No. 02-

IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter,
Carla Frew, *et al.*,

Petitioners,

v.

DON GILBERT, Commissioner of the
Texas Health and Human Services Commission, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the Early and Periodic Screening Diagnosis and Treatment (EPSDT) component of the Medicaid Act. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Another case pending before this Court also involves EPSDT. *Haveman v. Westside Mothers*, No. 02-277. If the Court grants a writ of certiorari in that case to address questions related to this case, the Petitioner-children ask the Court to suspend this case pending resolution of the other.

1. Do State officials waive Eleventh Amendment immunity by urging the district court to adopt a consent decree when the decree is based on federal law and specifically provides for the district court's ongoing supervision of the officials' decree compliance?

2. Does the Eleventh Amendment bar a district court from enforcing a consent decree entered into by State officials unless the plaintiffs show that the "decree violation is also a violation of a federal right" remediable under § 1983?

3. Does State officials' failure to provide services required by the Medicaid Act's EPSDT provisions violate rights that Medicaid recipients may enforce pursuant to 42 U.S.C. § 1983? *See* 42 U.S.C. §§ 1396a(a)(43); 1396d(r).

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Linda Frew, as next friend of her minor child, Carla Frew,

Maria Ayala, as next friend of her minor children, Christopher Arizola, Leonard Jimenez and Joseph Veliz,

Mary Fischer, as next friend of her minor child, Tyrone T. Edwards,

Mary Jane Garza, as next friend of her minor children, Hilary Garza and Sarah Renea Garza,

Charlotte Garvin as next friend of her minor children, Johnny Martinez, Brooklyn Garvin and BreAnna Garvin, and

Shannon Garcia, as next friend of her minor children, Andrew Garcia, Marisha Garcia, Stephen Sanchez and Allison Sanchez

Respondents, all sued in their official capacities only:

Don Gilbert, Texas Commissioner of Health and Human Services,

Linda Wertz, Texas State Medicaid Director,

Eduardo Sanchez, MD, Texas Commissioner of Health,

Bridgett Cook, employee of Texas Department of Health, and

Susan Penfield, MD, employee of Texas Department of Health

Note of Explanation: The style of this case in the district court is *Frew v. Gilbert*; in the court of appeals the style is *Frazar v. Gilbert*. Plaintiff Frazar is not before this Court because the district court voluntarily dismissed her in 1994.

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The court of appeals' decision is reported at 300 F.3d 530 (5th Cir. 2002) and reprinted in Appendix A (hereinafter "App."). The district court's decision denying the Respondent State officials' motion to dismiss (filed May 17, 2001) is reprinted in App. B. The district court's decision permitting supplementation of the complaint (filed March 12, 2001) is reprinted in App. C. The district court's memorandum opinion finding violations of the consent decree is reported at 109 F. Supp. 2d 579 (E.D. Tex. 2000). The memorandum opinion and the district court's remedial order (both filed August 14, 2000) are reprinted in App. D. The parties' consent decree (filed February 20, 1996) is lodged with the Clerk (hereinafter "L.")

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 24, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution; 42 U.S.C. §§ 1396a(a)(43); 1396d(r) and 42 U.S.C. § 1983 are reprinted in App. E.

STATEMENT OF THE CASE

This Petition addresses the Fifth Circuit's refusal to permit enforcement of a consent decree in a case about the Medicaid Act's Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Program. In conflict with other courts of appeals, the Fifth Circuit improperly held that the Eleventh Amendment prohibits enforcement of the decree even though State officials voluntarily urged the entry of a prospective decree that: (1) is based on federal law; (2) creates enforceable obligations; and (3) specifically provides for judicial resolution of disputes about compliance.

When States accept federal Medicaid funds, they must follow federal Medicaid requirements. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990). EPSDT is a required service. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Through EPSDT, Congress created a practical approach to health care for indigent young Medicaid recipients. Medicaid officials must "provide for"

- informing all Medicaid recipients under the age of 21 about EPSDT and immunizations,
- providing or arranging for screens "in all cases where they are requested," and
- "arranging for (directly or through referral to appropriate agencies, organizations, or individuals)" all necessary corrective treatment.

42 U.S.C. §§ 1396a(a)(43)(A); (B); (C); 1396d(r).

The Petitioner mothers filed suit in 1993 because the officials were not providing the Petitioner children with EPSDT services. The complaint describes the officials' violations of the children's rights to: (1) information about EPSDT rights; (2) provision or arrangement of medical screens and dental, vision and hearing preventive services; and (3) provision or arrangement of necessary corrective treatment.

The district court had jurisdiction over the dispute. 28 U.S.C. § 1331. The children sought only prospective relief from State officials sued in their official capacities. 42 U.S.C. § 1983. In 1994, the district court certified the case as a class action.

This petition arises from the court of appeals' decision in two consolidated appeals. The first interlocutory appeal addresses enforcement of the consent decree. The second interlocutory appeal addresses the children's first supplemental complaint.

A. Consent Decree In 1994, after extensive discovery, the parties hoped to settle this case. The district court set an agreed schedule for negotiations. In January 1995, the parties proposed to the court an initial settlement. They also reported that the officials wished to "inform appropriate legislative and executive offices of the State of the content and potential financial implications of this agreement. The Defendants [did] not feel that they [could] give their final approval until this discussion [took] place." 3R888.[1] Negotiations continued for several more months. The officials had time to obtain approval and to reconsider the settlement to be sure that it reflected their discretion and judgment.

In July 1995, the parties made a final proposal to the court to settle most issues presented by this litigation. They also noted that disputed issues remained. For example, although the parties noted that the United States Secretary of Health and Human Services (hereinafter "Secretary") had established participation goals for EPSDT medical screens, the decree does not resolve disputes about meeting those goals. 3R902.

