section we are  
17 talking about, 671(a)(15) requires the State to come up  
18 with a plan that would produce reasonable efforts, but  
19 nothing is perfect. I mean, if the plan provides for  
20 reasonable efforts, the fact that now and then it may in a  
21 particular case not produce that would not seem to me to  
22 violate (a)(15), but you think it does?

23 MS. TCHEN: No, what we think is, it wouldn't  
24 necessarily violate (a)(15), which requires the State to  
25 have a plan that provides reasonable efforts. There is a



1 separate --

2 QUESTION: What does it violate then?

3 MS. TCHEN: There is a separate section, section  
4 672(a) that says that in individual cases, that in order  
5 to receive Federal reimbursement, there must be a State  
6 judicial determination of whether reasonable efforts were  
7 made in the best interest of the child.

8 Now it is also the case however, Justice Scalia,  
9 that Congress recognized there are going to be a lot of  
10 cases where there should be no reasonable efforts made at  
11 all because of the best interests of the child which the  
12 State courts are required to balance as well in section  
13 672 explicitly and this individualized decision making is  
14 what was intended under the reasonable efforts clause  
15 because the clause itself reads, in each case.

16 It doesn't say a system of reasonable efforts,  
17 which is what the plaintiffs are seeking here. They want  
18 a substantive right to allow a Federal court to judge  
19 whether there is a system of reasonable efforts by the  
20 State.

21 But there is nowhere in the statute, the plain  
22 language never speaks about a system of reasonable  
23 efforts.

24 QUESTION: Well, it speaks of a plan.

25 MS. TCHEN: It speaks of a plan --

1 QUESTION: What's the difference between a  
2 system and a plan in your view?

3 MS. TCHEN: Here the plan is an actual document,  
4 as in many other Federal and State cooperative funding  
5 acts, which requires that the State put together a  
6 document, submit it to the Secretary and have it approved.

7 QUESTION: And that is what has to provide that  
8 reasonable efforts will be made?

9 MS. TCHEN: That's right.

10 QUESTION: It's the plan.

11 MS. TCHEN: Is the plan. Now the plan was never  
12 at issue in this case, and I think it's telling. The  
13 plaintiffs here are not suing because they disagree with  
14 the plan that was approved --

15 QUESTION: They agree that the plan provides for  
16 reasonable efforts?

17 MS. TCHEN: They simply never raised the plan.

18 QUESTION: They never raised --

19 MS. TCHEN: They never raised the plan. What  
20 they are trying to do is say there is not just a right to  
21 a plan, but a substantive right beyond the plan to  
22 reasonable efforts which they define.

23 What is allows them to do and it allows Federal  
24 courts to do under this undefined substantive right to  
25 reasonable efforts is to peel off one after another

1 various administrative structures in the States and hold  
2 it up to a standard of reasonable efforts, and it's  
3 already happening.

4 This case is only one of five that are currently  
5 pending against the Illinois Department of Children and  
6 Family Services, taking one part of the department's  
7 structure after another and holding it up. In this case,  
8 it's caseworker assignment. In another case, it's cash  
9 assistance and housing to abusive parents. In another  
10 case it's parental visitation, and in yet another case,  
11 it's sibling visitation.

12 In fact, there are 13 States and the District of  
13 Columbia that currently are exposed to reasonable efforts  
14 lawsuits taking one little piece after another. The  
15 plaintiffs have even cited one coming out of the Third  
16 Circuit most recently last week, in which a visitation  
17 rule was held up to the court and under some standard  
18 which we don't know because Congress didn't give us a  
19 measurement, it said that a visitation rule of 1 hour  
20 every other week was somehow not so meager that it fell  
21 below a standard of reasonableness.

22 But Congress has not provided us what that  
23 standard would be.

24 QUESTION: What are the reasonableness  
25 requirements that the Court must determine under 672 in

1 the event of payment to a child?

2 MS. TCHEEN: What the reasonableness --

3 QUESTION: Where is that? Is that quoted in  
4 672?

5 MS. TCHEEN: It's 672. I believe it's in  
6 petitioner's brief.

7 QUESTION: The blue brief?

8 MS. TCHEEN: The blue brief.

9 QUESTION: I have been looking for it. I can't  
10 find it.

11 QUESTION: 672(a)(1).

12 MS. TCHEEN: 672(a)(1), it's not quoted in full,  
13 but on page 24, it's stated that the foster care placement  
14 must be the result of a judicial determination that  
15 continuation at home, quote, "would be contrary to the  
16 welfare of such child, and that reasonable efforts of the  
17 type described in section 671(a)(15) have been made."

18 QUESTION: So the statute does require the  
19 courts in this instance to make a determination whether or  
20 not reasonable efforts have been made. Is that a  
21 different inquiry than the respondents are asking for  
22 here?

23 MS. TCHEEN: Yes, it is, Justice Kennedy. It is  
24 a uniquely different one. It is a determination on a  
25 case-by-case basis, and 672 is very specific. It's on the



1 individual child for whom the State seeks Federal  
2 reimbursement, there must be an individualized  
3 determination based on the facts of that case, which is,  
4 as we submit, the only way you can determine  
5 reasonableness. You have to look at the risk to the  
6 child. You have to look --

7 QUESTION: So the reasonableness of the plan is  
8 not in question in the inquiry that is made under  
9 672(a)(1)?

10 MS. TCHEN: No, it's not. That is what  
11 plaintiff is seeking -- in fact, plaintiffs specifically  
12 disavow that they are looking for that individualized  
13 determination, which is the only judicial determination  
14 that Congress intended under the reasonable efforts  
15 clause.

16 QUESTION: Ms. Tchen, will you file with the  
17 clerk, as soon as you can after the argument, a full copy  
18 of the section you were just talking about?

19 MS. TCHEN: Yes, I will, Mr. Chief Justice.

20 QUESTION: If you find it's not otherwise in the  
21 briefs or in the appendix.

22 MS. TCHEN: Yes. Actually, I have a copy here.

23 Plaintiffs completely disavow that particular  
24 inquiry. They are seeking a systemic right to reasonable  
25 efforts, which simply does not appear anywhere in the

1 statute at all. Furthermore --

2 QUESTION: You say it doesn't appear in the  
3 statute, but the statute does require the plan to include  
4 a systemic right, doesn't it?

