SUPREME COURT OF THE UNITED STATES

No. 90–1488

SUE SUTER, ET AL., PETITIONERS *v.*
ARTIST M. ET AL.

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

[March 25, 1992]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

The Adoption Assistance and Child Welfare Act of 1980 (Adoption Act) conditions federal funding for state child welfare, foster care, and adoption programs upon, *inter alia*, the State's express commitment to make, ``in each case, reasonable efforts'' to prevent the need for removing children from their homes and ``reasonable efforts,'' where removal has occurred, to reunify the family. §671(a)(15). The Court holds today that the plaintiff children in this case may not enforce the State's commitment in federal court either under 42 U.S.C. §1983 or under the Act itself.

In my view, the Court's conclusion is plainly inconsistent with this Court's decision just two Terms ago in *Wilder* v. *Virginia Hospital Assn.*, 496 U.S. 498 (1990), in which we found enforceable under §1983 a functionally identical provision of the Medicaid Act requiring ``reasonable'' reimbursements to health care providers. More troubling still, the Court reaches its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under §1983. I cannot acquiesce in this unexplained disregard for established law. Accordingly, I dissent.

Section 1983 provides a cause of action for the ``deprivation of any rights, privileges, or immunities, secured by the Constitution and laws'' of the United States. We recognized in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that §1983 provides a cause of action for violations of federal statutes, not just the Constitution. Since *Thiboutot*, we have recognized two general exceptions to this rule. First, no cause of action will lie where the statute in question does not ```create enforceable rights, privileges, or immunities within the meaning of §1983.''' *Wilder*, 496 U.S., at 508 (quoting *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987)). Second, §1983 is unavailable where ``Congress has foreclosed enforcement of the statute in the enactment itself.'' 496 U.S., at 508.

In determining the scope of the first exception—whether a federal statute creates an ``enforceable right''—the Court has developed and repeatedly applied a three-part test. We have asked (1) whether the statutory provision at issue ```was intend[ed] to benefit the putative plaintiff.''' *Id.*, at 509 (quoting *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106 (1989)). If so, then the provision creates an enforceable right unless (2) the provision ``reflects merely a `congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit,'' 496 U.S., at 509 (quoting *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 19 (1981)), or unless (3) the plaintiff's interest is so ```vague and amorphous''' as to be ```beyond the competence of the judiciary to enforce.''' 496 U.S., at 509 (quoting *Golden State*, 493 U.S., at 106, and *Wright*, 479 U.S., at 431–432). See also *Dennis* v. *Higgins*, ___ U.S. ___, ___-___ (1991) (quoting and applying the three-part test as stated in *Golden State*). The Court today has little difficulty

concluding that the plaintiff children in this case have no enforceable rights, because it does not mention—much less apply—this firmly established analytic framework.

In *Wilder*, we held that under the above three-part test, the Boren Amendment to the Medicaid Act creates an enforceable right. As does the Adoption Act, the Medicaid Act provides federal funding for state programs that meet certain federal standards and requires participating States to file a plan with the Secretary of Health and Human Services. Most relevant here, the Medicaid Act, like the Adoption Act, requires that the State undertake a ``reasonableness'' commitment in its plan. With respect to the rate at which providers are to be reimbursed, the Boren Amendment requires that

> ``a State plan for medical assistance must
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> . . . . .
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> ``provide . . . for payment . . . [of services] provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State. . .) which the State finds, and makes assurances satisfactory to the Secretary, are *reasonable and adequate* to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have *reasonable* access . . . to inpatient hospital services of *adequate* quality.'' 42 U.S.C. §1396a(a)13(A) (emphasis supplied).

In *Wilder*, we had no difficulty concluding that the reimbursement provision of the Boren Amendment ``was intend[ed] to benefit'' the plaintiff providers of Medicaid services. 496 U.S., at 510. We also concluded that the second part of the test was

satisfied. The amendment, we held, does not simply express a ``congressional preference'' for reasonable and adequate reimbursement rates; rather, it imposes a ``binding obligation'' on the State to establish and maintain such rates. *Id.*, at 512. In so concluding, we emphasized two features of the Medicaid reimbursement scheme. First, we observed that the language of the provision is ``cast in mandatory rather than precatory terms,'' stating that the plan ``*must*'' provide for reasonable and adequate reimbursement. *Ibid.* Second, we noted that the text of the statute expressly conditions federal funding on state compliance with the amendment and requires the Secretary to withhold funds from noncomplying States. *Ibid.* In light of these features of the Medicaid Act, we rejected the argument, advanced by the defendant state officials and by the United States as *amicus curiae*, that the only enforceable state obligation is the obligation to file a plan with the Secretary, to find that its rates are reasonable and adequate, and to make assurances to that effect in the plan. *Id.*, at 512–515. Rather, we concluded, participating States are required actually to provide reasonable and adequate rates, not just profess to the Secretary that they have done so. *Ibid.*