In December 1995, the district court took evidence about whether to adopt the proposed settlement as the court's decree. During opening statements, the Attorney General recommended "that the Court sign this proposed consent decree." 15R12;17. He noted that the decree was negotiated within the framework of federal Medicaid law. 15R13;16-7. All three of the State officials' witnesses testified in favor of entry of the decree.

In February 1996, the district court found that the proposed settlement was fair, reasonable and adequate. The court entered the settlement as its decree. *See*, *e.g.*, App. at 57a. The officials did not appeal.

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1. The children refer to the record as _R_. The first number refers to the volume; the second number refers to the page. If citation to a line is possible, the line citation follows the page citation. The two are separated by a semicolon.

The consent decree allows judicial relief from disputes about the officials' compliance with the order. If disputes arise, "the parties may request relief from [the] Court." L.; ¶303. The officials also must file quarterly monitoring reports to inform the district court of the "status of each activity" required by the decree. L.; ¶¶306-7.

Further, even though the officials did not admit liability, L.; ¶301, they urged the district court to enter a decree that could be enforced. For example, the term "will," used throughout the decree, "creates a mandatory, *enforceable obligation*." L.; ¶302 (emphasis added). Finally, the decree notes that the "agreements negotiated by the parties which led to [the decree] were reached within the framework of federal law related to the EPSDT and Medicaid programs. . . ." L.; ¶308.

Although the officials violated many aspects of the decree, they made some efforts to comply. For several years, they filed quarterly reports about their efforts to follow the court's order. L.; ¶¶306-7.

In 1998, the children moved to enforce several of the decree's provisions. The officials did not file a motion to dissolve or modify the decree.[2] Indeed, they "readily" admitted in briefing before the district court that "some portions of the Decree directly relate to the Federal statutory scheme for the EPSDT program and to the right created by Congress. . . ." 11R343. They conceded that "[t]hese entitlements *can be enforced* by Federal Courts who have authority to prospectively enjoin State officials for violating those rights." 11R349 (emphasis added). *See* App. at 247a-248a.

B. District Court Ruling After a five-day hearing in March 2000, the district court ruled that it had jurisdiction to enforce the decree. First, the court ruled that the case falls within the

2. The court of appeals incorrectly found that the district court refused to modify the consent decree. App. at 3a. No one asked the district court to modify the decree.

Ex Parte Young exception to the Eleventh Amendment because it seeks prospective relief from State officials' violation of federal law. App. at 246a n.197. Second, the district court noted that the State officials did not object to the entry of the consent decree. App. at 247a. Sovereign immunity did not bar decree enforcement because the decree was properly entered and it vindicated federal rights. App. at 247a-261a; *See Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986). Finally, the court concluded that the Medicaid Act's EPSDT provisions create rights that may be enforced pursuant to § 1983. *See Blessing v. Freestone*, 520 U.S. 329 (1997). App. at 234a-244a.

The district court also found that the officials were violating most of the decree provisions cited by the children. The record is filled with examples of many children who could not obtain required EPSDT services. For example, a two-year old with cerebral palsy could not even hold his head up — let alone walk — because he did not receive proper physical therapy. App. at 163a-164a. For want of a hearing test to diagnose his deafness, a seven-year old class member was about to be placed in special education because he was incorrectly perceived to have learning disabilities. App. at 88a n.32; 17R171;4 to 172;22. Another youth had to wait eight weeks for orthopedic care for a broken arm. App. at 149a n.98. Children in managed care could not even obtain emergency care for severe and prolonged asthma attacks of a critical nature, or dangerous episodes of vomiting and fever that resulted in dehydration requiring intravenous fluids. App. at 157a-158a.

Other evidence also shows that the children's EPSDT rights are violated. Even though they are entitled to information about EPSDT, "[o]verwhelming evidence . . . demonstrat[es] that large numbers of class members do not know about" EPSDT. App. at 61a. More than one million Petitioner-children get no dental care at all. App. at 92a. As

a result, they "crowd emergency rooms in hospitals, suffering from acute forms of dental disease that, while easily preventable, often lead to such health complications as serious oral infections, dehydration, fever and malnourishment stemming from the inability to eat." App. at 91a.

After finding that the officials were violating the decree, the district court chose to "require 'relatively mild sanctions as a first resort,'" so it ordered the officials to propose "corrective action plans to remedy each violation of the decree." App. at 276a-277a, *citing United States v. United Shoe Machinery Corporation*, 391 U.S. 244, 249-50 (1968). As with the decree itself, the district court's remedial order only provides prospective relief.

The officials appealed.[3]

C. Court of Appeals Ruling On July 24, 2002, the court of appeals vacated the district court's orders in both appeals and remanded for further proceedings. App. at 46a. The court held that the Eleventh Amendment deprived the district court of jurisdiction to enforce the consent decree. The Fifth Circuit found that the State officials did not waive Eleventh Amendment immunity by their litigation conduct, such as urging the district court to enter the decree and attempting to comply with it. App. at 39a-42a. Further, the Fifth Circuit held that the Eleventh Amendment requires the district court to "fall back on its

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3. The second interlocutory appeal concerns the children's first supplemental complaint. It asserts the new claim that the officials do not provide the children with dental care and services that are available at least to the extent that they are available to the general population in the geographic area. 42 U.S.C. § 1396a(a)(30)(A). It further claims that the officials do not furnish dental care to the children with reasonable promptness. 42 U.S.C. § 1396a(a)(8). After allowing the children to supplement their complaint, App. at 52a, on May 17, 2001, the district court denied the officials' motion to dismiss the first supplemental complaint. App. at 48a. The officials appealed.

inherent jurisdiction" to enforce a consent decree against State officials. App. at 24a. "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." App. at 27a-28a. The court of appeals did not apply the standards for entering consent decrees to decide whether the decree could be enforced. App. at 24a-27a; *see Firefighters*, 478 U.S. at 525. Instead, the court extended the reasoning of its controversial decision in *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir.) (*LelszI*), *rehearing en banc denied*, 815 F.2d 1034, (*LelszII)*, *subsequent panel decision*, 824 F.2d 372, *cert. dismissed*, 483 U.S. 1057 (1987), to hold for the first time that the Eleventh Amendment bars enforcement against State officials of a consent decree based on federal law. Finally, the court of appeals held that, although the Medicaid Act's EPSDT provisions may create enforceable rights, proof that children did not receive EPSDT information, screens and services did not prove violations of those rights. App. at 33a-39a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision about consent decree enforcement conflicts with decisions of other United States courts of appeals as well as this Court's analysis in other cases. Also, the court's decision concerning the violation of EPSDT rights creates confusion and conflict among the courts of appeals. Supreme Court Rule 10(a).