5 MS. TCHEN: No, it says a plan that provides  
6 that in each case, reasonable efforts will be made.

7 QUESTION: Well, the in each case language is  
8 in -- I thought it was in (a)(2)?

9 MS. TCHEN: No. It's in 671(a)(15), 671(a)(15)  
10 simply says that the plan provide that in each case  
11 reasonable efforts be made. It doesn't say system.  
12 Elsewhere in the statute there is reference to a case  
13 review system which indicates, I believe, that Congress  
14 knew and knew how to use the word system when it wanted to  
15 use system.

16 QUESTION: Yes, but the very fact that the  
17 requirement is in a plan means it has to be part of the  
18 system, doesn't it?

19 MS. TCHEN: No. I think what the Secretary's  
20 regulations say is what reasonable efforts means is a list  
21 of services. There may not be one system for providing  
22 reasonable efforts. You need to have flexibility. You  
23 need to be able to address the variation of problems that  
24 exist in a State in this very volatile and highly  
25 individualized area of child welfare involving abused and

1 neglected children.

2 The circumstances vary a great deal. We don't  
3 know a lot about what works to keep children at home.

4 QUESTION: What you are saying is the plan  
5 required by the Secretary contemplates variation for  
6 different kinds of cases.

7 MS. TCHEEN: The plan simply says a list of  
8 services, that the States to comply with the plan, what  
9 the regulations say, is that there is a list of services  
10 which States may choose to --

11 QUESTION: May I ask if that regulation is in  
12 the materials before us?

13 MS. TCHEEN: I don't believe it's quoted in full  
14 but it is also cited both in our brief and in the brief of  
15 the United States.

16 And I would like to reserve the balance of my  
17 time.

18 QUESTION: I just have one question. Assume  
19 that there is clear noncompliance with the reasonable plan  
20 requirement, could respondents bring an action against the  
21 secretary under the Administrative Procedure Act to compel  
22 the secretary to withhold payments?

23 MS. TCHEEN: I don't think that is a question  
24 that has been directly addressed by this Court. It may  
25 well fall as a nonenforcement decision under Heckler v.

1 Chaney and may be precluded from suit as something that is  
2 left to the --

3 QUESTION: But the inquiry there would be the  
4 same if such an action were brought?

5 MS. TCHEN: It's an analogous inquiry, I think,  
6 under Heckler whether there is no law to apply, and I  
7 would like to reserve the balance of my time.

8 QUESTION: Very well, Ms. Tchen.

9 Mr. Roberts, we will hear from you.

10 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

11 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

12 SUPPORTING THE PETITIONERS

13 MR. ROBERTS: Thank you, Mr. Chief Justice, and  
14 may it please the Court:

15 QUESTION: Mr. Roberts, could you answer Justice  
16 Kennedy's -- just the question he just put from the point  
17 of view of the Government?

18 MR. ROBERTS: Yes. We don't believe that an  
19 action against the secretary would lie because it would  
20 involve issues of prosecutorial discretion and no law to  
21 apply, so there wouldn't be a direct action against the  
22 secretary under the APA.

23 QUESTION: Prosecutorial discretion?

24 MR. ROBERTS: Well, the discretion of how to  
25 enforce the requirements of the statute against the



1 States, yes. The secretary may well decide that the  
2 resources are better used providing care even though the  
3 State is not complying and then taking other steps to  
4 ensure compliance.

5 But no individual would have a right to sue the  
6 secretary, to compel the secretary to cut off funds to the  
7 State.

8 The court below erred in this case in concluding  
9 that the reasonable efforts proviso was sufficiently  
10 specific and definite to create a right enforceable under  
11 section 1983. I think the issue is most clearly posed by  
12 asking the question, reasonable with respect to what?

13 The statute provides no answer. This is not a  
14 case like Wilder where the statute provided for reasonable  
15 rates, but then went on at some length to specify what  
16 that meant: rates to meet the costs that must be incurred  
17 by efficiently and economically operated hospitals  
18 providing care in accordance with Federal and State law.

19 This Court in Wilder said that that statutory  
20 language provided an objective benchmark against which to  
21 assess the reasonableness of rates. Here, the statute  
22 provides none.

23 QUESTION: How do you answer Justice Scalia's  
24 question about the Sherman Act and its reasonableness  
25 standard, Mr. Roberts?

1 MR. ROBERTS: First of all, the Sherman Act  
2 specifically directs the courts to enforce the provision.  
3 There is no such direction to Federal courts in this case.

4 Second of all, I think the Sherman Act does  
5 provide an objective benchmark: the standard of free  
6 market competition which the courts can use in applying  
7 those vague terms as well.

8 In this case the regulations also don't answer  
9 the question, reasonable with respect to what? The case  
10 is therefore not like this Court's decision in Wright  
11 where the Court relied on regulations defining what was  
12 included in rent in holding that tenants could enforce a  
13 rent ceiling under section 1983.

14 Here the secretary specifically determined not  
15 to define reasonable efforts in the implementing  
16 regulations.

17 QUESTION: Does that mean, Mr. Roberts, that the  
18 secretary could never withhold funds for failure to comply  
19 with this provision?

20 MR. ROBERTS: No, Your Honor. The secretary can  
21 enforce the reasonable efforts provision by engaging in  
22 precisely the sort of social policy judgments that are  
23 entrusted to an expert administrative agency but which are  
24 not entrusted under our system to the Federal courts.

25 QUESTION: Are they entrusted pursuant to any

1 standard specified by Congress or are they entirely made  
2 up by the secretary?

3 MR. ROBERTS: Well, the secretary's  
4 determination of what's reasonable in specific cases.

5 QUESTION: How does the secretary know what's  
6 reasonable, that is what I am asking you.

7 MR. ROBERTS: He knows by making the sorts of  
8 policy judgments on each case, as a State submits a  
9 particular plan and they say here is what we are going to  
10 do to comply with reasonable efforts, the secretary makes  
11 policy judgments --

12 QUESTION: Are those policy judgments guided by  
13 anything Congress says in the statute?

14 MR. ROBERTS: No, other than reasonable efforts,  
15 that is what confines the secretary's discretion. It is a  
16 very broad --

17 QUESTION: How does it confine the secretary's  
18 discretion anymore than it would confine the judge's  
19 discretion?

