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02-1667 Tennessee v. Lane

Ruling Below: (6th Cir., 315 F.3d 680, 13 A.D. Cas. 1665)

Title II of Americans with Disabilities Act constitutes valid abrogation of states' 11th Amendment immunity from suit by private parties alleging due process violations, in light of (i) evidence establishing that physical barriers in public buildings, including courthouses and courtrooms, have had effect of denying disabled people opportunity to exercise fundamental rights guaranteed by due process clause and (ii) Congress's authority under Section 5 of 14th Amendment to enact legislation to vindicate such rights; 11th Amendment does, however, bar suit against state by private parties under Title II of ADA based on alleged equal protection violations; action under Title II by disabled individuals alleging that inaccessibility of physical facilities barred access to state courts should not be dismissed, because factual record is not yet sufficiently developed to permit determination of whether due process violations are alleged.

Question Presented: Does Title II of ADA exceed Congress's authority under Section 5 of 14th Amendment, thereby failing validly to abrogate states' 11th Amendment immunity from private damage claims?

**George LANE; Beverly Jones, Plaintiffs-Appellees,
United States of America, Intervenor,
v.
State of TENNESSEE, Defendant-Appellant,
Polk County, Tennessee, et al., Defendants.**

United States Court of Appeals
For the Sixth Circuit

Decided January 10, 2000

BOYCE F. MARTIN, JR., Chief Circuit
Judge.

This Court initially issued an opinion in this case on July 16, 2002. We held that Lane and Jones stated claims founded in due process violations, and, under *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.2002) (en banc) *cert. denied*, 123 S.Ct. 72, 154 L.Ed.2d 15 (2002), Tennessee and the other state defendants were not immune from Lane and Jones's damages claims under Title II of the Americans with Disabilities Act. On

September 20, we granted the State of Tennessee's motion for panel rehearing. All parties submitted supplemental briefs. Tennessee argued that Lane and Jones's claims are not based on due process violations and that Tennessee therefore enjoys Eleventh Amendment immunity from suit on those claims. On rehearing and for the following reasons, we **AFFIRM** the district court's denial of Tennessee's motion to dismiss and **REMAND** this case for further proceedings.

In *Popovich*, we considered the validity of the abrogation of a state's immunity to suit by private parties under Title II of the Americans with Disabilities Act. Guiding our hand through our evaluation was the

Supreme Court's recent decision in *University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), in which the Supreme Court affirmed that Section Five of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment immunity of the states to private damage suits. We held that the Eleventh Amendment barred claims under Title II of the Americans with Disabilities Act based on equal protection violations but Congress could abrogate Eleventh Amendment immunity as to due process claims.

Among the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts. For criminal defendants like Lane, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Parties in civil litigation have an analogous due process right to be present in the courtroom and to meaningfully participate in the process unless their exclusion furthers important governmental interests. See *Popovich*, 276 F.3d at 813-14; *Helminski v. Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981, 106 S.Ct. 386, 88 L.Ed.2d 339 (1985). Further, those who fail to appear in court may not be sanctioned for failing to appear until they have been accorded due process. *Groppi v. Leslie*, 404 U.S. 496, 502, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972). These guarantees are protective of equal justice

and fair treatment before the courts.

The evidence before Congress when it enacted Title II of the Americans with Disabilities Act established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause. In *Popovich*, we found that Title II was enacted "to guarantee meaningful enforcement" of the constitutional rights of the disabled. 276 F.3d at 815-16. In doing so, Congress may require states to consider the nature of the constitutional right at issue, the often relatively small cost of compliance, and the effect of failure to accommodate those with disabilities. In the context of the case before us, Congress could ask states to weigh the fundamental importance of access to the courts to our justice system, that the perpetuation of the current physical barriers force people with disabilities to either forgo their right to be present in court or be carried into court, and that the remedy is often inexpensive and simple.

Based on the record before Congress in considering the Americans with Disabilities legislation, it was reasonable for Congress to conclude that it needed to enact legislation to prevent states from unduly burdening constitutional rights, including the right of access to the courts. States have myriad ways to unburden these rights, from the major step of renovating facilities to the relatively minor step of assigning aides to assist in access to the facilities. The record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes. Title II ensures that the refusal

to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability to accommodate, not on inconvenience or unfounded concerns about costs.

This statutory protection is a preventive measure commensurate to the gravity of precluding access to the courts by those with disabilities. In addition, these requirements are carefully tailored to the unique features of disability discrimination that persists in public services. A simple ban on discrimination against those with disabilities lacks teeth. The continuing legacy of discrimination is too powerful. Title II affirmatively promotes integration of those with disabilities.

Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee. Lane alleges that he has been denied the benefit of access to the courts. Jones similarly alleges that she has been excluded from courthouses and court proceedings by an inability to access the physical facilities. Tennessee responds that the violations alleged are not due process violations. The difficult questions presented by this case cannot be clarified absent a factual record. Because in *Popovich* we held that Title II is an appropriate means of enforcing the due process rights of individuals, and because this case came to us before any development of the facts, we hold that the district court appropriately denied Tennessee's motion to dismiss this action.

We AFFIRM the decision of the district court and REMAND for further proceedings consistent with this opinion.

Justices to Hear Case on Whether the Disabled Can Sue States on Access to Courtrooms

The New York Times

June 24, 2003

Linda Greenhouse

A state claim of immunity from suit under the central provision of the Americans With Disabilities Act will provide the next Supreme Court term with a focus for the court's continuing debate over the balance of state and federal power.

The justices agreed today to hear Tennessee's appeal from a ruling that left the state open to a lawsuit by two residents who use wheelchairs and who were unable to gain access to state courtrooms. One plaintiff, George Lane, crawled up two flights of stairs for his arraignment on misdemeanor traffic charges, and was later arrested for "failure to appear" and jailed when he refused to repeat the ordeal when it came time for a pretrial hearing.

The other plaintiff, Beverly Jones, is a certified court reporter who needs access to courtrooms to do her job. She was unable to enter four county courthouses where lawyers had hired her to record the proceedings. Her legal complaint listed 23 Tennessee counties with inaccessible courthouses despite the requirement of Title II of the Americans With Disabilities Act that public "services, programs or activities" be made accessible to people with disabilities.