Moreover, this petition presents important questions about federal courts' jurisdiction to enforce consent decrees based on federal law and entered into by State officials. Also, this petition presents an important question of federal law about the use of 42 U.S.C. § 1983 to remedy violations of EPSDT rights. These questions have not been resolved by this Court, but should be. Finally, the Fifth Circuit's decision conflicts with decisions of this Court. Supreme Court Rule 10(c).

I. State Officials Waive Eleventh Amendment Immunity By Agreeing To — and Voluntarily Urging The District Court To Adopt — A Consent Decree That: (1) Is Based On Federal Law; (2) Specifically Provides For The District Court's Ongoing Supervision Of The Officials' Decree Compliance And; (3) By Its Own Terms Creates "Mandatory, *Enforceable*" Obligations.

The Eleventh Amendment does not immunize State officials from enforcement of a consent decree that they urge a district court to enter. To hold otherwise would be anomalous and inconsistent because State officials could "both (1) .. . invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) . . . claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Lapides v. Bd. of Regents of Univ. System*, 535 U.S. __, 122 S. Ct. 1640, 1643 (2002).

A. Many Courts Of Appeals Disagree With The Fifth Circuit's Conclusion That State Officials Do Not Waive Eleventh Amendment Immunity By Urging Entry of Consent Decrees.

This Court's review is necessary to prevent confusion and conflict among the lower courts about when State officials waive their Eleventh Amendment immunity so that consent decrees may be enforced against them. The First, Second, Third, Seventh and Ninth Circuit Courts of Appeals disagree with the Fifth Circuit's conclusion that State officials do not waive their Eleventh Amendment immunity by urging the district court to enter a consent decree. For example, the Second Circuit holds that State officials waive Eleventh Amendment immunity simply by agreeing to a consent decree. *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (decree modification denied).

Further, other courts disagree with the Fifth Circuit's conclusion that State officials do not waive immunity when they: (1) urge the district court to enter the decree; (2) do not appeal from the entry of the decree; and (3) attempt to follow it.[4] For example, in *Mitchell v. Com'n on Adult Entertainment Est.*, 12 F.3d 406, 408 (3d Cir. 1993) (costs), a Delaware Commission settled a licensing dispute. The Commission "agreed to forego an appeal and accept the district court's judgment" in return for an agreement that the plaintiff also would not appeal. "To say that the Commission can now collaterally attack the [consent] judgment on eleventh amendment grounds would be the same as saying that, despite the settlement it voluntarily entered, the Commission was free at any time thereafter to disavow the judgment on eleventh amendment grounds. . . ." *Id.* at 409; *see also Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) (attorney's fees), *subsequent history omitted*; *Vecchione v. Wohlgemuth*, 558 F.2d 150, 158-59 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (decree vacation denied).

Unlike the Fifth Circuit, other courts of appeals recognize that it is unjust to allow State officials to bargain for consent orders and later urge that the courts are powerless to enforce them. Once State officials decide to pursue entry of a decree instead of trial, they cannot "'evade an integral portion of that decree. . . .' Such a result would impugn the integrity of the court and allow the [official] to avoid his bargained-for obligations — while retaining the benefits of concessions he obtained on other issues during the negotiations." *Kozlowski*, 871 F.2d at 245 (citation omitted in original). Further, to allow State officials to disobey a decree would turn the court's proper order into "a mere advisory opinion." *Vecchione*, 558 F.2d at 159.

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4. In this case, the officials filed reports to try to convince the district court that they had complied with the decree. L.; ¶¶306-7.

Moreover, unlike the Fifth Circuit, several courts of appeals only permit State officials to escape decree obligations by obtaining modification or dissolution of the decree. They cannot rely on the Eleventh Amendment to "simply ignore the consent decree." *Hook v. State of Ariz. Dept. of Corrections*, 972 F.2d 1012, 1016 (9th Cir. 1992) (*subsequent history omitted*); *see also Komyatti v. Bayh*, 96 F.3d 955, 962-63 (7th Cir. 1996) (decree enforcement); *Kozlowski*, 871 F.2d at 246-49; *Rufo v. Inmates of Suffolk County*, 502 U.S. 367, 389 (1992); App at 262a n.203.[5] This rule has the beneficial result of allowing district courts to manage the orders that State officials urge should be entered, whether by enforcing decrees or modifying them as allowed by the Rules of Civil Procedure.

B. Lower Courts Need To Know When Consent Decrees Can Be Enforced Against State Officials.

This case presents an important question about the lower courts' ability to enforce consent decrees that State officials urge federal courts to enter. This question comes up frequently. State officials often ask federal courts to enter agreed orders to resolve disputes in many areas of the law. *See*, *e.g.*, *Rufo*, 502 U.S. 367.

"[J]urisdictional rules should be clear." *Lapides*, 122 S. Ct. at 1645. The lower courts and parties to litigation need clear rules to govern enforcement of consent decrees against State officials. Settling plaintiffs and defendants always give up things "that they might have won had they proceeded with the litigation," *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971), including the right to demand trial. *Lawyer v. Department of Justice*, 521 U.S. 567, 580 (1997). Parties to settlement negotiations need to know whether a federal court

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5. Even injunctions that may "be subject to substantial constitutional question" must be obeyed unless they are modified or dissolved. *Walker v. City of Birmingham*, 388 U.S. 307, 317-19 (1967).

will be able to enforce consent decrees against State officials so they can decide whether what they are getting in settlement is worth what they are giving up.