20 MR. ROBERTS: It doesn't confine the secretary's  
21 more than a judge's, but the secretary, the Congress  
22 determined, had the expert experience in the field of  
23 child welfare to make the policy judgments. There are, as  
24 we indicated, no right answers in this area, but Congress  
25 entrusted the secretary in applying the act to come up

1 with good policy judgments. They may be different in  
2 different cases --

3 QUESTION: Without any legislative guidance  
4 whatsoever?

5 MR. ROBERTS: The guidance is simply reasonable  
6 efforts to keep families together and to provide for the  
7 return of the children.

8 QUESTION: Almost as vague as public interest,  
9 convenience, and necessity, isn't it?

10 MR. ROBERTS: Well, except that in this case  
11 there are no objective standards to which a court can  
12 resort. In those other cases there are. Now, some of  
13 respondent's amici do say there are objective standards.  
14 The National Association of Social Workers, for example,  
15 says that the objective standards are those published and  
16 endorsed by the National Association of Social Workers.

17 And that highlights the problem in this case.  
18 Congress refrained from enacting any such specific  
19 standards in the statute. The secretary declined to enact  
20 any such specific standard in the regulations, though she  
21 was urged to do so.

22 And now these groups come before this Court and  
23 urge this Court to elevate their professional standards to  
24 the level of an enforceable Federal right.

25 QUESTION: What are the State courts supposed to



1 use? It's the same language that the State courts are  
2 supposed to apply under 672(a).

3 MR. ROBERTS: The State courts can apply it in  
4 the context of a particular removal decision involving a  
5 particular child and a particular family history. The  
6 Federal courts -- the respondents disclaim any such role  
7 for the Federal courts under section 1983. They are much  
8 more interested in defining on a systemic level in the  
9 abstract what constitutes reasonable efforts.

10 The State courts look to the particular case,  
11 what the State has done for this child against -- and  
12 balance that against the asserted need to remove the child  
13 from the home.

14 Now the respondents may not agree with their  
15 amici on the source of the standards to apply in this  
16 case, but if it's not those standards, which standards?  
17 If the Federal courts are going to enforce a supposed  
18 right to reasonable efforts, the first thing they are  
19 going to have to do is set an objective benchmark against  
20 which to assess reasonableness, and that exercise involves  
21 policy judgments beyond the competence of the article 3  
22 branch, not beyond their competence in the sense that  
23 judges would be incapable of coming up with an answer in  
24 any particular case, but beyond their competence in the  
25 sense that it moves the courts from adjudication of

1 particular cases and controversies to the setting of  
2 social policy.

3 QUESTION: Well, I suppose the State in  
4 submitting a plan promises to live up to it.

5 MR. ROBERTS: Yes. It sets forth in its plans  
6 how it intends to comply with the requirement and the  
7 secretary either accepts it or rejects it.

8 QUESTION: Says that is a good way, that's fine.  
9 That is just fine, and so why would a court have to decide  
10 what a benchmark is, they just want to enforce this  
11 promise that the State has -- here is what we are going to  
12 do and the secretary says fine, go ahead and do it. And  
13 why can't a private person just enforce that contract?

14 MR. ROBERTS: Well, in the first place, that's  
15 not what is involved here. The State's plan says nothing  
16 about providing a caseworker within 3 days and the Federal  
17 court is simply enforcing that requirement. The State's  
18 plan says nothing of the sort.

19 QUESTION: What does it say?

20 MR. ROBERTS: It simply lists the State services  
21 that are available, through which it intends to comply  
22 with the requirement.

23 QUESTION: Doesn't it mean that in each case  
24 these services will be available?

25 MR. ROBERTS: It means that in each case

1 reasonable efforts will be made, and here is an array of  
2 services from which they can draw. It doesn't mean that  
3 every service will be available in every case. In some  
4 cases no --

5 QUESTION: What if the State doesn't provide any  
6 services at all?

7 MR. ROBERTS: Well, in some cases that may be  
8 appropriate. If you have a situation where immediate  
9 removal of the child is demanded for health and safety  
10 reasons, no efforts at keeping the family together may be  
11 the appropriate efforts.

12 The position of the plaintiffs here is at least  
13 three steps removed from the statutory language. On its  
14 face this statute simply sets forth a contract between the  
15 United States and the State, confers no rights on anyone.  
16 If there are any rights, it would seem to be simply rights  
17 to what the statute provides, a plan providing for  
18 reasonable efforts approved by the secretary.

19 Illinois has a plan, does provide for reasonable  
20 efforts, has been approved by the Secretary. If there  
21 were any further right to actual implementation of the  
22 plan it would be seem to be just that, implementation of  
23 the plan. Here the plaintiffs and the court go beyond  
24 that and set forth the requirement of 3 days in every case  
25 though the State plan says nothing about that.

1           We are not told why 3 days is reasonable in  
2   every case while the 9- to 10-day average of the State is  
3   not, nor for that matter, why 3 days is reasonable here  
4   when the First Circuit determined that 24 hours was needed  
5   to meet the reasonableness requirement.

6           The point is that determining how quickly a  
7   caseworker capable of providing services should be  
8   assigned to a new case involves basic policy judgments  
9   about the allocation of limited resources in a child  
10   welfare system, the sort of policy judgments entrusted to  
11   the States in the first instance and to the secretary.

12           If there are no further questions --

13           QUESTION: Very well.

14           Mr. Dsida, we'll now hear from you.

15           ORAL ARGUMENT OF MICHAEL DSIDA

16           ON BEHALF OF THE RESPONDENTS

17           MR. DSIDA: Thank you, Mr. Chief Justice, and  
18   may it please the Court:

19           This case turns on two critical issues. First,  
20   Federal courts are competent in applying reasonableness  
21   standards of the type at issue here, and their task is  
22   especially straightforward in this context when the  
23   defendants have made no efforts, let alone the reasonable  
24   efforts required of them by the statute, to keep families  
25   together.



1 QUESTION: Do you agree with the petitioner, Mr.  
2 Dsida, that your clients have not attacked the plan filed  
3 by the State at all?

4 MR. DSIDA: Your Honor, I don't think that is a  
5 fair characterization of our complaint. What we contended  
6 in our complaint was that the defendants had failed to  
7 make reasonable efforts and it was clear --

8 QUESTION: Why do the defendants have to make  
9 reasonable efforts? The statute says, the plan shall  
10 provide that reasonable efforts shall be made, doesn't it?