Two years ago, in *University of Alabama v. Garrett*, the court examined a separate provision of the Americans With Disabilities Act that protects state employees from discrimination on account of disability. The

court held that states are immune from suit by their employees under this provision. The access provision raises different constitutional issues, however, and there has been a widening split among the federal appeals courts over how to analyze state immunity claims under that provision. Of the 12 appellate circuits, five have ruled for the states, three for disabled plaintiffs at least under some circumstances, and the remaining four have pending cases.

In the case accepted today, *Tennessee v. Lane*, No. 02-1667, the United States Court of Appeals for the Sixth Circuit ruled that while the *Garrett* decision meant that states could not be sued for violating the equal protection rights of people with disabilities, states remained liable for suit for violating rights protected by the Constitution's guarantee of due process. Access to court was such a right, the appeals court held.

The justices' decision to accept the case was almost a foregone conclusion. Three times before, including this term, the court had accepted a case that raised the same question. But in two cases, the parties dismissed the case before the court could rule, and in the other, the justices failed to resolve the question.

From the point of view of disability rights advocates, none of the other cases provided as sympathetic and compelling a set of facts as this one. This time, lawyers for the two

plaintiffs urged the court to hear the state's appeal, as did lawyers for the federal government, which had intervened on the plaintiffs' side in the lower courts.

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Don't shield states from ADA responsibilities

The Tennessean-Nashville

June 29, 2003

EDITORIAL

Does the Americans with Disabilities Act give individuals the right to sue states? That is the central issue in a case from Tennessee that the U.S. Supreme Court will decide next session.

Judging from the court's recent decisions concerning other types of discrimination, the plaintiffs will have an uphill battle. Over the last few years, the Supreme Court has shielded state governments from many types of civil rights lawsuits, including suits claiming age discrimination and disability discrimination. In those instances, the court has held that states enjoy sovereign immunity from lawsuits seeking damages. Collectively, those decisions have substantially weakened anti-discrimination laws as they apply to employees in the public sector.

Yet if advocates for people with disabilities are discouraged by court precedent, they should be encouraged by the strength of the case the justices will hear. The case involves two paraplegics who want to sue the state of Tennessee for failing to comply with the ADA. One plaintiff, Beverly Jones, has relied on a wheelchair since an auto accident. Jones earns her living as a court reporter, but since many courthouses around Tennessee aren't wheelchair accessible, her ability to do her work has been seriously impeded.

The other plaintiff is George Lane, who also has used a wheelchair since a car accident.

Lane was summoned to court on a misdemeanor charge that claimed he was driving on a revoked license on the day of his accident. The courthouse had no elevator, so Lane had to crawl up the steps. When he was summoned for a second appearance, Lane refused to crawl, and instead sent word to the judge that he was downstairs. He was still arrested for failure to appear in court.

Not being physically able to do one's work, and not being physically able to defend oneself in court discrimination doesn't get much more troubling than that. If a private business had been responsible for the discrimination against Jones and Lane, it would have had to answer to a court of law. Surely the Supreme Court will determine that when discrimination is so blatant that one's constitutional rights are violated, that person deserves a day in court.

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STATE IMMUNITY AND THE AMERICANS WITH DISABILITIES ACT
AFTER *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V.*
GARRETT

University of Colorado Law Review

Summer 2003

Ryan Gill

[Excerpt; some footnotes and citations omitted.]

Introduction

The ADA was intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹ *** Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."² The Court in *Garrett* addressed only Title I of the ADA. As a result, it has yet to be determined whether private suits for money damages will continue to be available to private parties suing the states under Title II. Moreover, because *Garrett* addressed only private suits for monetary damages against the states under Title I, there is also some question as to what alternative remedies remain available for private plaintiffs to remedy state discrimination under both Titles I and II of the ADA.

¹ 42 U.S.C. § 12101(b)(1).

² § 12132.

I. Background Information on the ADA and State Sovereign Immunity

State sovereign immunity and federal legislation that purports to abrogate that immunity involves the interplay of three areas of law: the legislation itself, the Eleventh Amendment, and the Fourteenth Amendment. Some background information on the ADA and the components of the sovereign immunity doctrine is necessary for this discussion. ***

A. The Americans with Disabilities Act

With the passage of the ADA, Congress intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." In order to accomplish these goals, Congress invoked two of its constitutionally granted legislative powers to enact the ADA: Section Five of the Fourteenth Amendment and the Commerce Clause. The purpose of the Act is, in part, "to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."

Under the ADA's statutory scheme, a "disability" can be defined in one of three ways: first, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" second, as "a record of such an impairment;" and third, as the perception of "having such an impairment." The Act not only prohibits invidious discrimination against disabled persons but also mandates that employers provide "reasonable accommodations" for a "qualified individual with a disability" unless it can be demonstrated that such an accommodation would cause undue hardship for the employer. Failure to make such reasonable accommodations in the absence of undue hardship constitutes actionable discrimination under the ADA.

*** Title II is broader than Title I in that it applies to all public places and public services and applies to all disabled people, not just disabled employees. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Both Titles I and II allow for money damages to be sought by private plaintiffs against a covered entity that violates the ADA. *** [H]owever, under *Garrett* the private monetary remedies permitted by Title I were found unconstitutional when challenged by the States. Moreover, under various federal circuit courts' of appeals decisions that followed *Garrett*, the monetary remedies permitted by Title II have been successfully resisted by states that argue such awards violate their sovereign immunity guaranteed by the Eleventh Amendment.

B. The Eleventh Amendment

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." ***

Although the plain text of the Eleventh Amendment only bars suits against a state by citizens of a different state, the Supreme Court in *Hans v. Louisiana*³ took the concept of state sovereign immunity a step further. There, the Court held that despite its explicit language, the Eleventh Amendment granted immunity to the states against suits from their own citizens. The Court in *Hans* stated that because state immunity existed prior to the passage of the Eleventh Amendment it was not limited by the language of that amendment.

Despite *Hans*, Congress's ability to permit private suits for damages against non-consenting states in federal statutes pursuant to its Commerce Clause powers largely went unquestioned during the 106 years between *Hans* and *Seminole Tribe v. Florida*.⁴ The Supreme Court's modern state sovereignty jurisprudence stems from a constitutional test derived from a line of cases beginning with *Seminole Tribe*.