Since "settlements rather than litigation will serve the interests of plaintiffs *as well as defendants*." *Evans v. Jeff D.*, 475 U.S. 717, 733 (1986), *quoting Marek v. Chesny*, 473 U.S. 1, 10 (1985) (emphasis added), this Court should establish clear and fair rules that allow State officials to enter into consent decrees that can be enforced. When State officials urge the district court to enter a consent decree that specifically allows for the district court's ongoing supervision of decree compliance, they waive immunity because they "voluntarily invoked the federal court's jurisdiction." *Lapides*, 122 S. Ct. at 1644. They must not be allowed to misuse the Eleventh Amendment later by arguing that the court cannot enforce an order that they urged should be entered. *Id*.

C. *Gunter* and *Lapides* Bar State Officials From Urging Entry Of A Consent Decree And Later Claiming That The Eleventh Amendment Prohibits Decree Enforcement.

"[T]he proposition that the Eleventh Amendment . . . control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, *is not open for discussion*." *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 292 (1906), *followed in Lapides*, 122 S. Ct. at 1646 (emphasis added). Affirmative litigation conduct can waive Eleventh Amendment immunity. *Lapides*, 122 S. Ct. at 1643. In *Lapides*, the State of Georgia "voluntarily invoked the federal court's jurisdiction" by agreeing to remove a case to federal court. *Id*. at 1644. By so doing, the State waived immunity, even though it was "brought involuntarily into the case as a defendant," *Id*., and even though the plaintiff's claims were based on State law. *Id*. at 1643. Also, the State

waived immunity even though at the time of removal, it did not expressly say that it was waiving Eleventh Amendment immunity. The act of removal itself effectuated the waiver because it was clear. *Id*. at 1644. Finally, as a matter of federal law, immunity was waived even though a State statute prohibited the Attorney General from waiving immunity. *Id*. at 1645. It was fair for the Attorney General's litigation conduct to bind the State because the State legislature had authorized the Attorney General to represent the State in court. *Id*.[6]

Lapides' logic requires the enforcement of a consent decree when State officials voluntarily submit the decree and its enforcement to judicial determination. *Id*. at 1644. In this case, nothing compelled the officials to urge the district court to enter the decree — which they did unanimously. As in all settlement negotiations, the officials had the "unilateral right to block" the agreement that resulted in the decree. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 395-96 (1998) (Kennedy, J., concurring)

Instead of opposing agreed relief, the officials in this case embraced it. After informing the appropriate legislators and executive officers, the officials urged the district court to enter a consent decree that specifically allows the children to "request relief from the Court" if the "Defendants' future activities .. . [do not] comport with the terms and intent of this Decree." L. at ¶303. They further urged the district court to enter a decree that "creates . . . mandatory, *enforceable* obligation[s]." L.; ¶302 (emphasis added).

By affirmatively urging the district court to adopt a decree that provides for judicial relief, the officials invoked the court's jurisdiction, "thereby waiv[ing] any immunity

6. As in *Lapides*, the Texas Attorney General is authorized to represent the State in court and to "propose a settlement agreement." *Terrazas v. Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991); Tex. Const. Art. 4, § 22.

which [they] otherwise might have had." *Gardner v. State of New Jersey*, 329 U.S. 565, 574 (1947), *followed in Lapides*, 122 S. Ct. at 1646.[7] This rule "makes sense" because in the litigation context, the Eleventh Amendment should honor "the judicial need to avoid inconsistency, anomaly, and unfairness." *Lapides*, 122 S. Ct. at 1644.

D. *Lapides* Bars State Officials From Reviving Immunity After They Have Waived It.

Despite *Lapides*, the court of appeals held that the officials did not clearly waive their immunity when they urged entry of the decree because later the officials raised an "Eleventh Amendment defense to the enforcement of the decree." App. at 41a-42a. This Court should not allow State officials to trivialize the Amendment by selectively asserting "immunity" to achieve litigation advantages. 122 S. Ct. at 1644.

As in this case, the *Lapides* defendant also disavowed the protection of the Eleventh Amendment and then sought to revive immunity later in the case. 122 S. Ct. at 1642. In *Lapides*, this Court rightly prohibited the defendant from reasserting the Eleventh Amendment immunity that it had already waived. The Court should follow *Lapides* in this case. The Court should not allow State officials to obtain concessions during settlement negotiations and then abuse the cloak of immunity to avoid obligations that they promised the district court they would assume.

Further, the court of appeals also incorrectly concluded that the officials in this case did not unequivocally waive the Eleventh Amendment because the "consent decree

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7. The officials' actions after the decree was entered further indicate that they assented to the court's jurisdiction over them. They did not appeal from the entry of the decree. To assist the district court to determine if they were complying with the decree, they filed quarterly reports about their efforts for several years. L.; ¶ 306.

expressly states in paragraph 301 that 'Defendants do not concede liability.'" App. at 41a. The officials' refusal to admit liability, however, is not the same as asserting Eleventh Amendment immunity. The Eleventh Amendment provides immunity from suit, which is not "a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Puerto Rico Aqueduct v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993). Since decree terms must be given their natural meanings, *Armour*, 402 U.S. at 678, including "technical meaning[s]," *United States v. ITT Continental Baking Company*, 420 U.S. 223, 238 (1975), the court of appeals should have concluded that the parties meant what they said. While the officials did not concede liability, they *did* agree to a decree that could be enforced against them.

II. A District Court's Jurisdiction To Enter And Enforce A Consent Decree Does Not Depend On Whether Violations Of The Decree Are Also Violations Of Federal Rights.