11 MR. DSIDA: Your Honor, the plan also must be in  
12 effect -- it's clear that the statute requires that the  
13 specific obligations under the plan must be implemented by  
14 the State and that has been this Court's position under  
15 Federal/State cooperative --

16 QUESTION: So what's your answer to the question  
17 I asked you? You don't agree with petitioners, that you  
18 did not attack the plan, and therefore you say you did  
19 attack the plan?

20 MR. DSIDA: We did attack the plan. We didn't  
21 use the word State plan specifically, but we did attack  
22 the plan in that defendants have failed to live up to  
23 their obligations under the plan.

24 QUESTION: But that's two different things.

25 MR. DSIDA: Your Honor, the plan --

1 QUESTION: Isn't that two different things?  
2 One, whether the plan complies with the statute, and  
3 second, whether the defendants have lived up to their  
4 obligation under the plan. Is that or is that not two  
5 different things?

6 MR. DSIDA: That is two different things, Your  
7 Honor. I think defendants correctly stated that the plan  
8 is different from their obligation. The plan is simply is  
9 a document which they submit to the secretary.

10 QUESTION: And that's what the statutory  
11 language that -- at least the petitioners were talking  
12 about related to, isn't it?

13 MR. DSIDA: The statutory language requires them  
14 to submit a plan to the secretary --

15 QUESTION: And you don't claim the secretary  
16 made a mistake in approving the plan?

17 MR. DSIDA: That's not our --

18 QUESTION: Just yes or no.

19 MR. DSIDA: No, Your Honor.

20 QUESTION: All right.

21 MR. DSIDA: The question today is whether or not  
22 the defendants have lived up to their obligations under  
23 the plan.

24 QUESTION: So we take the case on the assumption  
25 that the plan is reasonable?

1 MR. DSIDA: That the plan is reasonable?

2 QUESTION: Yes.

3 MR. DSIDA: Your Honor, the plan was approved by  
4 the secretary. The defendants failed to adhere to their  
5 obligations under the plan.

6 QUESTION: But as the base point, the beginning  
7 point is that we assume that there is in place a plan that  
8 if followed would comply with the statute.

9 MR. DSIDA: Yes, Your Honor, that's a fair  
10 assumption. But what happened in this case is that  
11 defendants failed to make any efforts and in that context  
12 courts are competent to enforce the reasonableness  
13 standard provided here.

14 The second crucial point here is that  
15 enforcement of the reasonable efforts requirement will  
16 preserve only the most limited role for Federal courts in  
17 this area --

18 QUESTION: Excuse me. It seems to me you are  
19 arguing a different theory now. If, as you say, all they  
20 are trying to do is get the State to live up to the  
21 State's promise under the plan, the benchmark should not  
22 be the very vague reasonableness standard of the statute,  
23 but rather the benchmark should be the plan.

24 MR. DSIDA: The plan contains a promise by the  
25 State of Illinois to make reasonable efforts in each case,

1 and they did not do that here. Defendants up until today  
2 did not contest before the court that issue. There is no  
3 dispute --

4 QUESTION: I see. Does the plan say that in so  
5 many words, we promise to make reasonable efforts in each  
6 case?

7 MR. DSIDA: The plan essentially repeats the  
8 language of the statute, that the State will provide that  
9 reasonable efforts will be made in each case.

10 QUESTION: Is the plan in the record?

11 MR. DSIDA: No, Your Honor, it's not. But if  
12 the Court would like, we could submit that.

13 QUESTION: Well, if you say you want to enforce  
14 the plan, it looks to me like you would let us know what  
15 the plan you are trying to enforce is.

16 MR. DSIDA: The plan contains the requirements  
17 set forth by the statute and among them --

18 QUESTION: Would you see to it that the clerk  
19 has copies?

20 MR. DSIDA: Yes, Your Honor. Enforcing this  
21 particular statutory requirement will not, will preserve  
22 only the most limited role for Federal courts as well, but  
23 it's a role which is consistent with the contract entered  
24 into between the Federal Government and the States under  
25 title IV-E.



1           Now Illinois purports to adhere to this  
2 obligation by assigning a caseworker to each abused and  
3 neglected child in his or her family. Under DCFS's  
4 system, the caseworker alone is responsible for providing  
5 services to keep children in their own homes, and for  
6 providing services to make it possible for children to  
7 return to their homes if they have been placed in foster  
8 care.

9           But as the district court found in plaintiff's  
10 cases, defendants regularly and systematically deprived  
11 these children of caseworkers and the services which  
12 caseworkers alone can provide for weeks and months at a  
13 time.

14           QUESTION: Mr. Dsida, it seems to me that under  
15 your theory, that the court would be asked in each  
16 instance to look at the specifics of the plan and then  
17 determine whether in that State the plan was specific  
18 enough to give some cause of action for enforcement, and  
19 that would become the standard, which would seem perhaps  
20 to result in different standards being applied in  
21 different States depending on the content of a particular  
22 plan.

23           MR. DSIDA: No, Your Honor. The ultimate  
24 obligation of the State is the one set forth by Congress  
25 in the statute. The State must provide reasonable efforts

1 to keep these children with their families or to return  
2 them to their families. That is the standard which the  
3 courts are to apply. That's the obligation which  
4 defendants admit that they are bound to adhere to, and the  
5 Solicitor General agrees on that point.

6 QUESTION: And you don't rely on any other  
7 specifics in this particular State of Illinois as  
8 supporting your cause of action?

9 MR. DSIDA: No, Your Honor, that's the  
10 obligation which we contend defendants failed to adhere  
11 to, and it's clear in this case that they did not. The  
12 district court found that in plaintiff's case, that  
13 defendants regularly deprived children of caseworkers,  
14 which is the sole means DCFS chose to use under their  
15 system to implement this reasonable efforts requirement.

16 And in a situation like this, it's very  
17 straightforward for courts to enforce and apply this  
18 statute. The courts below needed to look no further --

19 QUESTION: Well, I thought the courts below did  
20 in fact look further and look at what Illinois had done  
21 and said and because the State had indicated that the  
22 provision of child care workers was the linchpin and so  
23 forth, that that provided the standard. The court didn't  
24 need to do that, I take it?

25 MR. DSIDA: The court didn't need to do that,

1 but what it was doing there was ultimately crafting its  
2 remedy, consistent with the State's approach in trying to  
3 resolve the problems which the plaintiffs had presented.  
4 And the court looked at the defendant's plan to  
5 restructure the department after it heard extensive  
6 evidence that the defendants had regularly and  
7 systemically deprived these children of caseworkers, and  
8 the reasonable efforts which only caseworkers can provide.