Finally, we rejected the State's argument that Medicaid providers' right to ``reasonable and adequate'' reimbursement is ``too vague and amorphous'' for judicial enforcement. We acknowledged that the State has ``substantial discretion'' in choosing among various methods of calculating reimbursement rates. *Id.*, at 519; see also *id.*, at 505–508. A State's discretion in determining how to calculate what rates are ``reasonable and adequate,'' we concluded, ``may affect the standard under which a court reviews'' the state's reimbursement plan, but it does not make the right to reasonable reimbursement judicially unenforceable. *Id.*, at 519.

These principles, as we applied them in *Wilder*, require the conclusion that the Adoption Act's ``reasonable efforts'' clause[1] establishes a right enforceable under §1983. Each of the three elements of our three-part test is satisfied. First, and most obvious, the plaintiff children in this case are clearly the intended beneficiaries of the requirement that the State make ``reasonable efforts'' to prevent unnecessary removal and to reunify temporarily removed children with their families.

Second, the ``reasonable efforts'' clause imposes a binding obligation on the State because it is ``cast in mandatory rather than precatory terms,'' providing that a participating State ``*shall* have a plan approved by the Secretary which . . . *shall be in effect* in all political subdivisions of the State, and, if administered by them, *mandatory* upon them.'' Further, the statute requires the plan to ``provid[e] that, in each case, reasonable efforts *will be made*.'' Moreover, as in *Wilder*, the statutory text expressly conditions federal funding on state compliance with the plan requirement and requires the Secretary to reduce payments to a State, if ``in the administration of [the State's] plan there is a substantial failure to comply with the provisions of the plan.'' 42 U.S.C. §671(b). Under our holding in *Wilder*, these

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[1]``In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—. . . (3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, mandatory upon them; [and] . . . (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.'' 42 U.S.C. §671(a).

provisions of the Adoption Act impose a binding obligation on the State. Indeed, neither the petitioner state officials nor *amicus* United States dispute this point. Brief for Petitioners 17; Reply Brief for Petitioners 3, n. 2; Brief for United States as *Amicus Curiae* 13–14.

What petitioners and *amicus* United States do dispute is whether the third element of the *Golden State-Wilder-Dennis* test has been satisfied: They argue that the ``reasonable efforts'' clause of the Adoption Act is too ``vague and amorphous'' to be judicially enforced. Aware that *Wilder* enforced an apparently similar ``reasonableness'' clause, they argue that *this* clause is categorically different.

According to petitioners, the Court would not have found the Boren Amendment's reasonableness clause enforceable had the statute not provided an ``objective benchmark'' against which ``reasonable and adequate'' reimbursement rates could be measured. Reasonable and adequate rates, the Boren Amendment provides, are those that meet the costs that would be incurred by ``an `efficiently and economically operated facilit[y]' providing care in compliance with federal and state standards while at the same time ensuring `reasonable access' to eligible participants.'' *Wilder*, 496 U.S., at 519 (quoting 42 U.S.C. §1396a(a)(13)(A)). Petitioners claim that, given this benchmark, ``reasonable and adequate'' rates can be ascertained by ``*monetary* calculations easily determined based on prevailing rates in the market.'' Brief for Petitioners 21. By contrast, they observe, there is ``no market for `reasonable efforts' to keep or return a child home, and such `reasonable efforts' cannot be calculated or quantified.'' *Ibid.*

Petitioners misunderstand the sense in which the ``benchmark'' in *Wilder* is ``objective.'' The Boren Amendment does not simply define ``reasonable and adequate'' rates as market rates. Rather, it defines a