This case presents important questions about the lower courts' jurisdiction to enforce consent decrees that provide prospective relief from State officials. *See Ex Parte Young*, 209 U.S. 123 (1908). Contrary to the Fifth Circuit's decision in this case, if the district court has jurisdiction to enter a consent decree, it also has jurisdiction to enforce it.

A. Many Courts Of Appeals Disagree With The Fifth Circuit's Decision That A District Court Must Rely On Its Inherent Jurisdiction And Find A Violation Of Remediable Rights To Enforce A Consent Decree.

The Courts of Appeals for the Second, Fourth, Sixth, Seventh and Tenth Circuits disagree with the Fifth Circuit's reasoning in this case. The Fifth Circuit relies on two concepts to hold that the Eleventh Amendment prohibits the district court from enforcing the consent decree here.

First, several courts of appeals disagree with the Fifth Circuit's conclusion that a federal court's jurisdiction to enforce a consent decree differs from its jurisdiction to enter a decree. App. at 21a-22a; 27a. To reach this decision, the Fifth Circuit relied on *LelszI*, 807 F.2d at 1252. *LelszI* addresses enforcement of a consent decree concerning treatment and rehabilitation in a state facility for the mentally retarded. 807 F.2d at 1245-6. The Eleventh Amendment barred enforcement of the decree because it was founded in state law. *LelszI*, 807 F.2d at 1247, *citing*, *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1984).[8] The Fifth Circuit decision here extends *LelszI* to a consent decree that was "reached within the framework of federal law related to the EPSDT and Medicaid programs. . . ." L.; ¶308; App. at 27a.

As the Fifth Circuit notes, other courts of appeals find the distinction between jurisdiction to enter a decree and jurisdiction to enforce it "'utterly indefensible' or 'untenable.'" App. at 27a. *See also* App. at 257a-260a. As the Second Circuit says, "[i]f a federal court can validly enter a consent decree, it can surely enforce that decree." *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989). *See also Duran v. Carruthers*, 885 F.2d 1485, 1490-91 (10th Cir. 1989) (motion to vacate decree denied). A properly entered decree can even be enforced by contempt. *Komyatti v. Bayh*, 96 F.3d 955, 963 (7th Cir. 1996).

The Seventh Circuit agrees that the Eleventh Amendment does not prevent enforcement of a decree based on federal law. "[A] provision in a validly-entered consent decree is an obligation on State officials to conform their conduct to federal law." *Komyatti*, 96 F.3d at 960-61, *quoting*, *Firefighters*, 478 U.S. at 525.

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8. Until the Fifth Circuit's decision in this case, *Lelsz* and its rationale were limited to consent decrees based on state law or no law. *Ibarra v. Texas Employment Commission*, 823 F.2d 873, 877 (5th Cir. 1987); *see also* App. at 252a-256a.

Even more pertinently, the Seventh Circuit concludes that the Eleventh Amendment does not prohibit enforcement of a consent decree based on the Medicaid Act's requirements. *Wisconsin Hospital Ass'n v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) (per J. Posner). "The decree did not engage the Eleventh Amendment. . . . The decree settled a genuine, noncollusive case that was within the exception to the Eleventh Amendment that *Ex Parte Young* created." *Id.* at 868. The same is true in this case.

Further, since the children seek protection from ongoing violations of the federal Medicaid Act, the decree here arises in a classic *Ex parte Young* case. The decree and the district court's order enforcing it provide only prospective relief, exactly as *Ex parte Young* envisions. The Seventh and Fourth Circuits both hold that the Eleventh Amendment does not prohibit forward-looking orders to enforce consent decrees in cases about Medicaid. *Reivitz,* 820 F.2d at 868; *Alexander v. Hill*, 707 F.2d 780, 783-4 (4th Cir.), *cert. denied*, 464 U.S. 874 (1983).[9]

Second, the Fifth Circuit holds that to overcome the Eleventh Amendment, plaintiffs must prove that a violation of the decree is also a violation of rights remediable pursuant to § 1983. App. at 27a-28a. Several courts of appeals disagree with this conclusion and its reasoning. For example, in *Rosen v. Tennessee Com'r of Finance and Admin.*, 288 F.3d 918, 925 (6th Cir. 2002), a federal court properly enforced an agreed order based on the Medicaid Act, even though it had not had "the opportunity to adjudicate on the merits" a § 1983 case against state officials.

The Fifth Circuit's rule significantly restricts the scope of remedies that can be enforced against State officials — in

9. The remedial order in this case only requires prospective relief from the State officials, i.e., the development of plans to remedy their violations of the decree.

conflict with rules established by other courts of appeals.[10] According to the Seventh Circuit, "[i]t is well established that consent decrees may embody conditions beyond those imposed directly by [federal law] itself . . . [when] the condition .. . is related to elimination of the condition that is alleged to offend" federal law. *Komyatti*, 96 F.3d at 959 (*citing Rufo*, 502 U.S. at 389). Consent decrees rarely require the "bare minimum" required by federal law; they generally contain provisions that require more than the minima. *Id*.

The Tenth Circuit agrees. When a consent decree "ordered state officials to conform their conduct to federal law, and the provisions of the decree .. . tend to vindicate those rights," the decree can be enforced. *Duran*, 885 F.2d at 1491. A decree can be enforced against State officials even if its provisions do more than achieve the minimal requirements of federal law. *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991), *cited with approval in Rufo*, 502 U.S. at 390. To hold otherwise would require a full trial on the merits "every time an effort was made . . . to enforce . . . the decree by judicial action." *Plyler*, 924 F.2d at 1327.

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10. When the evenly divided Fifth Circuit denied review by the whole court of *LelszI*, the dissent noted that the decision improperly limits the enforcement of consent decree remedies.

> There can be no doubt that a federal court, to remedy federal violations, may require state officers to adopt programs that, absent the federal violations, were not guaranteed to the plaintiffs by the Constitution or federal statute. The remedial program must only be tailored to cure the condition that offends federal law.

