

## COURT DECISIONS FROM 2006

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## Good Decision On Reasonable Promptness Claims From Southern District of New York

The federal district court for the Southern District of New York ordered officials from New York City and New York State to improve their procedures to fix errors that led to the denial of Medicaid and Food Stamps to battered immigrant women and their children.

The court held that the beneficiaries could enforce federal law, found that federal law had been violated, ordered injunctive relief, and certified a class action. *M.K.B. v. Eggleston*, 2006 WL 2469155 (S.D.N.Y. Aug. 29, 2006).

The case was brought under the reasonable promptness provisions of Medicaid and Food Stamp statutes. At the outset, the court held that these provisions are enforceable pursuant to 42 U.S.C. § 1983.

The Medicaid provision at issue in the case is 42 U.S.C. § 1396a(a)(8), the statutory requirement to permit individuals to apply and provide Medicaid with “reasonable promptness.” The court applied the three part test established in *Blessing v. Freestone*, 520 U.S. 329 (1997), also noting the holding of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), that federal rights, not benefits or interests, may be enforced under § 1983. For the first prong of the Blessing test, the court held that the statute was “plainly designed to benefit persons like the plaintiffs here, and Congress’s focus . . . was on the individual, rather than the aggregate or the responsibility of state actors.” Addressing the second prong, the court ruled that the obligations imposed were neither vague nor amorphous, since the claim challenged the accuracy of eligibility determinations, “an evaluation of which is well within the judiciary’s competence.” Third, the court found that the statutory was mandatory, since it contained the word “shall.” The court cited caselaw from the first, third and eleventh circuits holding that the Medicaid reasonable promptness provision is enforceable under § 1983.

The court then analyzed and found enforceable two provisions of the Food Stamp Act regarding promptness. 7 U.S.C. § 2020(e)(3) requires that the state “promptly determine the eligibility” of food stamp applicants, and 7 U.S.C. § 2020(e)(9) requires that, in the context of expedited food stamps, coupons be provided no later than 7 days after the application for households with incomes below a certain level. The court held that these food stamp statute provisions met the *Blessing* test, repeating the analysis utilized for the Medicaid prompt processing provision and cited cases from the fifth circuit and the southern district of NY.

The court found that the plaintiffs were erroneously denied public assistance, Medicaid benefits, and/or food stamps, in violation of their federal and state rights. The court further held that they were denied adequate notice of the denial of their applications, in violation of the due process clause of the U.S. Constitution.

The district court ordered injunctive relief against both the City and State agencies. The court noted

that the Eleventh Amendment does not preclude suit against a city and that a municipality may be held liable under §1983 for a policy, custom or usage that caused the deprivation of plaintiffs' rights. The court found that the state defendants were vicariously liable for the city defendant's violations of plaintiffs' federal rights, since the Eleventh Amendment does not preclude suits against state officers in their official capacity for prospective injunctive relief to prevent a continuing violation of federal law.

Finally, the court ruled that all the requirements for class certification were satisfied. The court noted that class members shared common issues of law and fact. All class members alleged that defendants erroneously and systemically failed to provide public benefits to members of the class as a result of flaws in computer systems, erroneous policy bulletins and directives, and inadequate training. The court found that there were common questions of law, even though each member of the class was denied benefits for slightly different reasons and under slightly different circumstances.

## Ninth Circuit Case on Fourteenth Amendment

The Ninth Circuit upheld the constitutionality of the application of the Religious Land Use and Institutionalized Persons Act (RLUIPA) to the denial of a land use permit.

A non-profit Sikh organization was denied a building permit for a temple after a hearing in which neighbors complained about effects upon the agricultural uses of surrounding land, traffic, and property values. The district court had held that the denial of the permit inhibited Guru Nanak's religious exercise, as protected by RLUIPA. The court of appeals affirmed and held that the federal law was a valid exercise of Congress' powers under the Fourteenth Amendment of the Constitution. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.2d 978 (9th Cir. Aug. 1, 2006).

The case is significant not only because it is a positive decision upholding congressional legislative power but also because of the history of the interplay between Congress and the Supreme Court in this area.

In *Employment Div., Dept. of Human Resources of Oregon v. Smith* ("Smith"), 494 U.S. 872 (1990), state employees were fired and denied unemployment compensation for the "misconduct" of sacramental use of peyote in a ceremony of a Native American Church. The Supreme Court held in *Smith* that the Free Exercise Clause of the First Amendment does not inhibit a state from enforcement of valid laws of general application that incidentally burden religious conduct. Justice Scalia wrote the majority opinion. Justice O'Connor concurred. Justices Blackmun, Brennan, and Marshall dissented.