In *Seminole Tribe*, the Court overruled precedent and held that Congress could not abrogate states' Eleventh Amendment sovereign immunity through its Article I Commerce Clause powers. To reach this result, the Court set forth a two-tiered analysis to evaluate a statute that purports to abrogate the states' Eleventh Amendment immunity. Under the analysis, the Court

³ 134 U.S. 1 (1890).

⁴ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

must first determine whether Congress "unequivocally expressed its intent to abrogate the immunity."⁵ Second, the Court must determine whether Congress acted "pursuant to a valid exercise of power."⁶

Applying this test to the statute in *Seminole Tribe*, the Court stated that Congress had clearly expressed its intent to abrogate state sovereign immunity, but had not acted pursuant to a valid exercise of power. To reach that decision, the Court held that Congress does not have the authority under the Commerce Clause to abrogate state sovereign immunity from private suits in federal courts because such an exercise would amount to an impermissible expansion of the courts' Article III jurisdiction. Importantly, Article III sets forth the entire catalog of permissible federal court jurisdiction and the bounds of Article III can only be expanded by the Fourteenth Amendment. This results because the Fourteenth Amendment was ratified after the Eleventh Amendment and therefore "expand[ed] federal power at the expense of state autonomy" thereby "fundamentally alter[ing] the balance of state and federal power struck by the Constitution."

After *Seminole Tribe*, the only way Congress can abrogate state sovereign immunity is through valid legislation passed under its legislative powers found in Section Five of the Fourteenth Amendment. As will be seen below, this means Congress can only provide a private damage remedy against the states in response to a pattern and

history of state behavior that violates a person's Fourteenth Amendment guarantees.

V. *The ADA after Garrett*

In *Garrett*, the United States Supreme Court had the chance to clear up a very complicated area of law, yet chose to address only Title I, rather than both Titles I and II. The Court opted only to address Title I of the ADA, stating in footnote 1 that it was "not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation."⁷ This footnote in the Court's opinion leaves some question as to whether there are fundamental differences between the remedies of the two sections that would merit a different outcome. Thus, the Court left open the question whether the private monetary remedies available under Title II are still valid.

A. *Differences between the Remedies Afforded under Titles I and II of the ADA*

Importantly, the *Garrett* court noted that the remedial scheme provided pursuant to Title II is different than the remedial scheme provided under Title I.⁸ Because the Court

⁵ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

⁶ *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)); see also *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (holding that Congress must make its intention to abrogate the states' Eleventh Amendment immunity unmistakably clear in the language of the statute).

⁷ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 n.1 (2001).

⁸ The *Garrett* Court noted in footnote 1 that the remedial provisions of Titles I and II are somewhat different. *Id.* Specifically, Title I in 42 U.S.C. § 12117(a) states that:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

declined to address Title II in *Garrett*, in part based on the different remedial provisions, these differences may well be important in an analysis of continued validity of the private remedy under Title II.

Title II's remedial scheme incorporates the remedial scheme of the Rehabilitation Act of 1973.⁹ The Rehabilitation Act, in turn, incorporates the remedies of Title VI of the Civil Rights Act of 1964.¹⁰ The remedial scheme of Title VI includes a judicially implied private cause of action.¹¹

Title I, on the other hand, incorporates the remedies found in Title VII of the Civil Rights Act of 1964. Title VII has an explicit private right of action. Thus, the differences that the Court in *Garrett* referred to in footnote 1 of its opinion may well be referring to the differences between implied and express remedies.

B. Title II of the ADA

Aside from the differences in the remedial provisions of the two titles, there are also fundamental differences in what is covered by Titles I and II. Title II applies to a greater variety of state conduct, where Title I applies strictly to employment discrimination. Title II is broader than Title I and applies to discrimination in all public places and public services and applies to all disabled people, not just disabled employees. Significantly, Title II applies to

the very broad category of all "services, programs or activities of a public entity."

Because of the greater breadth of coverage under Title II, there is likely more evidence in the congressional record of unconstitutional behavior by the states of the conduct prohibited by Title II. In fact, the Court in *Garrett* acknowledged that there are more examples of unconstitutional state conduct when it stated that "the overwhelming majority of these accounts [referring to examples of discrimination in the congressional record] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA."¹² The *Garrett* majority also quoted both the House and the Senate Committee hearings, which recited that discrimination was rampant in the areas of public services, transportation, and public accommodations, among others.¹³ These are areas which would be covered by Title II of the ADA. Because the Court in *Garrett* only examined the congressional record as it related to state employment discrimination, it is unclear whether the congressional record as to state constitutional violations in the Title II sphere would be seen to establish a pattern of unconstitutional state discrimination.

However, the Supreme Court did not decide the issue and therefore the Circuit Courts of Appeal must each decide whether the monetary remedies of Title II are more constitutionally sound than those of Title I under the analysis set forth in *Garrett*.

Title II in 42 U.S.C. § 12133 states that:

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

⁹ 29 U.S.C. §794a(a)(2) (2000).

¹⁰ 42 U.S.C. §§2000d-2000d-7.

¹¹ *Garcia v. State Univ. of New York Health Sci. Ctr.*, 280 F.3d 98, 111 (2d Cir. 2001); see also *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 594-95 (1983).

¹² *Garrett*, 531 U.S. at 371 n.7 (2001).

¹³ S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, at 28 (1990).

D. *Conclusions: The Future of Title II*

The federal district courts, like the appeals courts and the Supreme Court, are now examining the congressional record for a tight congruence and proportionality fit for Title II, as mandated in *Garrett*. Requiring a detailed record of unconstitutional state conduct represents a fairly significant departure from the methodology used prior to *Flores*, *Kimel*, and *Garrett*, where the courts simply looked to the reasonableness of the congressional findings.