``reasonable and adequate'' rate by referring to what *would* be provided by a *hypothetical* facility—one that operates ``efficiently and economically,'' ``compli[es] with federal and state standards,'' and ``ensur[es] `reasonable access' to eligible participants.'' Whether particular existing facilities meet those criteria is not a purely empirical judgment that requires only simple ``monetary calculations.'' Indeed, the Boren Amendment's specification of the words ``reasonable and adequate'' ultimately refers us to a *second* reasonableness clause: The ``benchmark'' facility, we are told, is one that ``ensure[s] `*reasonable access*' to eligible participants.'' This second reasonableness clause is left undefined. Contrary to petitioners' suggestions, then, the ``reasonable and adequate'' rates provision of the Boren Amendment is not ``objective'' in the sense of being mechanically measurable. The fact that this Court found the provision judicially enforceable demonstrates that an asserted right is not ``vague and amorphous'' simply because it cannot be easily ``calculated or quantified.''

Petitioners also argue that the right to ``reasonable efforts'' is ``vague and amorphous'' because of substantial disagreement in the child-welfare community concerning appropriate strategies. Furthermore, they contend, because the choice of a particular strategy in a particular case necessarily will depend upon the facts of that case, a court-enforced right to reasonable efforts either will homogenize very different situations or else will fragment into a plurality of ``rights'' that vary from State to State. For both of these reasons, petitioners contend, Congress left the question of what efforts are ``reasonable'' to state juvenile courts, the recognized experts in such matters.

Here again, comparison with *Wilder* is instructive. The Court noted the lack of consensus concerning which of various possible methods of calculating

reimbursable costs would best promote efficient operation of health care facilities. See *Wilder*, 496 U.S., at 506–507. The Court further noted that Congress chose a standard that leaves the States considerable autonomy in selecting the methods they will use to determine which reimbursement rates are ``reasonable and adequate.'' *Id.*, at 506–508, 515. The result, of course, is that the ``content'' of the federal right to reasonable and adequate rates—the method of calculating reimbursement and the chosen rate—varies from State to State. And although federal judges are hardly expert either in selecting methods of Medicaid cost reimbursement or in determining whether particular rates are ``reasonable and adequate,'' neither the majority nor the dissent found that the right to reasonable and adequate reimbursement was so vague and amorphous as to be ``beyond the competence of the judiciary to enforce.'' See *id.*, at 519–520; *id.*, at 524 (REHNQUIST, C.J., dissenting). State flexibility in determining what is ``reasonable,'' we held,

> ``may affect the standard under which a court reviews whether the rates comply with the amendment, but it does not render the amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act.'' *Id.*, at 520.

The same principles apply here. There may be a ``range'' of ``efforts'' to prevent unnecessary removals or secure beneficial reunifications that are ``reasonable.'' *Id.*, at 520. It may also be that a court, in reviewing a State's strategies of compliance with the ``reasonable efforts'' clause, would owe substantial deference to the State's choice of strategies. That does not mean, however, that *no* State's efforts could *ever* be deemed ``unreasonable.'' As in *Wilder*, the asserted right in

this case is simply not inherently ``beyond the competence of the judiciary to enforce.'' *Ibid.*

Petitioners' argument that the ``reasonable efforts'' clause of the Adoption Act is so vague and amorphous as to be unenforceable assumes that in *Wright* and *Wilder* the Court was working at the outer limits of what is judicially cognizable: Any deviation from *Wright* or *Wilder*, petitioners imply, would go beyond the bounds of judicial competence. There is absolutely nothing to indicate that this is so. See *Wilder*, 496 U.S., at 520 (inquiry into reasonableness of reimbursement rates is ``*well within* the competence of the Judiciary'') (emphasis supplied). Federal courts, in innumerable cases, have routinely enforced reasonableness clauses in federal statutes. See, *e.g., Virginia R. Co.* v. *System Fed'n No. 40*, 300 U.S. 515 (1937) (enforcing ``every reasonable effort'' provision of the Railway Labor Act and noting that ``whether action taken or omitted is . . . reasonable [is an] everyday subjec[t] of inquiry by courts in framing and enforcing their decrees''). Petitioners have not shown that the Adoption Act's reasonableness clause is exceptional in this respect.

The Court does not explain why the settled three-part test for determining the enforceability of an asserted right is not applied in this case. Moreover, the reasons the Court does offer to support its conclusion—that the Adoption Act's ``reasonable efforts'' clause creates no enforceable right—were raised and rejected in *Wilder*.