In direct response to *Smith*, Congress enacted the Religious Freedom and Restoration Act (RFRA), which prohibited governments from substantially burdening a person's exercise of religion even if the burden resulted from a rule of general applicability unless there was a compelling governmental interest and the government utilized the least restrictive means of furthering that compelling governmental interest. Yet, the Supreme Court held that RFRA was unconstitutional. In *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997), the Supreme Court held that RFRA was an unconstitutional exercise of congressional power pursuant to Section Five of the Fourteenth Amendment because of a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. Justice Kennedy wrote the majority opinion. Justices Stevens and Scalia concurred. Justice O'Connor, Breyer and Souter dissented.

Then in direct response to *City of Boerne*, Congress enacted RLUIPA, which narrowed the applicability of the law to regulations regarding land use and prison conditions. The Supreme Court unanimously held in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), in a decision written by Justice Ginsberg, that RLUIPA's applicability to prison conditions was within the proper bounds of congressional power. The Supreme Court held that RLUIPA did not exceed the limits of permissible government accommodation of religious practices. The Court gave great weight to congressional hearings regarding barriers to inmates practicing their religion.

The Ninth Circuit similarly held in *Guru Nanak* that the provisions of RLUIPA regarding land use were validly enacted pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment. The court noted that in nine hearings, Congress "compiled a substantial amount of

statistical and anecdotal data demonstrating that governmental entities nationwide purposefully exclude unwanted religious groups by denying them use permits through discretionary and subjective standards and processes.” The court held that RLUIPA was a “congruent and proportional response to free exercise violations because it targets only regulations that ... violate individual’s religious exercise.” The judges on the Ninth Circuit panel were D.W. Nelson (Carter), Rawlinson (Clinton), and Bea (Reagan).

## Hawaii District Court 1983 Decision

The district court of Hawaii held that *Gonzaga University v. Doe*, 536 U.S. 273 (2002), overruled Ninth Circuit precedent, so that § 1983 is no longer available to enforce the Admission Act, the federal statute whereby Hawaii became a state in the United States.

The district court of Hawaii, Judge Mollway (a Clinton appointee), held that *Gonzaga University v. Doe*, 536 U.S. 273 (2002), overruled Ninth Circuit precedent, so that § 1983 is no longer available to enforce the Admission Act, the federal statute whereby Hawaii became a state in the United States. *Day v. Apoliona*, 2006 WL 2338212 (D. Haw. Aug. 10, 2006). The Admission Act established a public trust to be used for the betterment of native Hawaiians. The plaintiffs challenged the use of public trust funds by the Office of Hawaiian Affairs, alleging funds for native Hawaiians were disbursed “without regard to blood quantum.”

The district court focused on the following statement in *Gonzaga*: “A court’s role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.” 536 U.S. at 285. The district court interpreted *Gonzaga* as holding that there can be no enforceable rights under 1983 if there is no implied private right of action.

In *Keaukaha-Panaewa Community Assn. v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1978) (*Keaukaha I*), the Ninth Circuit had held that there was no private right of action under the Admission Act. Nevertheless, subsequent decisions held that there was a statutory right enforceable under § 1983. *Keaukaha-Panaewa Community Assn. v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984) (*Keaukaha II*); *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993). Indeed in *Keaukaha II*, the Ninth Circuit explicitly held that the absence of a private right of action did not preclude the finding of a right to enforce pursuant to § 1983.

However, in *Day*, the district court stated that *Gonzaga* forced a change:

The Ninth Circuit’s conclusion in *Keaukaha I*, 588 F.2d at 1223-35, that neither the text nor the legislative history of the Admission Act indicates any congressional intent to create a private right of action requires the conclusion here that the Admission Act confers no individual rights enforceable under § 1983.

The district court acknowledged that it was disregarding prior Ninth Circuit caselaw, but claimed that this was mandated by the US Supreme Court, a higher authority, in *Gonzaga*. The district court held that the Admission Act failed the first prong of *Blessing v. Freestone*, 520 U.S. 329 (1997) (Congress must have intended that the provision in question benefit the plaintiff), based on the lack of a private right of action.