The question remains, however: how much support is required from the congressional record? The answer that appears to be given by the Supreme Court in *Garrett* and other courts since is that very strong evidence of manifest state unconstitutional discrimination must be present in the congressional record. ***

*** Under current Supreme Court jurisprudence, it appears that Congress will not be permitted to allow for damages in response to less flagrant types of discrimination absent a substantial record of evidence in the form of numerous examples of irrational and therefore unconstitutional discrimination by the states. This clear trend in the Supreme Court will likely result in the invalidation of private suits for money damages against states under Title II should the Supreme Court decide the issue. ***

02-628 Frew v. Hawkins

Ruling Below: (Frazar v. Gilbert, 5th Cir., 300 F.3d 530)

State did not unequivocally waive its 11th Amendment immunity from suit in federal court by entering into consent decree expressly stating that state defendants "do not concede liability"; because 11th Amendment limits federal courts' jurisdiction over state to enforcement of federal rights, before district court can remedy violation of provision of consent decree specifying procedures state must follow in implementing Medicaid early and periodic screening, diagnosis, and treatment program, plaintiffs must demonstrate that any such consent decree violation is also violation of federal right by showing (1) statutory violation of specific provision of Medicaid Act that (2) was intended to benefit plaintiffs, (3) is not so vague and amorphous that its enforcement would strain judicial competence, and (4) imposes binding obligation on states; under latter standard, provisions of Medicaid Act authorizing secretary of health and human services to set state goals for individual participation in EPSDT program and to cut federal funding for substantial failure to comply with statutory provisions do not create individualized right actionable under 42 U.S.C. § 1983 to require state plan to meet participation or performance measures; district court did not find specific violations of EPSDT provisions of Medicaid Act, but rather found violations of consent decree provisions that are not required by Medicaid Act, and thus its order enforcing consent decree is vacated.

Question Presented: (1) Do state officials waive 11th Amendment immunity by urging district court to adopt consent decree when decree is based on federal law and specifically provides for district court's ongoing supervision of officials' decree compliance? (2) Does 11th Amendment bar district court from enforcing consent decree entered into by state officials unless plaintiffs show that "decree violation is also a violation of a federal right" remediable under Section 1983?

FRAZAR, Plaintiff-Appellee,
v.
GILBERT, Defendant-Appellant.

United States Court of Appeals
For the Fifth Circuit

Decided July 24, 2002

[Excerpt; some footnotes and citations
omitted.]

REAVLEY, Circuit Judge:

BACKGROUND

This suit began in 1993 when Jeneva Frazar and Linda Frew, suing on behalf of their children, alleged that the State of Texas (the State) and the named state

officials (the state defendants) were failing to provide federally mandated Medicaid benefits to the children under the Texas version of the early and periodic screening, diagnostic, and treatment services (EPSDT) program. The Medicaid program provides federal funding for medical services to the poor. State participation is voluntary, but once a state joins the Medicaid program, it is charged with administering a state plan and must meet certain federal mandates. A participating state must have an EPSDT program which provides services described in the Medicaid Act.

Plaintiffs complained that the Texas EPSDT program, known as the Texas Health Steps program, had failed to provide federally mandated services. They claimed that the EPSDT program did not meet various requirements of 42 U.S.C. §§ 1396a(a) and 1396d(r), federal regulations, and provisions of the State Medicaid Manual. Specifically, plaintiffs claimed that the EPSDT program (1) did not have policies or procedures to assure that class members receive health, dental, vision, and hearing screens, (2) did not meet annual participation goals set by the Secretary of Health and Human Services, (3) did not effectively inform eligible persons of the availability of EPSDT services, (4) did not employ policies and procedures to provide or arrange for other necessary measures to correct or ameliorate physical and mental conditions discovered by the screening services, (5) did not provide case management services to all EPSDT recipients as needed, and (6) did not provide services uniformly in all political subdivisions of the State.

Plaintiffs sought injunctive relief under 42 U.S.C. § 1983 and requested class certification. In 1994 the district court certified the case as a class action. According to the district court the class consists of over 1.5 million Texas youth.

The parties proceeded to conduct settlement negotiations, and agreed to a consent decree. The record indicates that this proposed consent decree was reached after the district court ordered the parties to pursue a settlement. The district court conducted a fairness hearing on the proposed settlement, see Fed.R.Civ.P. 23(e), and in February 1996 approved and entered the consent decree.

"A consent decree is akin to a contract yet also functions as an enforceable judicial order." The consent decree in the pending case is a lengthy document and orders the state defendants to implement many highly detailed and specific procedures relating to the EPSDT program. It contemplates continuing oversight of the agreement by the district court. It states in paragraph 6 that "the parties agree and the Court orders" the state defendants to implement the changes and procedures to the EPSDT program set out in the decree, and provides in paragraph 303 that if the state defendants fail to comply with the terms and intent of the decree, the plaintiffs "may request relief from this Court." In paragraphs 306 and 307, the state defendants are required, "[f]or the duration of this Decree," to submit "monitoring reports" four times a year to the court. The reports must include a chart which identifies "each paragraph of this Decree that obliges Defendants to act and each required action. The chart will further state the status of each

activity." The decree places no limit on its duration.

DISCUSSION

2. Enforceability of Consent Decree under § 1983 and the Eleventh Amendment

The district court, while often making reference to statutory requirements and the consistency of the consent decree with the Medicaid Act, did not consider it necessary to determine whether an alleged violation of the consent decree would constitute, in the absence of the decree, a statutory violation of the Medicaid Act remediable under § 1983. On the contrary, it held that "[i]n enforcing the consent decree, the court is bound solely by its language," and that "an interpretation of the decree must be based strictly on the language of the decree, and not on the legal requirements of the Medicaid Act, except to the extent that those requirements are clearly imported by the language of the decree." This was error.

While § 1983 is usually invoked in cases where a plaintiff is claiming a constitutional violation, by its terms it extends to both constitutional and statutory violations, since it provides a remedy to those who suffer a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Stating a claim under § 1983 requires a plaintiff to "allege a violation of rights secured by the Constitution or laws of the United States." Section 1983 does not itself create any substantive rights; it only

provides a remedy for the violation of a substantive federal right conferred elsewhere.

Proof of a violation of a federal statute, by itself, does not entitle a plaintiff to relief under § 1983. Instead, in *Blessing v. Freestone*,¹⁴ the Court explained that to obtain relief under § 1983, "a plaintiff must assert the violation of a federal right, not merely a violation of federal law." Whether a statutory violation amounts to a violation of a statutory right actionable under § 1983 depends on three factors recognized in *Blessing*:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Employing this test, the Court in *Blessing* held that 42 U.S.C. § 609(a)(8), a provision of Title IV-D of the Social Security Act authorizing the Secretary of Health and Human Services to reduce payments to a state that does not "substantially comply" with Title IV-D, did not give rise to individual rights actionable under § 1983.