The Court acknowledges that the Adoption Act is ``mandatory in its terms.'' *Ante*, at 9. It adopts, however, a narrow understanding of what is ``mandatory.'' It reasons that the language of §671(a), which provides that ``[i]n order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary,'' requires participating States only to submit and receive

approval for a plan that contains the features listed in §§671(a)(1) to (16). According to the Court, the beneficiaries of the Act enjoy at most a procedural right under §671(a)—the right to require a participating State to prepare and file a plan—not a substantive right to require the State to live up to the commitments stated in that plan, such as the commitment to make ``reasonable efforts'' to prevent unnecessary removals and secure beneficial reunifications of families. Since the State of Illinois has filed a plan that the Secretary has approved, the Court reasons, the State has violated no right enforceable in federal court.

The Court's reasoning should sound familiar: The state officials in *Wilder* made exactly the same argument, and this Court rejected it. In *Wilder*, we noted that the Medicaid Act expressly conditions federal funding on state compliance with the provisions of an approved plan, and that the Secretary is required to withhold payments from noncomplying States. See *Wilder*, 496 U.S., at 512 (citing 42 U.S.C. §1396c).[2] In substantially identical language, the Adoption Act, too, requires States to live up to the commitments stated in their plans.[3] To be sure, the Court's reasoning is consistent with the

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[2]``If the Secretary . . . finds . . . that in the administration of the plan there is a failure to comply substantially with any . . . provision [required to be included in the plan,] the Secretary shall notify [the] State agency that further payments will not be made . . . .'' 42 U.S.C. §1396c.

[3]``[I]n any case in which the Secretary finds . . . there is a substantial failure to comply with the provisions of [an approved] plan, the Secretary shall notify the State that further payments will not be made . . ., or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate . . . .'' 42 U.S.C. §671(b).

dissent in *Wilder*. See *id.*, at 524, 527–528 (REHNQUIST, C.J., dissenting). But it flatly contradicts what the Court *held* in that case.

The Court attempts to fend off this conclusion in two ways, neither of them persuasive. First, the Court seeks to distinguish *Wilder*, asserting that our conclusion—that the Boren Amendment gave the health-care providers a substantive right to reasonable and adequate reimbursement—``relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates.'' *Ante*, at 10 (citing *Wilder*, 496 U.S., at 519, n. 17). By contrast, the Court continues, neither the provisions of the Adoption Act nor the implementing regulations offer any guidance as to how the term ``reasonable efforts'' should be interpreted.

Even assuming that it is accurate to call the statute and regulations involved in that case ``detailed,''[4] the

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[4]Petitioners suggest a sharp contrast between the implementing regulations considered in *Wilder* and the implementing regulation for the Adoption Act ``reasonable efforts'' provision: The former, they say, require the State to consider certain factors, but the latter merely provides ``a laundry list of services the States *may* provide.'' Brief for Petitioners 34 (citing 45 CFR §1357.15(e) (1991)). Further, petitioners emphasize HHS's remark during rulemaking that States must retain flexibility in administering the Adoption Act's ``reasonable efforts'' requirement. Brief for Petitioners 34–35.

Neither of these factors marks a significant difference between *Wilder* and the present case. The difference between *requiring* States to *consider* certain factors, as in *Wilder*, and *permitting* States to *provide* certain listed services, as in the present case, is hardly dramatic. As for the second asserted difference, *Wilder* itself emphasized that States must

Court has misread *Wilder*. The Court there referred to the relative specificity of the statute and regulations not to demonstrate that the health-care providers enjoyed a substantive right to reasonable and adequate rates—we had already concluded that the State was under a binding obligation to adopt such rates, see *Wilder*, 496 U.S., at 514–515—but only to reinforce our conclusion that the providers' interest was not so ``vague and amorphous'' as to be ``beyond the competence of judicial enforcement.'' See 496 U.S., at 519, n. 17. Under our three-part test, the Court would not have inquired whether that interest was ``vague and amorphous'' unless it had *already* concluded that the State was required to do more than simply file a paper plan that lists the appropriate factors.