## Good 6th Cir. Title IX Case

The Sixth Circuit held that Title IX does not preclude relief for constitutional claims under § 1983. *Communities for Equity v. Michigan High School Athletic Ass’n*, 2006 WL 2355596 (6th Cir. Aug. 16, 2006). The case was brought by parents and high school athletes contending that the Michigan High School Athletic Association’s scheduling of sports seasons discriminated against female athletes on the basis of gender.

The case previously had been appealed all the way to the US Supreme Court, which vacated the earlier decision for reconsideration in light of *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). The Rancho suit sought damages under § 1983 for violations of the Telecommunications Act, and the Supreme Court held that relief under § 1983 was precluded, based on the remedies provided in the Telecommunications Act.

On remand in *Communities for Equity*, Sixth Circuit judges Cole and Gilman, both of whom are Clinton appointees, ruled that the Rancho case did not warrant any change in the earlier decision permitting constitutional claims to proceed under § 1983. Judge Kennedy, who is a Carter appointee, dissented, and stated that Title IX supplants gender-based equal protection claims under § 1983.

The majority decision in *Communities for Equity* relies heavily on an earlier Sixth Circuit decision, *Lillard v. Shelby County Bd. of Ed.*, 76 F.3d 716 (6th Cir. 1996). *Lillard* held that Title IX contains no comprehensive enforcement scheme and the remedies afforded in Title IX are insufficient to preclude the pursuit of a remedy under § 1983 for constitutional violations. In *Communities for Equity*, the Sixth Circuit interpreted the Rancho case as being limited to plaintiffs who attempted to recover only for violations of federal statutory law (as opposed to constitutional law) through the enforcement mechanism of § 1983, when the statute provided a comprehensive enforcement scheme. The Sixth Circuit held that Rancho did not in any way overrule or invalidate *Lillard*, and therefore, the court continued to abide by its earlier decision in *Lillard*. The court of appeals stated that “Congress did not intend for the termination of federal funds – the only remedy explicitly authorized by Title IX – to serve as a comprehensive or exclusive remedy.”

The Sixth Circuit notes there is a split among courts of appeals on this issue. The Eighth and Tenth Circuits, now joined by the Sixth, have held that Title IX is not comprehensive enough to be exclusive of relief under § 1983. *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996). However, the Second, Third, and Seventh Circuits have reached the opposite conclusion, holding that Title IX precludes access to § 1983 for constitutional claims. *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990).

On the merits, the Sixth Circuit held that the Athletic Association had violated the girls’ rights under the equal protection clause, Title IX, and Michigan’s civil rights statute.

## Bad 8th Cir. Class Cert/11 Am. case

Although the plaintiffs sought only declaratory and injunctive relief, the Eighth Circuit reversed class certification based, in part, on concerns about sovereign immunity under the Eleventh Amendment in a case against officials in charge of Nebraska's three residential mental health facilities. Sixteen present and former female patients allege rape and sexual abuse at these institutions, in violation of their rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the Constitution, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. Plaintiffs allege that state officers, in their official capacities, failed to protect female patients from sexual and physical assaults by male patients and staff and failed to adequately treat their mental illnesses and developmental disabilities. However, the court of appeals held that adjudication of the claims of former residents could violate the state's Eleventh Amendment immunity from damage claims and that the district court had abused its discretion in certifying a class that included former residents. *Elizabeth M. v. Montenez*, 2006 WL 2346469 (8th Cir. Aug. 15, 2006). The judges on the Eighth Circuit panel are Loken (Bush I), Bouman (Reagan), and Smith (Bush II).

A number of the plaintiffs in *Elizabeth M.* had also participated as plaintiffs in earlier litigation alleging sexual abuse at one of the Nebraska mental health facilities. *Caroline C. v. Johnson*, 174 F.R.D. 452 (D. Neb. 1996). Following class certification, the *Caroline C.* case settled, mandating appropriate mental health treatment for class members. The consent decree in *Caroline C.* expired by its terms at the end of 2000.

The Eighth Circuit acknowledged that former patients could be recommitted to one of the facilities, but concluded that their claims were moot. The court of appeals rejected the plaintiffs' contention that they should be permitted to represent the class because their claims are capable of repetition, yet evading review. Instead, the court found that long-term residents would "better represent the class of present and future residents."

The court of appeals stated, without citation or elaboration, that adjudication of the claims of former patients "for a declaratory judgment that prior assaults violated their rights is not necessary to the claims for injunctive relief but threatens to violate the State's Eleventh Amendment immunity from damages claim." The court stated that a claim under the constitution for non-custodial mental health treatment "is highly dubious." The court criticized the complaint for failing to specify the statutory basis of a post-discharge claim in the ADA or Rehabilitation Act. The Eighth Circuit concluded that the inclusion of both present and former residents in one broad class was "unmanageable."