Lelsz v. Kavanagh, 815 F.2d 1034, 1036-37 (5th Cir. 1987) (dissent from denial of rehearing en banc) (*subsequent history omitted*), *citing Milliken v. Bradley*, 433 U.S. 267 (1977) (*LelszII*).

B. The Eleventh Amendment Is Not Offended When Federal Courts Issue Prospective Remedial Orders To Remedy Violations Of Consent Decrees That Also Provide Prospective Relief From Ongoing Violations Of Federal Law.

To preserve the supremacy of federal law, federal courts must be able to order prospective relief from State officials' ongoing violations of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985). When State officials propose to settle disputes about violations of federal law, federal courts may approve those settlements without a formal adjudication that the officials violated the law. *Lawyer*, 512 U.S. at 578-80. It would indeed be anomalous if federal courts could not enforce properly approved agreed orders without finding that State officials have violated the law — a finding that everyone agreed was not necessary.

Importantly, the rules for proper entry of consent decrees ensure that the Eleventh Amendment is not offended in cases that are based on federal law. To be properly entered, a decree "must (1) 'spring from and serve to 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.'" *Firefighters*, 478 U.S. at 525. The decree in this case meets the *Firefighters* test, so the Eleventh Amendment does not bar enforcement. App. at 260a-261a.

C. The Fifth Circuit's Analysis Improperly Limits The Scope Of Injunctive Relief In Cases Involving State Officials.

The Fifth Circuit's approach unduly restricts the remedies that should be available — and enforceable — when State officials agree to them. Consent decrees may do more than merely order State officials to obey EPSDT law. "[A]lmost

any affirmative decree beyond a directive to obey the [law] necessarily does that." *Rufo*, 502 U.S. at 389.[11] If a decree's remedies cannot be enforced unless violation of the decree also violates Medicaid rights, then the parties can gain nothing by entering into a consent decree. This limit prevents parties to federal litigation — including State officials — from agreeing to nuanced remedies that are acceptable to all of them.

Further, federal courts do — and should — have plenary power to enter and enforce injunctions. *See*, *e.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). Although subject to review for abuse of discretion, federal courts have broad and flexible power to issue injunctions with sufficient specificity to resolve disputes. *Spallone v. United States*, 493 U.S. 265, 273-76 (1990); *see also Milliken*, 433 U.S. at 281-82.[12] For example, in disputes about segregated schools, federal courts may order remedial education programs, special in-service teacher training, changes in student testing programs or even suspension of testing. *Id*. at 282-88.[13] These remedies are proper even though their absence does not violate equal protection requirements. They are appropriate because they remedy the consequences of unlawful actions. *Id*. at 288.

When using their power to fashion injunctive relief by court order (instead of by agreement), federal courts must respect State officials' exercise of their discretion to the extent possible. *Milliken*, 433 U.S. at 280-81. It would not "make

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11. The *Rufo* defendants included a State official. 502 U.S. at 372.

12. The *Milliken* defendants included State officials. Defendant Milliken himself was the governor of Michigan. 433 U.S. at 267-69.

13. It does not offend the Eleventh Amendment to require State officials to contribute to the costs of these remedial programs. *Milliken*, 433 U.S. at 288-90.

sense" for federal courts to be without jurisdiction to enforce a consent decree that already represents and incorporates the officials' discretion.

Further, once the district court found that the officials were violating sections of the consent decree, the court ordered a remedy designed to respect the officials' discretion. Instead of fashioning its own remedy for decree violations, the district court ordered the defendants to propose remedial plans. App. at 277a. This approach allows the district court to incorporate the officials' judgment into its prospective remedial orders.[14]

Finally, jurisdictional rules should "make sense." *Lapides*, 122 S. Ct. at 1244. To be fair, *Lapides* prohibits a defendant from removing a case to federal court, having it dismissed because of the Eleventh Amendment, seeking removal again, requesting dismissal again, and on and on *ad infinitum.* In the context of consent decrees, it would not "make sense" to allow State officials to urge entry of a decree to avoid trial, and then force trial on the merits before the plaintiffs could seek relief from a decree violation — and possibly yet another trial on the merits in the event of another decree violation.

D. To Require Proof of Violation of Rights Remediable Via § 1983 Conflicts With *Verizon*'s Conclusion That Eleventh Amendment Analysis Does Not Include The Merits Of A Case.

Eleventh Amendment analysis "*does not include an analysis of the merits*." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, __ U.S. __, 122 S. Ct. 1753, 1761 (2002) (emphasis added). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court

14. Other courts properly take more specific approaches to enforcing agreed decrees. *See, e.g.*, *Rosen*, 288 F.3d at 924-5 (agreed order concerning Medicaid Act).

need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 1760, *quoting*, *Idaho v. Coeur d'Alene*, 521 U.S. 261, 296 (1997) (O'Connor, J. concurring.)

Despite *Verizon*, the Fifth Circuit held that to avoid the Eleventh Amendment's bar to jurisdiction, a plaintiff must prove that a violation of a consent decree is also a violation of *rights* remediable through § 1983. The Fifth Circuit's analysis conflicts with *Verizon*, which establishes that Eleventh Amendment analysis does *not* address the merits of a case, i.e., whether rights have been violated.

III. State Officials' Failure To Provide Services Required By The EPSDT Provisions Violates Rights That Medicaid Recipients May Enforce Pursuant To 42 U.S.C. § 1983.

This case presents an important question about whether millions of this country's children are entitled to actually receive the health care services that Congress has promised them, and that all of the States have agreed to provide. Further, this case presents an important question about the nature of rights granted by the Medicaid Act and other federal statutes.