Second, the Court emphasizes: ``Other sections of the [Adoption] Act provide enforcement mechanisms for the reasonable efforts clause of §671(a)(15).'' *Ante*, at 12. Such ``mechanisms'' include the Secretary's power to cut off or reduce funds for noncompliance with the State plan, and the requirement of a state judicial finding that ``reasonable efforts'' have been made before federal funds may be used to reimburse foster care payments for a child involuntarily removed.

The Court has apparently forgotten that ever since *Rosado* v. *Wyman*, 397 U.S. 397 (1970), the power of the Secretary to enforce congressional spending conditions by cutting off funds has not prevented the federal courts from enforcing those same conditions. See *id.*, at 420, 422–423. Indeed, we reasoned in *Wilder* that a similar ``cutoff'' provision *supports* the conclusion that the Medicaid Act creates an enforceable right, because it puts the State ``on notice'' that it may not simply adopt the

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retain substantial discretion in calculating ``reasonable and adequate'' reimbursement rates.

reimbursement rates of its choosing. See *Wilder*, 496 U.S., at 514. As for the Court's contention that §671(a)(15) should be enforced through individual removal determinations in state juvenile court, the availability of a state judicial forum can hardly deprive a §1983 plaintiff of a federal forum. *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). The Court's reliance on enforcement mechanisms other than §1983, therefore, does not support its conclusion that the ``reasonable efforts'' clause of the Adoption Act creates no enforceable right.

The Court, without acknowledgement, has departed from our precedents in yet another way. In our prior cases, the existence of other enforcement mechanisms has been relevant not to the question whether the statute at issue creates an enforceable right, but to whether the second exception to §1983 enforcement applies—whether, that is, ```Congress has foreclosed enforcement of the statute in the enactment itself.''' *Wilder*, 496 U.S., at 508 (quoting *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987)). In determining whether this second exception to §1983 enforcement applies, we have required the defendant not merely to point to the existence of alternative means of enforcement, but to demonstrate ``by express provision or other specific evidence from the statute itself that Congress intended to foreclose [§1983] enforcement.'' 496 U.S., at 520–521. We have said repeatedly that we will not ``lightly'' conclude that Congress has so intended. *Id.*, at 520 (quoting *Wright*, 479 U.S., at 423–424, and *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984)). In only two instances, where we concluded that ``the statute itself provides a comprehensive remedial scheme which leaves no room for additional private remedies under §1983,'' have we held that Congress has intended to foreclose §1983 enforcement. See *Smith* v. *Robinson*, 468 U.S. 992 (1984) (``carefully tailored'' mixed system of

enforcement beginning with local administrative review and culminating in a right to judicial review); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U.S. 1 (1981) (enforcement scheme authorizing EPA to bring civil suits, providing for criminal penalties, and including two citizen-suit provisions).

The Court does not find these demanding criteria satisfied here. See *ante*, at 12 and n. 11. Instead, it simply circumvents them altogether: The Court holds that even if the funding cutoff provision in the Adoption Act is not an ``express provision'' that ``provides a comprehensive remedial scheme'' leaving ``no room for additional private remedies under §1983,'' *Wilder*, 496 U.S., at 520, that provision nevertheless precludes §1983 enforcement. In so holding, the Court has inverted the established presumption that a private remedy is available under §1983 unless ``Congress has affirmatively withdrawn the remedy.'' 496 U.S., at 509, n. 9 (citing *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106–107 (1989), and *Wright*, 479 U.S., at 423–424).

In sum, the Court has failed, without explanation, to apply the framework our precedents have consistently deemed applicable; it has sought to support its conclusion by resurrecting arguments decisively rejected less than two years ago in *Wilder*; and it has contravened 22 years of precedent by suggesting that the existence of other ``enforcement mechanisms'' precludes §1983 enforcement. At least for this case, it has changed the rules of the game without offering even minimal justification, and it has failed even to acknowledge that it is doing anything more extraordinary than ``interpret[ing]'' the Adoption Act ``by its own terms.'' *Ante*, at 10, n. 8. Readers of the Court's opinion will not be misled by this hollow assurance. And, after all, we are dealing here with children. I would affirm the judgment of the

Court of Appeals.[5] I dissent.

[5]Since I conclude that respondents have a cause of action under §1983, I need not reach the question, decided in the affirmative by the Court of Appeals, whether petitioners may pursue a private action arising directly under the Adoption Act.