In *Wilder v. Virginia Hospital Ass'n*,¹⁵ the Supreme Court held that the Boren Amendment to the Medicaid Act, which required reimbursement according to

¹⁴ 520 U.S. 329 (1997).

¹⁵ 496 U.S. 498 (1990).

rates that a state finds "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," was enforceable by health care providers under § 1983. In making this determination the Court set out the same three factors described in *Blessing* above.

In *Evergreen Presbyterian Ministries Inc. v. Hood*,¹⁶ we applied the *Blessing* factors and held that one portion of one Medicaid provision created a federal right enforceable by Medicaid recipients, but not Medicaid providers, under § 1983. We held that the portion of 42 U.S.C. § 1396a(a)(30)(A) relating to equal access gave recipients a federal right of action, but that the district court had abused its discretion in holding that the plaintiff recipients had shown a substantial likelihood of success in proving a violation of this provision entitling them to preliminary injunctive relief.

Applying the *Blessing* factors to the pending case, there is no doubt that under the first factor the Medicaid program generally is intended to benefit qualifying recipients such as members of the plaintiff class. The Medicaid Act is, however, a large and complex statute, and whether plaintiffs seeking to enforce a federal right under the Medicaid Act can meet this requirement depends on which statutory provision or provisions they rely. In *Evergreen*, we further explained that receipt of an indirect benefit under the statutory provision in issue "is not sufficient to support a claim that [plaintiffs] are its intended beneficiaries."

Similarly, moving to the second prong of the *Blessing* test, while some of the provisions of the Medicaid Act are not so vague and amorphous that enforcement would strain judicial competence, plaintiffs' claims can succeed only if predicated on those provisions.

Under the third *Blessing* factor, the Medicaid statute does impose some binding obligations on the states. With respect to the EPSDT program at issue in the pending case, 42 U.S.C. § 1396a(a) provides that state Medicaid plans "must" meet the federal mandates set out in that statute, including the requirements for EPSDT programs set out in § 1396a(a)(43). We have explained that once states choose to participate in Medicaid, they "are required to provide certain minimum mandatory services," including EPSDT services. Again, however, we are not prepared to hold that every provision of the Medicaid Act which might be relevant to plaintiffs' claims imposes a binding obligation on the states.

In addition to the three factors described above, *Blessing* goes on to state:

Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress specifically foreclosed a remedy under § 1983. Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.

¹⁶ 235 F.3d 908 (5th Cir.2000).

Under this last part of the *Blessing* analysis, Congress did not expressly foreclose resort to § 1983, or establish a comprehensive remedial scheme intended to supplant § 1983. While the Secretary of Health and Human Services is authorized to cut off federal funding to a State that fails to comply with the Medicaid statute, there is no comprehensive enforcement scheme that would foreclose § 1983 relief under *Blessing*.

It is clear that a violation of every provision of the Medicaid Act does not become actionable under § 1983 simply because some aspects of the Act meet the requirements of *Blessing* and related authority. *Blessing* itself cautioned against such a holding, since it found that the Social Security legislation at issue was a "multifaceted statutory scheme" containing many provisions which "do not fit our traditional three criteria for identifying statutory rights." While the courts in *Wilder* and *Evergreen* held that violations of particular provisions of the Medicaid Act were actionable by certain plaintiffs under § 1983, it does not follow that every section of the Medicaid Act that might be relevant to plaintiffs' claims will support a § 1983 claim. In *Blessing*, the Court reasoned that a remand was warranted to allow the district court to construe the claims "in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting. Only by manageably breaking down the complaint into specific allegations can the District Court proceed to determine whether any specific claim asserts an individual federal right."

The district court's authority to enforce the consent decree is further limited by the Eleventh Amendment. This suit was brought against state officials in their official capacities, seeking injunctive relief under § 1983 and the authority of *Ex Parte Young*¹⁷ and related authority.

A fundamental rule of federal jurisdiction, of which the Eleventh Amendment is an exemplification, is that the judicial power of the federal courts granted by the Constitution does not extend to suits by private parties against the states. In order to accommodate both the supremacy of federal law and the Eleventh Amendment, *Ex Parte Young* allows a private suit against state officials to enjoin state conduct that violates federal law. "[T]he *Young* doctrine rests on the need to promote the vindication of federal rights." [Footnote omitted] It "has not been provided an expansive interpretation."

We addressed the enforceability of a consent decree in the face of Eleventh Amendment immunity in *Lelsz v. Kavanagh*.¹⁸ In that case the state defendants appealed a district court order purporting to enforce a consent decree by ordering the State to furlough a certain number of mentally ill patients in the State's care. We stated that the relief ordered, "in effect, requires state officials to comply with state law." We held that the district court was without jurisdiction to enforce the consent decree.

The plaintiffs in *Lelsz* argued that the consent decree was enforceable under *Local Number 93, International Ass'n of*

¹⁷ 209 U.S. 123 (1908).

¹⁸ 807 F.2d 1243 (5th Cir.1987).

Firefighters v. City of Cleveland,¹⁹ where the Supreme Court held that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." We rejected this argument, reasoning that if the court had no jurisdiction, *Firefighters* did not apply. We further explained that *Firefighters*

addressed the entry of a consent decree and held that the parties' agreement could result in a decree whose terms would exceed the court's remedial authority under a governing statute. It does not enlarge the court's latitude to issue its own, different order enforcing or modifying the decree, for in that case we presume the court must fall back on its inherent jurisdiction....

....
[T]he right/remedy distinction urged by appellees inevitably collides with the principles of federalism and comity which animate the Eleventh Amendment.... Therefore, the only legitimate basis for federal court intervention, consistent with the Eleventh Amendment is the vindication of federal rights. If a federal court remedy unfounded in federal law intrudes into the governance of matters otherwise presided over by the states, no federal right has been vindicated.