To determine if a federal statute creates rights subject to enforcement, courts must determine "whether Congress *intended to create a federal right*." *Gonzaga University v. Doe*, __ U.S. __, 122 S. Ct. 2268, 1275 (2002) (original emphasis). The "text and structure of a statute" determine if Congress intended to "confer individual rights upon a class of beneficiaries." *Id.* at 2276-77. In this regard, *Gonzaga* amplifies the first prong in a three prong test used to determine if Congress created a right subject to § 1983 enforcement. *Blessing v. Freestone*, 520 U.S. 329 (1997). In other regards, *Gonzaga* reaffirms the *Blessing* test. *Gonzaga*, 122 S. Ct. at 2274.

As an initial matter, the EPSDT provisions — independent of any other sections of the Medicaid Act — meet the *Gonzaga-Blessing* test for whether a statute creates enforceable rights. First, § 1396a(a)(43) identifies very clearly the class of EPSDT beneficiaries. They are "all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance." 42 U.S.C. § 1396a(a)(43)(A). The same section of the Act also identifies the individual rights that Congress intended to confer upon this class of beneficiaries. The rights include:

- information from state officials about the availability of EPSDT services and immunizations. 42 U.S.C. § 1396a(a)(43)(A).
- provision or arrangement for "screening services in all cases where they are requested." 42 U.S.C. § 1396a(a)(43)(B). The statute defines the frequency and elements of screens, as well as dental, hearing and vision preventive services. 42 U.S.C. §§ 1396d(r)(1); (2); (3); (4).
- arrangements for "(directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services." 42 U.S.C. § 1396a(a)(43)(C). Medically needed corrective treatment includes "[s]uch other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services. . . ." 42 U.S.C. § 1396d(r)(5).

Sections 1396a(a)(43) and 1396d(r) clearly indicate that Congress intended the EPSDT provisions to benefit Medicaid recipients under the age of 21, i.e., the children in this case. When Congress defines a group of beneficiaries and specifies the services to be provided, Congress creates rights that may be remedied through § 1983. *See King v. Smith*, 392 U.S. 309, 317 (1968).

Further, the EPSDT provisions meet the second and third prongs of *Blessing*. *See, e.g.*, *Pediatric Specialty Care v. Ark. Human Services*, 293 F.3d 472, 477-79 (8th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852, 863 (6th Cir. 2002), *cert. pending*, No. 02-277; *Miller by Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1997); *Pereira by Pereira v. Kozlowski*, 996 F.2d 723, 724-26 (4th Cir. 1993).

A. The Courts Of Appeals Disagree About The Extent Of EPSDT Rights.

Cases recently filed in this Court highlight the confusion among the courts of appeal about EPSDT rights. The Petition in *Odom v. Antrican*, No. 02-220 at 7 (hereinafter "*Antrican*"),[15] relies on this case to argue that the courts of appeals disagree about EPSDT rights. *See also Antrican* Reply at 4-5. Similarly, the Petition in *Haveman v. Westside Mothers*, No. 02-277 at 26 (hereinafter "*Westside Mothers*"), relies on this case to urge that a conflict exists about EPSDT rights.

Although the Petitioners in *Antrican* and *Westside Mothers* urge that there are no EPSDT rights, the courts of appeals for the Fourth, Sixth, Seventh, Eighth and Eleventh Circuits hold that EPSDT creates rights that may be enforced via § 1983.[16] *Pediatric Specialty Care v. Ark. Human Services*, 293 F.3d 472, 477-9 (8th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852, 862-3 (6th Cir. 2002),

15. The Court denied a writ of certiorari in *Antrican* on October 21, 2002.

16. Further, Congress intends EPSDT to create rights enforceable pursuant to § 1983. When Congress strengthened the EPSDT requirements in 1989, Congress approved one federal court decision. H.R. No. 101-247, 101st Cong., 1st Sess. 398 at 399 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2124 at 2125. In that case, Texas children who qualified for Medicaid relied on § 1983 to enforce their EPSDT rights. *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983).

cert. pending, No. 02-277; *Miller by Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1997); *Pittman by Pope v. Sec'y of Florida Dep't. Of Health and Rehab. Services*, 998 F.2d 887 (11th Cir.), *cert. denied*, 510 U.S. 1030 (1993); *Pereira by Pereira v. Kozlowski*, 996 F.2d 723 (4th Cir. 1993).

In this case, the Fifth Circuit implied that the EPSDT provisions may create rights, App. at 28a, and decided that indigent children who qualify for Medicaid do not have a right to actually receive the EPSDT information, screens and services that they need. App. at 33a-39a. This decision conflicts with decisions from the Fifth and Seventh Circuits, as well as Congress. 42 U.S.C. §§ 1320a-2; 1320a-10. *See below*.

Congress intends EPSDT to be "'an affirmative program aimed at reducing future Medicaid expense by detecting and remedying incipient dental problems. . . .'" *Mitchell*, 701 F.2d at 347 (citation omitted in original). *See also Stanton v. Bond*, 504 F.2d 1246, 1250 (7th Cir. 1974) (subsequent history omitted); *see also* 42 U.S.C. §§ 1320a-2; 1320a-10 (discussed below).

B. Children's EPSDT Rights Are Violated When They Cannot Get Health Care Guaranteed To Them By The Medicaid Act.

Even though the children proved that many of them cannot get health care that they need, the Fifth Circuit erroneously concluded that no facts showed violations of rights subject to § 1983 relief. In reaching this conclusion, the Fifth Circuit incorrectly focused its analysis on "the opening text of § 1396a(a) and § 1396a(a)(43) . . . [which] . . . only requir[e] that a state '*plan*' must '*provide for* . . .' meeting [EPSDT] requirements." App. at 29a-30a (original emphasis).

To the contrary, Congress emphasizes that "[i]n an action brought to enforce [provisions] of the Social Security Act, such provision is not to be deemed unenforceable because

of its inclusion in a section . . . requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. §§ 1320a-2; 1320a-10. Sections 1320a-2 and § 1320a-10 reinstate "prior Supreme Court decisions" to set the "grounds for determining the availability of private rights of action to enforce State plan requirements."