9 So the court looked at the caseworkers only  
10 because defendants had made --

11 QUESTION: Well, then if another State hadn't  
12 made the provision of child caseworkers a linchpin then no  
13 remedy could be devised?

14 MR. DSIDA: It would depend on the particulars  
15 of that case. If a State employed another technique to  
16 supposedly provide reasonable efforts, but then utterly  
17 failed to do so, as Illinois had failed to do here, then a  
18 court might be -- it might be appropriate for a court to  
19 look at the particular practices of that State to provide  
20 a remedy which is not intrusive and which would not  
21 involve the Federal courts in the administration of the  
22 State agency's operations, and that's what the court did  
23 here.

24 It employed a remedy, exercising its broad  
25 remedial discretion, which was consistent with the State's

1 approach, and it was one which was not intrusive and one  
2 which provided -- which essentially deferred to the  
3 State's decisions and how they were to implement the  
4 requirements of this statute.

5 QUESTION: Would it have been within the statute  
6 for the Federal administrator, for the secretary to refuse  
7 to approve a plan unless it was more specific than the one  
8 involved here? You say that the plan here essentially  
9 just repeats that best efforts will be made.

10 Would it have been appropriate for the secretary  
11 to say, I won't approve a plan unless it provides for  
12 social workers to be assigned within 3 days?

13 MR. DSIDA: The secretary could have made that  
14 decision in this case, but the secretary did not.

15 QUESTION: And if he had, we wouldn't be here.  
16 We wouldn't have this case?

17 MR. DSIDA: If the secretary had not approved  
18 the plan?

19 QUESTION: Right.

20 MR. DSIDA: That's correct, Your Honor, because  
21 presumably the State would have then responded  
22 appropriately in resolving their violation of the statute  
23 in that regard.

24 But what's clear here is that the Court can  
25 determine that the State has failed to live up to its



1 obligations to make reasonable efforts. Courts  
2 apply -- Federal courts apply reasonableness standards  
3 every day. It is a central part of the task of any  
4 Federal court judge, and that includes assessing the  
5 reasonableness of a party's conduct under countless  
6 Federal statutes.

7 QUESTION: Is there something peculiar about the  
8 reasonableness judgment here in implicating essentially  
9 judgments about the appropriate determination of the way  
10 the State uses its money?

11 In other words, one of the benchmark problems in  
12 this case is that there doesn't seem to be a benchmark  
13 anywhere like the well-run clinic in Wilder, the free  
14 market, whatever, of whatever value that is.

15 Here, the reference has to be an appropriate  
16 expenditure of State revenues and an appropriate  
17 determination about the amount of revenues to be used, or  
18 do those two elements of the decision make this something  
19 quite different from the normal reasonableness  
20 determination that Federal courts make every day?

21 MR. DSIDA: Your Honor, if I understand your  
22 question, I don't think the courts are called upon under  
23 this statute to assess whether or not a State has spent  
24 its money appropriately.

25 QUESTION: What if the State simply replies, as

1 it seems to me it is bound to do in a certain number of  
2 cases, no, we are not going to have a caseworker for every  
3 complaint in 3 days because we haven't got enough money to  
4 pay caseworkers, and we haven't got enough money to do  
5 that because we have to build highways and we don't want  
6 to raise the tax rate and so on.

7 Ultimately, I suppose any State could have a  
8 caseworker in 3 days if it wants to spend money enough.  
9 Why isn't that necessarily implicated?

10 MR. DSIDA: Your Honor, the State has accepted  
11 the obligation imposed by it under title IV-E by accepting  
12 substantial Federal funding --

13 QUESTION: It has accepted an obligation to do  
14 something which is reasonable, but what is reasonable is  
15 in part a decision about the appropriate expenditure of  
16 State funds in relation to the problem, and there doesn't  
17 seem to be any more specific Federal standard to which a  
18 Federal court can look in determining whether that  
19 particular aspect of reasonableness has been satisfied.

20 MR. DSIDA: Your Honor, under this Court's  
21 decision in Wilder, courts would be obligated or  
22 plaintiffs would be under a heavy burden to show that a  
23 particular State's conduct was not reasonable, did not  
24 meet the terms of the statute, so courts wouldn't be  
25 delving into the minutia of the State's administration and

1 the State's spending of the funding.

2 But what this case is about is that the State  
3 has made no efforts and although there may be gray areas,  
4 there may be difficult cases for courts to determine, it's  
5 clear that in this case, the State's failure to make any  
6 efforts to keep these children with their families, and  
7 its failure to make any efforts to return children to  
8 their families was not reasonable.

9 QUESTION: You are asking for more than simply a  
10 determination that nothing is not reasonable. You are  
11 asking for a determination, in effect, of what is  
12 reasonable, assignment in 3 days, whatever.

13 MR. DSIDA: Your Honor, the assignment -- the  
14 remedy crafted by the district court was not the violation  
15 that -- we were not saying that failure to assign  
16 caseworkers is required under the statute. What we alleged  
17 was that defendants were not making reasonable efforts.  
18 Under their system, the caseworker is the linchpin, the  
19 only way the defendants make reasonable efforts, and we  
20 asked the district court to develop a remedy consistent  
21 with the State's reliance on caseworkers --

22 QUESTION: The remedy being, in effect, a plan  
23 for the assignment of caseworkers --

24 MR. DSIDA: Yes, Your Honor.

25 QUESTION: -- and standards determining when

1 they should get assigned.

2 MR. DSIDA: Your Honor, that is in fact what we  
3 asked, but that is the remedy that the district court  
4 choose to use in deference to the State agency which  
5 itself elected to use caseworkers as the means by which  
6 reasonable efforts are made in each case.

7 We were not asking to impose a new structure on  
8 the State, and the district court ultimately deferred --

9 QUESTION: You weren't asking them to order  
10 caseworkers when in fact caseworkers had not otherwise  
11 been thought appropriate. What you are asking them to do  
12 is to determine when and how caseworkers should be used.

13 MR. DSIDA: Your Honor, ultimately the district  
14 court --

15 QUESTION: Isn't that true?

16 MR. DSIDA: Your Honor, we asked the district  
17 court to order the defendants to provide caseworkers, that  
18 is true.

19 QUESTION: Not just to provide caseworkers, to  
20 provide caseworkers subject to certain standards of  
21 assignment, subject to a standard governing the number of  
22 days within which workers must be assigned, isn't that  
23 true?