In *Saahir v. Estelle*,²⁰ we also addressed the enforceability of a consent decree. In that case, the district court had entered a consent decree approving a settlement between the plaintiff inmate and the state defendants which allowed the plaintiff to order tapes. The plaintiff filed a motion

for contempt when some of his tapes were confiscated. We recognized that in *Lelsz* we had held "that the district court lacked jurisdiction to enforce a consent decree against the State to the extent that the relief ordered in the decree was based on state law ... because the only legitimate basis for federal court intervention consistent with the Eleventh Amendment was the vindication of federal rights." We held that enforcing the consent decree to allow the plaintiff to keep non-religious tapes was not required under state law, and further held that

enforcing the provision would not be required by any federal or constitutional law, as we fail to discern any First Amendment protections except as to the religious tapes. Because "the only legitimate basis for federal court intervention, consistent with the Eleventh Amendment is the vindication of federal rights," *Lelsz*, 807 F.2d at 1252, the federal courts have no jurisdiction to enforce the provision as it relates to the non-religious tapes.

Underlying our reasoning in *Lelsz* and *Saahir* is the jurisdictional nature of the Eleventh Amendment. Eleventh Amendment immunity is in "the nature of a jurisdictional bar." Regardless of what the parties agreed to in the consent decree, "the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power." The Eleventh Amendment "is a specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts."

¹⁹ 478 U.S. 501 (1986) ("*Firefighters*").

²⁰ 47 F.3d 758 (5th Cir.1995).

We recognized in *Lelsz* and *Saahir* that a federal court "must fall back on its inherent jurisdiction" when it issues an order enforcing a consent decree. For our purposes, the essential holding of *Lelsz* and *Saahir* is that a consent decree like the one entered by the district court is not enforceable against the State or its officials except to vindicate a federal right granted in the federal Constitution or a federal statute, since "the consent decree does not enlarge the courts' jurisdiction." *Blessing* sets out the factors used in deciding whether a statutory violation amounts to a violation of a "federal right" actionable under § 1983.

The district court held that "the *Firefighters* test will be applied to the decree provisions sought to be enforced by plaintiffs." In *Firefighters* the Supreme Court upheld a consent decree that, according to the petitioner, granted relief that was unavailable under the statute in issue. The Court, without reaching the issue of statutory construction, concluded that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." In the pending case, the district court, under its interpretation of the "*Firefighters* test," erroneously held that

to sustain federal court jurisdiction to approve a consent decree against state officials, the remedies in the decree must only serve to: 1) resolve a dispute within the court's subject matter jurisdiction, 2) come within the general scope of the case made by the pleadings, and 3) further the objectives

of the law upon which the complaint was based.

Although the district court engaged at some length in a generalized discussion of the *Blessing* factors, it is clear to us that the district court did not conduct a particularized *Blessing* analysis as to each alleged violation of the consent decree. *** Instead of determining whether each alleged violation of the consent decree was a statutory violation actionable under *Blessing*, the court held that "an interpretation of the decree must be based strictly on the language of the decree, and not on the legal requirements of the Medicaid Act, except to the extent that those requirements are clearly imported by the language of the decree."

Firefighters is a consent decree case but is not an Eleventh Amendment case, and does not therefore address the deference federal courts must show for the Eleventh Amendment when called upon to enjoin state officials under *Ex Parte Young*. "Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." Moreover, we expressly distinguished *Firefighters* in both *Lelsz* and *Saahir*, reasoning that (1) *Firefighters* does not help the plaintiff if the district court lacks jurisdiction as a result of the Eleventh Amendment, and (2) even if a federal court is not necessarily barred from entering a consent decree providing broader relief than it could have awarded at trial, it must fall back on its own jurisdiction when it issues an order enforcing the decree. The Eleventh Amendment limits that jurisdiction to the enforcement of federal rights.

Plaintiffs argue that *Lelsz* should be limited to a consent decree based only

on state law. The district court, likewise, would limit *Lelsz* to suits to enforce only state law claims, and "declined" to apply it. We do not read *Lelsz* so narrowly, and in any event *Saahir* cannot be read as limited to state-law-based consent decrees. Insofar as the district court noted authority that found the distinction we drew in *Lelsz* and *Saahir* between jurisdiction to enter and jurisdiction to enforce a consent decree "utterly indefensible" or "untenable," the district court, and we, are bound by the law of our circuit.

Before the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right, by showing (1) a statutory violation of a specific provision of the Medicaid Act, (2) which was intended to benefit plaintiffs, (3) which is not so vague and amorphous that its enforcement would strain judicial competence, and (4) which imposes a binding obligation on the states. Lest the court run afoul of *Blessing*, it must not paint "with too broad a brush" by failing to "separate out the particular rights it believe[s] arise from the statutory scheme." The *Blessing* criteria can only be properly applied when the claims are "broken down into manageable analytic bites."

3. Relief Available to Plaintiffs

a. Whether a Federal Court Can Set EPSDT Performance and Participation Standards

As discussed above, plaintiffs are only entitled to injunctive relief if they can show a violation of specific statutory provision that is actionable under § 1983

because it satisfies the *Blessing* test. Although relief under § 1983 for a violation of EPSDT provisions may be available, perfect state compliance with these provisions is not required. While a district court should have some discretion to craft an injunction to remedy violation of the Medicaid Act, there are limits on the relief available from a federal court.

We reach this conclusion based on our understanding of congressional intent. Our goal, of course, in construing a statute is to give effect to congressional intent, and we begin this task by looking to the language of the statute itself.

In the pending case, the district court did not direct that particular individuals receive EPSDT services to which they were entitled under federal law. It has instead taken upon itself the task of reworking the procedures and mechanisms whereby EPSDT services are provided to the totality of eligible participants. The court has become overseer of the State's Medicaid plan. As such, the court assumes the role of assuring that the State's plan meets federal mandates, which in turn raises the issue of whether the plan must always, unfailingly, provide the EPSDT services described in the Medicaid Act. We think that is not required.

Congress did not intend that a court can require that a state participating in the Medicaid program must always provide every EPSDT service to every eligible person at all times. Perfect compliance with such a complex set of requirements is practically impossible, and we will not infer congressional intent that a state achieve the impossible. Furthermore, looking to § 1396a(a)(43), even though

it refers in subpart (A) to providing notice to "all persons," and refers in subpart (B) to the provision of EPSDT screening services in "all cases" where such services are requested, the opening text of § 1396a(a) and § 1396a(a)(43) modify all of this language by only requiring that a state "plan" must "provide for" meeting these requirements. In § 1396a(b), Congress vested in the Secretary of Health and Human Services (Secretary) the initial responsibility for approving state plans. Section 1396a(a)(43)(D) requires that the state plan provide for reporting certain data including "the State's results in attaining the participation goals set for the State under section 1396d(r) of this title." ***

In § 1396c, the Secretary is authorized to reduce or eliminate, in its discretion, federal funding for state plans which are not in compliance with § 1396a.