This Court's 1990 decision in *Wilder*, 496 U.S. 498, predates the 1994 enactment of § 1320a-2 and § 1320a-10. In 1994, Congress reinstated *Wilder*'s holding that the Medicaid Act creates rights that may be enforced via § 1983, even though States must propose plans for federal approval.

Moreover, the Medicaid Act is not "a dead letter." *Wilder* 496 U.S. at 514. The reimbursement rates at issue in *Wilder* had to be "*actually* . . . reasonable and adequate." *Id.* at 515 (emphasis added).

In other words, it is not sufficient simply to have written EPSDT policies or State plan sections. EPSDT is "'aimed at . . . detecting and remedying incipient dental problems. . . .'" *Mitchell*, 701 F.2d at 347 (*citation omitted in original*). Children's health problems cannot be "remedied" unless children actually receive health care services. *See also Stanton*, 504 F.2d at 1250; *Antrican v. Buell*, 158 F. Supp. 2d 663, 672-73 (E.D.N.Car. 2001), *aff'd sub nom*, *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), *cert. denied*, No. 02-220.[17]

17. Medicaid recipients may also enforce the reasonable promptness and equal access provisions of the Medicaid Act, raised in the children's first supplemental complaint. 42 U.S.C. §§ 1396a(a)(8); 1396a(a)(30)(A). Like EPSDT, the reasonable promptness provision also creates a right to actually receive Medicaid services with reasonable promptness, not just to promptness policies. *Doe v. Chiles*, 136 F.2d 709, 719, 721-22 (11th Cir. 1998), *appeal after remand*, *sub nom Doe v. Bush*, 261 F.3d 1037 (11th Cir. 2001) (denying contempt). Similarly, the equal access provision looks to actual access to health care. *Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908, 927-28, 930-34 (5th Cir. 2000); *Arkansas Med. Society, Inc. v. Reynolds*, 6 F.3d 519, 527 (8th Cir. 1993).

C. EPSDT Participation Reports Do Not Preclude Enforcement of EPSDT Rights.

The Court should review this case to determine an important question about Congress' intent to create rights. Despite § 1396a(a)(43)'s requirement of EPSDT information, screens and necessary corrective treatment for "*all*" Medicaid recipients under the age of twenty-one, the Fifth Circuit analogizes EPSDT participation reports to the substantial compliance standards found unenforceable in *Blessing*. App. at 31a-32a. App. at 30a-32a.[18]

i. The Secretary's Reports and Participation Rates Are Not Before the Court.

As an initial matter, the Secretary's reports and participation rates are not before this Court. While the complaint addresses the EPSDT reporting requirements, the parties did not agree to a decree based upon that claim. The decree does not rely on the EPSDT reporting requirements. Further, the parties specified that issues about the Secretary's participation goals remain in dispute and are not resolved by the decree. 3R902. Finally, the decree does not set participation rates.

ii. *Blessing*'s "Substantial Compliance" Analysis Does Not Apply to EPSDT Rights.

Blessing's "substantial compliance" analysis does not apply to EPSDT. First, the *Blessing* plaintiffs relied on 42 U.S.C. § 609(8), which allows the Secretary to reduce federal payments if a State does not substantially comply with the statute. In this case, the children do not rely on the parallel section of the Medicaid Act. 42 U.S.C. § 1396c.

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18. The reports include data about "results in attaining the participation goals" set by the Secretary under § 1396d(r). 42 U.S.C. § 1396a(a)(43)(D). The Secretary has only set participation goals for medical screens.

Second, the Secretary's participation reports and rates do not defeat the children's rights to EPSDT services. The fact that one section of a statute includes substantial compliance language does *not* defeat rights created by other sections of the same statute. *Blessing* itself concludes that although the substantial compliance requirements of Title IV-D of the Social Security Act did not create enforceable rights, other sections of the same statute might well bestow rights upon the *Blessing* plaintiffs. 520 U.S. at 345-46.

Third, Congress can use its spending power to create a statute that both vests enforcement power in the Secretary and grants enforceable rights to a group of individuals. Congress may seek to "avoid the use of federal resources" for programs that do not meet federal standards, and at the same time endow individuals with entitlements. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), *cited with approval in Gonzaga*, 122 S. Ct. at 2275. "The first purpose is generally served by the statutory procedure for the termination of federal financial support." *Cannon*, 441 U.S. at 704. Withholding federal funds, however, is "severe and often may not provide an appropriate means of accomplishing the second purpose. . . ." *Id.* at 704-05. Indeed, litigation by private parties is less disruptive than "a cutoff of all federal funds." *Id.* at 710 n.44. The children would be harmed tremendously if federal funds were withheld from the Texas Medicaid Program, because they would not be able to obtain health care.

The structure and text of the Medicaid Act indicate that Congress intended to vest individual EPSDT rights in children who qualify for Medicaid, 42 U.S.C. §§ 1396a(a)(43); 1396d(r), and also vest in the Secretary the authority to withhold federal funds in the event of "failure to comply substantially." 42 U.S.C. § 1396c. These separate sections of the Act serve separate purposes. The EPSDT provisions grant rights to "all" children and youth who qualify for Medicaid; § 1396c allows the Secretary to conserve federal resources by withholding funds if States do not substantially comply with Medicaid requirements.[19] *See also Wilder*, 496 U.S. 516-19 (Secretary's role exists together with rights subject to § 1983 enforcement).

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19. Section 1396a(a)(43)(D) is the only part of § 1396a(a)(43) that mentions the Secretary. This aspect of the text of the EPSDT provision suggests that Congress intended the reports required by § 1396a(a)(43)(D) to assist the Secretary in his duties.

CONCLUSION

Petitioners respectfully ask this Court to grant the petition for a writ of certiorari to resolve the conflicts among the courts of appeals concerning the important questions of federal law presented by this petition.

Respectfully submitted,

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