24 MR. DSIDA: That's correct, Your Honor, and it  
25 was based on extensive testimony and extensive records



1 documenting the importance of caseworkers under DCFS's  
2 system.

3 If the State determines that there is another  
4 means for them to provide reasonable efforts, there is  
5 another avenue for them to adhere to the obligations under  
6 the statute, they can go back in front of the district  
7 court, present their new approach to the court and say,  
8 Your Honor, this is how we --

9 QUESTION: Fair enough. And if they can't and  
10 you in effect are claiming or the Federal court is  
11 claiming that there ought to be a caseworker assigned  
12 within 3 days and the State says no, we can't do it  
13 because we haven't got enough money to pay for  
14 caseworkers, then to go back to my original question,  
15 ultimately you are asking for a determination about the  
16 appropriate expenditure of State money.

17 MR. DSIDA: Your Honor, I do not think that is a  
18 fair characterization of our position here. The Court  
19 does not have to look at how the State is spending the  
20 money, the Court is looking at --

21 QUESTION: Well, look, let's assume -- maybe I  
22 was leaving a term out, let's assume that in fact the  
23 State is correct, that it simply does not have a budget  
24 which would allow for the hiring of enough caseworkers to  
25 satisfy, we will say, the 3-day standard.

1           The question is, should money be appropriated in  
2 a different fashion, isn't that true?

3           MR. DSIDA: Should Federal money be  
4 appropriated?

5           QUESTION: Should State money? I mean, it's a  
6 State/Federal mix, I assume.

7           MR. DSIDA: Your Honor, the State has entered  
8 into a contract with the Federal Government and the  
9 plaintiffs in this case are the ultimate beneficiaries of  
10 that contract.

11          QUESTION: Would you answer my question first  
12 and that is --

13          QUESTION: Mr. Dsida, when a Member of the Court  
14 asks you a question that can be answered by a yes or no,  
15 you should --

16          MR. DSIDA: I apologize.

17          QUESTION: -- answer yes or no and then give  
18 your reasons for answering the way you did.

19          MR. DSIDA: I apologize, Your Honor.  
20 Ultimately, Your Honor, it would require looking at the  
21 State's budget, and it may in this case require the agency  
22 to restructure its budget in such a way to fulfill its  
23 obligations under the injunction.

24          QUESTION: Yes, but may I just interrupt? Is it  
25 clear that the budget is of State money or maybe this is a

1 budget of the Federal program? Does the record tell us  
2 anything about how much of the money that is needed to  
3 buy, to pay for additional caseworkers would come from the  
4 Federal subsidy and how much would come from the State tax  
5 revenues?

6 MR. DSIDA: No, Your Honor, that's not in the  
7 record. But defendants have accepted substantial Federal  
8 funding --

9 QUESTION: Presumably, the purpose of the  
10 funding was to enable the State to comply with this  
11 program.

12 MR. DSIDA: That's correct, Your Honor.

13 QUESTION: So how do we assume there is a need  
14 for the State to spend a single dollar of its own money?  
15 We just don't know.

16 MR. DSIDA: That's correct, Your Honor, and I  
17 don't think the defendants have shown that the State is  
18 under any sort of financial burden which the Court, or  
19 which Justice Souter, you were concerned about.

20 There is nothing in the record which defendants  
21 have presented to show that they are unable to adhere or  
22 comply with the terms of the --

23 QUESTION: That may be. I am in no position to  
24 suggest otherwise there, but let me ask you just one more  
25 question. Are we unable to tell from this record even

1 whether the funds for social workers or the funds for the  
2 administration of the program in general consists of a mix  
3 of State and Federal dollars? Do we not even know that?

4 MR. DSIDA: There is nothing in the record, no,  
5 Your Honor, there is no -- the record doesn't speak to how  
6 the money is divided between the Federal and the State  
7 governments and how it would adhere to this obligation.

8 But ultimately the defendants have accepted  
9 Federal funding under this statute and they concede that  
10 this statute imposes a binding obligation on them.

11 QUESTION: Does the Federal statutory scheme  
12 envision that the Federal Government will fund 100 percent  
13 of the costs or does it assume that it's going to be a  
14 shared cost, State and Federal?

15 MR. DSIDA: Your Honor, the statute envisions  
16 that the costs will be shared --

17 QUESTION: It's shared, it is not?

18 MR. DSIDA: Yes, Your Honor.

19 QUESTION: Exactly.

20 MR. DSIDA: And in fact, section 674 provides an  
21 elaborate funding mechanism to determine how the State is  
22 to be funded, but there is no question about whether or  
23 not defendants are under this obligation to make  
24 reasonable efforts.

25 The sole question is whether or not courts are



1 capable of determining whether or not the State has  
2 violated its obligation in this case.

3 The record makes clear that in this case they  
4 have not. The defendants do not have a plan in effect to  
5 make reasonable efforts to prevent or eliminate the need  
6 for removing these children from their homes.

7 QUESTION: Well, the real question is whether a  
8 deficiency in that regard, if it exists, is one that is to  
9 be remedied by the Secretary's withholding of funds or by  
10 some individual suit under section 1983 or otherwise.

11 MR. DSIDA: Your Honor, this Court has  
12 repeatedly held since Rosado v. Wyman that the Secretary's  
13 ability to cut off funding under a Federal/State  
14 cooperative funding statute does not preclude enforcement  
15 of the statute under section 1983 by individual  
16 plaintiffs, and that is the case here.

17 In fact, the secretary --

18 QUESTION: Yes, but we have also said that in  
19 order to provide a private cause of action under 1983, we  
20 have to find certain things, certain objective standards,  
21 and one thing and another. Isn't that the question before  
22 us?

23 MR. DSIDA: Your Honor, the question is  
24 whether -- that is not the question before the Court. The  
25 question is whether or not courts are competent to enforce

1 this reasonableness standard, and courts enforce  
2 reasonableness standards on a regular basis. It is a  
3 central task of Federal courts.

4 And in fact, in the Wilder case, less than a  
5 year and a half ago, this Court again affirmed that  
6 Federal courts are capable of enforcing reasonableness  
7 standards, even though under that statute Federal courts  
8 would be required to look at, among other things, what  
9 constitutes adequate health care, what constitutes  
10 reasonable access to adequate health care, whether or not  
11 the State's Medicaid rates adequately account for the  
12 particular needs of individual hospitals serving a  
13 disproportionately large number of low income patients.