In our view, Congress has therefore spoken to the success expected of a state plan: it should meet EPSDT participation goals set by the Secretary. Under the third prong of *Blessing*, these are the only participation goals which are unambiguously imposed on the states. We do not read the statute as allowing a federal district court to require a higher standard of success. Congress did not in our view create such a federal right. Furthermore, under the second prong of *Blessing*, allowing federal courts, which are hardly expert at the intricacies of providing volume health care services to the poor, to choose their own performance goals would in our view render the EPSDT provisions so vague and amorphous as to strain judicial competence.

Moreover, we believe that plaintiffs cannot sue under § 1983 to require a plan to meet statewide or systemwide participation or performance measures, because, under *Blessing*, state compliance with such standards is not an individualized right actionable under § 1983. In *Blessing*, the court explained:

[T]he requirement that a State operate its child support program in "substantial compliance" with Title IV-D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from creating an individual entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied. A State substantially complies with Title IV-D when it provides most mandated services (such as enforcement of support obligations) in only 75 percent of the cases reviewed during the federal audit period. 45 C.F.R. § 305.20(a)(3)(iii) (1995). ***

An analogous situation is presented here. The statute authorizes the Secretary to set certain participation goals, and to cut federal funding if "there is a failure to substantially comply" with statutory provisions. Under *Blessing*, a state's failure to meet such a participation goal or other systemwide performance standard does not give rise to individual rights actionable under § 1983. The fact that plaintiffs have pursued their suit as a class action is of no consequence. A class action is merely a procedural

device; it does not create new substantive rights and cannot extend the subject matter jurisdiction of the district court.

b. Whether the Plaintiffs Have Shown a Statutory Violation

We now proceed to decide whether consent decree violations found by the district court amount to a statutory violation of the EPSDT provisions actionable under § 1983.

Rather than focusing on the statutory requirements, the court focused on the consent decree requirements and proceeded to find numerous consent decree violations. These consent decree provisions impose standards and requirements on the State which are not required by the Medicaid statute.

Looking to statutory EPSDT provisions, the requirement of subpart 43(B) that a state plan provide screening services is limited to the provision of services "where they are requested." We agree with the state defendants that a statutory violation of this requirement cannot occur except in cases where eligible persons request screening services. The district court recognized that the evidence did not support a finding that screening services were ever denied after they were so requested, noting that "[s]everal witnesses testified that defendants are not aware of a single class member who has requested services and not subsequently received those services."

Whether the state plan has met performance goals set by the Secretary is

unclear from the record. Regardless of the terms of the consent decree, the district court cannot impose higher performance standards than those set by the Secretary, and cannot under § 1983 impose systemwide performance or participation standards. The court did not find specific EPSDT statutory violations which might be actionable under § 1983, nor does any amount of sifting through the evidence allow us to make such findings. Instead the court found violations of provisions of the consent decree which are not required by the Medicaid Act.

[The court reviews the district court's various findings of violations of the consent decrees, and concludes that the court "was not authorized or competent to impose its own participation goals." "[T]he only participation goals mandated under the statute are those set by the Secretary, and that, under *Blessing*, such performance goals do not give rise to individual rights actionable under § 1983."]

In short, so far as we can tell from this record, plaintiffs have not established any violations of the EPSDT provisions of the Medicaid statute which are actionable under § 1983 and the *Ex Parte Young* exception to the Eleventh Amendment.

CONCLUSION

The orders of the district court in both appeals are VACATED and the case is REMANDED for whatever proceedings that may be consistent with this opinion.

High Court Eyes States' Right in Lawsuits

AP Online

March 10, 2003

Anne Gearan

WASHINGTON (AP) The Supreme Court agreed Monday to examine the court system's ability to enforce deals that states often strike to end mass lawsuits and whether states can later claim they are immune to allegations that they had not lived up to the bargain.

The case about Medicaid benefits for the poor could further the Supreme Court's recent line of states' rights rulings that have increased state powers at the expense of individuals and Congress.

At issue is a 1996 court-approved settlement that ended lawsuits over health care for poor children in Texas. The state did not admit liability but agreed to make a variety of improvements.

A group of poor children returned to federal court in 1998, complaining the state had violated the agreement. Among cases they cited were a 2-year-old cerebral palsy patient who could not hold up his head up because he had not received proper physical therapy and a 7-year-old who was not given a hearing test that would have diagnosed his deafness.

The Texas attorney general claimed that the state was immune from the challenges under the Constitution, and the agreement was not fully enforceable in court. The Constitution's 11th

Amendment makes state governments immune to most individual federal lawsuits, but there are exceptions.

Lawyers for children covered under Medicaid argued the state had agreed to the settlement, even urged a federal judge to approve it, and thus should not be allowed to shirk its duty.

A federal appeals court ruled for the state last year. Texas did not waive its constitutional immunity, and the federal court did not have far-reaching jurisdiction to enforce portions of the 1996 agreement, the appeals court said.

The lawsuit centers on the federal Early and Periodic Screening, Diagnosis and Treatment program, which covers about 1.5 million Texas children. The program is supposed to provide poor children with comprehensive and periodic checkups, including evaluations of children's development, nutritional and dental status, vision and hearing.

The case is *Frew v. Gilbert*, 02-628.

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**Case Summaries, 5th Circuit
FRAZAR V. GILBERT, NO. 00-41112**

Texas Lawyer

August 5, 2002

A consent decree entered by the district court is not enforceable against the state or its officials except to vindicate a federal right granted in the U.S. Constitution or a federal statute, since the consent decree does not enlarge the courts' jurisdiction.

Frazar v. Gilbert, No. 00-41112, 7/24/2002.

FACTS: State officials take interlocutory appeals from orders of the district court that refused to modify a prior consent decree and required detailed state action in the administration of the Medicaid program to afford health care to the certified class of indigent children.

This suit began in 1993 when Jeneva Frazar and Linda Frew, suing on behalf of their children, alleged that the state of Texas and the named state officials were failing to provide federally mandated Medicaid benefits to the children under the Texas version of the early and periodic screening, diagnostic and treatment services (EPSDT) program. The Medicaid program provides federal funding for medical services to the poor. State participation is voluntary, but once a state joins the Medicaid program, it is charged with administering a state plan and must meet certain federal mandates. A participating state must have an

EPSDT program which provides services described in the Medicaid Act.

The plaintiffs complained that the Texas EPSDT program, known as the Texas Health Steps program, had failed to provide federally mandated services. They claimed that the EPSDT program did not meet various requirements of 42 U.S.C. §§1396a(a) and 1396d(r), federal regulations, and provisions of the State Medicaid Manual. The plaintiffs claimed that the EPSDT program 1, did not have policies or procedures to assure that class members receive health, dental, vision and hearing screens; 2. did not meet annual participation goals set by the Secretary of Health and Human Services; 3. did not effectively inform eligible persons of the availability of EPSDT services; 4. did not employ policies and procedures to provide or arrange for other necessary measures to correct or ameliorate physical and mental conditions discovered by the screening services; 5. did not provide case management services to all EPSDT recipients as needed; and 6. did not provide services uniformly in all political subdivisions of the state.

The plaintiffs sought injunctive relief under 42 U.S.C. §1983 and requested class certification. In 1994 the district court certified the case as a class action. According to the district court the class consists of over 1.5 million Texas youth.

The parties proceeded to conduct settlement negotiations and agreed to a consent decree. The record indicates that this proposed consent decree was reached after the district court ordered the parties to pursue a settlement. The district court conducted a fairness hearing on the proposed settlement, and in February 1996 approved and entered the consent decree.

The consent decree in the pending case is a lengthy document and orders the state defendants to implement many highly detailed and specific procedures relating to the EPSDT program. It contemplates continuing oversight of the agreement by the district court. It states in paragraph 6 that "the parties agree and the court orders" the state defendants to implement the changes and procedures to the EPSDT program set out in the decree, and provides in paragraph 303 that if the state defendants fail to comply with the terms and intent of the decree, the plaintiffs "may request relief from this court." In paragraphs 306 and 307, the state defendants are required, "[f]or the duration of this decree," to submit "monitoring reports" four times a year to the court. The reports must include a chart which identifies "each paragraph of this decree that obliges defendants to act and each required action. The chart will further state the status of each activity." The decree places no limit on its duration.

HOLDING: Vacated and remanded. The district court held that the consent decree was enforceable under §1983, and in so doing rejected arguments that its enforcement would violate the 11th Amendment. This court holds that the ruling below was an order "refusing to dissolve or modify" an injunction under

28 U.S.C. §1292(a)(1). Further, insofar as the state defendants argued that enforcement of the consent decree ran afoul of the 11th Amendment, the collateral order doctrine allows immediate appellate review of an order denying a claim of 11th Amendment immunity.

Whether a statutory violation amounts to a violation of a statutory right actionable under 42 U.S.C. §1983 depends on three factors recognized in *Blessing v. Freestone*, 520 U.S. 329 (1997): "First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the states. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."

A violation of every provision of the Medicaid Act does not become actionable under §1983 simply because some aspects of the act meet the requirements of *Blessing* and related authority. *Blessing* itself cautioned against such a holding, since it found that the Social Security legislation at issue was a "multifaceted statutory scheme" containing many provisions which "do not fit our traditional three criteria for identifying statutory rights." In *Blessing*, the court reasoned that a remand was warranted to allow the district court to construe the claims "in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting. Only by

manageably breaking down the complaint into specific allegations can the District Court proceed to determine whether any specific claim asserts an individual federal right."

The district court's authority to enforce the consent decree is limited by the 11th Amendment. This suit was brought against state officials in their official capacities, seeking injunctive relief under §1983 and the authority of *Ex Parte Young*, 209 U.S. 123 (1908), and related authority.

The court recognized in *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987) and *Saahir v. Estelle*, 47 F.3d 758 (5th Cir. 1995), that a federal court "must fall back on its inherent jurisdiction" when it issues an order enforcing a consent decree. The essential holding of *Lelsz* and *Saahir* is that a consent decree like the one entered by the district court is not enforceable against the state or its officials except to vindicate a federal right granted in the federal Constitution or a federal statute, since the consent decree does not enlarge the courts' jurisdiction. *Blessing* sets out the factors used in deciding whether a statutory violation amounts to a violation of a "federal right" actionable under §1983.

Before the district court can remedy a violation of a provision of the consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a federal right, by showing 1. a statutory violation of a specific provision of the Medicaid Act; 2. which was intended to benefit plaintiffs; 3. which is not so vague and amorphous that its enforcement would strain judicial competence; and 4. which imposes a

binding obligation on the states. Lest the court run afoul of *Blessing*, it must not paint "with too broad a brush" by failing to "separate out the particular rights it believe[s] arise from the statutory scheme." The *Blessing* criteria can only be properly applied when the claims are "broken down into manageable analytic bites."

The statute authorizes the Secretary of Health and Human Services to set certain participation goals, and to cut federal funding if "there is a failure to substantially comply" with statutory provisions. Under *Blessing*, a state's failure to meet such a participation goal or other systemwide performance standard does not give rise to individual rights actionable under §1983. The fact that plaintiffs have pursued their suit as a class action is of no consequence. A class action is merely a procedural device; it does not create new substantive rights and cannot extend the subject matter jurisdiction of the district court.

The plaintiffs have not established any violations of the EPSDT provisions of the Medicaid statute which are actionable under §1983 and the *Ex Parte Young* exception to the 11th Amendment.

A state can waive its 11th Amendment immunity by voluntarily invoking the federal court's jurisdiction, but in the pending case the state did not do so; the state officials were sued as defendants. The state has not waived its 11th Amendment immunity.

Plaintiffs are objecting to the shortage of transportation for class members to obtain dental services and to the rates of

payment set by the Texas Legislature. Unless plaintiffs can prove that the right to dental services is being denied by the defendants, the court cannot act.

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