14 In short, a rather complicated inquiry, but one  
15 which, under this Court's decision in Wilder, the courts  
16 are well-equipped to undertake, and there is no reason to  
17 believe that Federal courts are any less capable of  
18 enforcing the reasonableness inquiry, a requirement set  
19 forth in this statute.

20 In fact, the State court enforcement or the  
21 State court decisions under section 672(a)(1) provide  
22 further evidence that courts generally are capable of  
23 assessing whether or not a State has made reasonable  
24 efforts to keep a family together, and defendants present  
25 no reason to or nothing to distinguish Federal courts'

1 ability to enforce that standard contained in this Federal  
2 statute.

3           Instead, they point only to this section as an  
4 indication that Congress intended to preclude enforcement  
5 under section 1983 of this statute, but that State court  
6 determinations under this section occur only at the time  
7 the State assumes custody of the child. They have no  
8 bearing on children who remain in their homes but are at  
9 risk of being removed when the State is making no efforts  
10 to keep them there.

11           They have no bearing on children who have  
12 already been placed in foster care when the State is  
13 making no efforts to return them to their families. These  
14 determinations under section 672(a)(1) provide no  
15 opportunity for -- to address the sort of systemic  
16 grievances which plaintiffs are seeking to remedy here.

17           In short, this provision pales in comparison to  
18 the express cause of action provided by Congress in the  
19 statutes at issue in Smith v. Robinson or National Sea  
20 Clammers, which this Court found sufficiently  
21 comprehensive to preclude enforcement under section 1983.

22           Just because section 1983 is available, however,  
23 does not mean that courts will be flooded with challenges  
24 to particular casework decisions in individual cases. The  
25 Adoption Assistance and Child Welfare Act, like the Boren

1 amendment, the provision at issue in Wilder, affords  
2 States substantial discretion in how they are to implement  
3 their obligations under the statute.

4 In keeping with Wilder then, plaintiffs will be  
5 under a heavy burden to show that the State's conduct fell  
6 outside of the range permitted by Congress under the  
7 statute.

8 In fact, in the Winston case which we addressed  
9 in our supplemental memorandum, the Court of Appeals for  
10 the Third Circuit showed how this heavy burden and this  
11 substantial discretion will prevent the sort of flood of  
12 litigation which defendants predict from ever occurring.

13 In that case the court first confirmed that the  
14 reasonable efforts requirement created enforceable rights  
15 under section 1983 but then it went on to hold that  
16 Pennsylvania's visitation policies were within the range  
17 of conduct permitted by Congress under the statute.

18 Pennsylvania had in fact exercised appropriate  
19 professional judgment, appropriate discretion in setting  
20 up those visitation policies, and as a result the court  
21 affirmed the judgment of the district court in favor of  
22 the State and county defendants.

23 Beyond that, beyond this heavy burden and the  
24 discretion afforded States, collateral estoppel will also  
25 serve to preclude what in all likelihood would otherwise



1 be the bulk of claims under this statute, namely, parents  
2 challenging the decision to remove a child from the home  
3 in the first instance.

4 QUESTION: Mr. Dsida, I think you may well be  
5 right, that the statute is not as comprehensive as other  
6 ones that we have found whose comprehensiveness precludes  
7 the inferring of any private right. But comprehensiveness  
8 aside, you have here a statute that at the general level  
9 puts the thing in the lap of the secretary. It leaves it  
10 up to the secretary to determine whether a plan is  
11 adequate or not and he can disapprove a plan.

12 MR. DSIDA: That's correct, Your Honor.

13 QUESTION: And there may be a lawsuit available  
14 to set aside his approval of a plan, that's conceivable.

15 MR. DSIDA: Your Honor, I don't believe that  
16 under Heckler v. Chaney we could challenge the secretary's  
17 decision to approve or disapprove a particular State plan.  
18 I don't think we have that remedy available.

19 In fact, the only thing that the secretary does  
20 in enforcing the State's plan is looking at the individual  
21 cases in the State courts and determining whether or not  
22 the State court orders have found that reasonable efforts  
23 have been made.

24 There is no independent assessment of the  
25 State's efforts, either in the individual cases or on a

1 systemic basis. The secretary simply fails to do that,  
2 and in light of that, the secretary's conduct and the  
3 inclusion of the secretary in the remedial scheme doesn't  
4 provide the sort of comprehensive mechanism necessary for  
5 close enforcement of the statute --

6 QUESTION: So the secretary could approve a plan  
7 that is grossly inadequate?

8 MR. DSIDA: Yes, Your Honor, under --

9 QUESTION: What would your remedy be? You have  
10 none?

11 MR. DSIDA: Our remedy is the Federal courts,  
12 Your Honor.

13 QUESTION: Wait, you say you are here enforcing  
14 the secretary's plan.

15 MR. DSIDA: No, Your Honor.

16 QUESTION: You are not here enforcing the  
17 secretary's plan?

18 MR. DSIDA: The State plan includes their  
19 obligation to make reasonable efforts. We are attempting  
20 to enforce the obligation that the State agrees to  
21 undertake, to make reasonable efforts to keep families  
22 together.

23 QUESTION: So you are saying, this is a statute  
24 that does not allow the direct review of the secretary's  
25 disapproval of a plan but somehow achieves the same result

1 through 672(a)? I mean, that is what you are saying. You  
2 are saying if the plan is inadequate you can kick it over.

3 MR. DSIDA: I am sorry. I don't understand Your  
4 Honor's question.

5 QUESTION: Let's assume the secretary approves  
6 an inadequate plan. You say there is no direct action to  
7 stop that?

8 MR. DSIDA: We cannot review the secretary's  
9 decision in that context pursuant to Heckler v. Chaney.

10 QUESTION: However, you can under 672(a) come in  
11 and say what the secretary has said is good enough is not  
12 good enough because the State promised to do not only what  
13 the secretary said was enough, but reasonable efforts.

14 MR. DSIDA: Your Honor, our claim is under  
15 671(a)(15). That is the provision of the statute of that  
16 we are contending defendants failed to adhere to here. The  
17 secretary's determination solely relates to whether or not  
18 the State courts have entered these particular orders at  
19 the time the court takes custody of the children.

20 There is no assessment under the secretary's  
21 approach of the efforts made to return children to their  
22 families, and there is no assessment under the secretary's  
23 approach of efforts made at the time children are in their  
24 homes to keep them in their homes, and independent of  
25 that, Your Honor, independent of the secretary's approach,

1 this Court has held that the secretary's ability to cut  
2 off funding or approve or disapprove a plan does not  
3 provide an indication that Congress intended to foreclose  
4 enforcement of a statute under section 1983, which this  
5 Court has repeatedly held is intended to provide a broad  
6 remedy for violations of Federal rights, privileges and  
7 immunities.

8 That is the case here. Defendants have violated  
9 plaintiffs' rights under the statute to reasonable efforts  
10 to keep them with their families. The Adoption Assistance  
11 and Child Welfare --

12 QUESTION: Mr. Dsida, the secretary has the  
13 power that you are asserting as well, right, under 671(b),  
14 the secretary could cut off funds for failure of the State  
15 to keep up its promises, right?

16 MR. DSIDA: Yes, Your Honor.

17 QUESTION: But he has chosen not to do that.

18 MR. DSIDA: He has chosen not to do that, Your  
19 Honor. But that does not preclude our ability to enforce  
20 the statute under section 1983.

21 The adoption -- Congress enacted this statute to  
22 keep children out of foster care whenever possible and  
23 enforcement of the reasonable efforts requirement is  
24 consistent with that purpose and is required by the  
25 structure, the language and the history of the act.



1           The reasonable efforts requirement is at the  
2 heart of the Adoption Assistance and Child Welfare Act and  
3 consistent with Congress's intent, it must be enforceable.

4           QUESTION: I take it the reason that Heckler v.  
5 Chaney would apply in your view is that there is no  
6 meaningful standard to judge the secretary's actions?

7           MR. DSIDA: No, Your Honor, I don't believe that  
8 is the case. Heckler v. Chaney provides the State, I am  
9 sorry, provides the agency substantial discretion in  
10 determining how to enforce a particular statutory  
11 provision.

12           QUESTION: But the reason there was no action  
13 permitted there was there was no meaningful standard by  
14 which to measure the secretary's actions.

15           MR. DSIDA: Your Honor, if I recall that case,  
16 Your Honor, I think ultimately it turned on whether or not  
17 there are specific standards which the State or which the  
18 secretary is obligated to adhere to in enforcing the  
19 statute.

20           There are no particular guidelines or there is  
21 no flow chart or something to that effect dictating how  
22 the secretary is obligated to review the State's plan.  
23 The secretary does in fact have some discretion in making  
24 those determinations, but there is not -- there is  
25 certainly a means for courts or the secretary to use in

1 reviewing the State's plan, namely, whether or not the  
2 State is providing reasonable efforts.

3 And that is not the case here. The defendants  
4 simply failed to provide any efforts and while there may  
5 be difficult cases under this statute, this case is not  
6 one of them.

7 Thank you.

8 QUESTION: Thank you, Mr. Dsida.

9 Ms. Tchen, you have 3 minutes remaining.

10 REBUTTAL ARGUMENT OF CHRISTINA M. TCHEN

11 ON BEHALF OF THE PETITIONERS

12 MS. TCHEN: Three brief points. In response to  
13 Justice Souter's questions regarding the record and the  
14 allocation of State resources, when the district court  
15 indicated its intent to impose a 3-day across the board  
16 mandatory injunction on the State, the State administrator  
17 over the case assignment process, Mr. Goad, did submit a  
18 supplemental affidavit, it's at the district court record,  
19 item under 96 in which Mr. Goad stated that to comply with  
20 the 3-day across the board injunction which was not what  
21 the State's original plan was with respect to caseworker  
22 assignment, would require the reallocation of resources  
23 from other areas in the department's budget.

24 We were unclear --

25 QUESTION: Would that reallocation involve State

1 money as distinguished from Federal money?

2 MS. TCHEEN: Yes, it would because the statute,  
3 although it's not in the record as a factual matter, the  
4 statute itself in sections 672 and 674 makes specific what  
5 title IV-E reimbursement is available. It is available on  
6 a dollar-for-dollar basis. If the State spends \$1 for  
7 foster care, for maintenance payments, it receives 50  
8 cents back from the Federal Government and there is a  
9 small administrative sharing of the costs as well.

10 QUESTION: Ms. Tchen, I really don't understand  
11 this argument. You don't really think that if the State  
12 comes in and pleads poverty to the secretary and says, we  
13 are a very poor State and therefore, we are going to make  
14 no efforts, for us that is reasonable, we are so poor that  
15 nothing is reasonable.

16 MS. TCHEEN: No, I think -- I am not arguing  
17 that, but I am arguing --

18 QUESTION: So what relevance does that have? I  
19 don't --

20 MS. TCHEEN: What relevance it has is that in  
21 fact in the secretary's regulations, the secretary made  
22 the decision not to implement, not to promulgate a  
23 mandatory regulation that said, States, you must do this,  
24 this and this to comply with reasonable efforts, because  
25 in promulgating that regulation, the secretary said that

1 the difficult decisions of how to allocate scarce  
2 resources and State resources in this area must be left to  
3 the States.

4 What the district court here did was to take  
5 over that decision making for the State and say, I don't  
6 care that you have to take money away from other services,  
7 you are going to spend money to assign caseworkers within  
8 3 days.

9 QUESTION: May I ask this question? Is the  
10 question whether, quote, reasonable efforts, unquote, have  
11 been made a question of Federal law or State law?

12 MS. TCHEN: In the instance, in section 672  
13 where there is individual determinations delegated  
14 specifically by Congress to the States, we believe it is a  
15 matter of the States looking at their individual case law,  
16 how they weigh best interests of the child --

17 QUESTION: Your answer is, as the Chief Justice  
18 said, sometimes you can give a short answer --

19 MS. TCHEN: I think it's the State law --

20 QUESTION: -- so you think you it's a question  
21 of -- the meaning of these words in this Federal statute  
22 is a question of State law?

23 MS. TCHEN: Defers to the States. It defers to  
24 the States in this area --

25 QUESTION: No, not just deference, ultimately.



1 MS. TCHEN: Ultimately, section 672, we believe,  
2 gives that decision to the States.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Tchen.

5 The case is submitted.

6 (Whereupon, at 11:01 a.m., the case in the  
7 above-entitled matter was submitted.)  
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## CERTIFICATION

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

NO. 90-1488 - SUE SUTER, ET AL., Petitioners V. ARTIST M., ET AL.

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

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Michelle Suter

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