Caroline C., the named plaintiff in the earlier litigation, was one of two named plaintiffs in *Elizabeth M.* who currently reside at a state mental health facility. Of those two, only Caroline C. alleged that she had been sexually assaulted, and this assault was from another resident. The court of appeals held that the case required an individualized inquiry as to whether an employee of the facility violated her substantive due process right to safety. The court stated: "The presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry."

The court held that since there were no named plaintiffs who were current residents of the other two facilities who alleged abuse, patients at the other two facilities could not be included in the class. Similarly, the court noted that there were no named plaintiffs who were current residents who alleged abuse by staff, and stated that claims of abuse by residents are not typical of claims of abuse by staff.

The Eighth Circuit stated that the district court's certification of the class "neither promotes the efficiency and economy underlying class actions nor pays sufficient heed to the federalism and separation of powers principles" established in Supreme Court cases.

The court completely vacated the class action certification, though it did suggest that Caroline C. could continue her case to improve conditions at the facility in which she resides.

## Ohio District Court Dismisses Rehab Act Complaint

In a case concerning payment of college tuition as part of vocational rehabilitation services for people with disabilities, an Ohio federal district court dismissed without prejudice a complaint seeking to enforce Title I of the Rehabilitation Act. The court held that the complaint failed to state a claim upon which relief can be granted. *Jackie S. v. Connelly*, 2006 WL 2033700 (S.D. Ohio 2006).

The Ohio Rehabilitation Services Commission promulgated an administrative rule limiting the amount of financial assistance the state would provide to disabled individuals seeking a post-secondary education. In a class action suit, eligible students alleged that the administrative rule is contrary to Title I of the Rehabilitation Act and its regulations.

The district court held that the state did not have sovereign immunity from suit under the Eleventh Amendment and that *Ex parte Young* is applicable to enforcement of the Rehabilitation Act. The court also ruled that there was no need for all of the named plaintiffs to exhaust administrative remedies, because such exhaustion would be futile.

However, the court held that there is neither an express nor an implied private right of action in either the Rehabilitation Act or the implementing regulations for plaintiffs seeking relief for systemic violations of the Act. The court stated that “no court has ever read Title I of the Rehabilitation Act to create an express cause of action.” The court noted that in 1998, Congress provided a right to a private civil action after a final hearing decision. 29 U.S.C. § 722 (c)(5)(J).

Finding that the Rehabilitation Act did not confer a right of action, the court then looked to see whether Section 1983 would provide a basis for suit. Plaintiffs alleged a violation of the due process clause of the 14th Amendment, enforceable pursuant to 42 U.S.C. § 1983. (The heading of the court’s discussion of 1983 states that plaintiffs alleged federal law violations enforceable through 1983, but the body of the discussion on 1983 does not address federal law violations.) The court noted that while the due process claim had been clarified in the briefing on the motion to dismiss, the complaint “makes a bare assertion that the college training rule is ‘arbitrary.’” The court held that the complaint’s allegation that the state’s action was “arbitrary” was insufficient to state a claim upon which relief could be granted. The court dismissed this claim without prejudice and gave the plaintiffs 20 days to amend their complaint to correct this deficiency.

Plaintiffs further alleged that state law conflicted with federal law and was therefore preempted pursuant to the Supremacy Clause of the Constitution. The court held that the complaint’s mere assertion that the state rule is preempted was too vague to state a claim upon which relief could be granted. The court gave the plaintiffs twenty days to amend this claim as well.

## Good 5th Cir. Consent Decree Decision

The Court of Appeals for the Fifth Circuit issued another decision yesterday in a Texas Medicaid case regarding whether a consent decree is enforceable in federal court. *Frazar v. Ladd*, 2006 WL 106 (5th Cir. 2006). The case concerns a detailed consent decree regarding the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program for children. Unlike its first decision, yesterday's Fifth Circuit decision upholds the enforceability of the consent decree.

In its first decision in this case, the Fifth Circuit refused to enforce the consent decree. It ruled that the state's violations of the consent decree did not give rise to individual rights enforceable under section 1983 and that the state did not unequivocally waive its Eleventh Amendment immunity with respect to enforcement of a consent decree. *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002).

That decision was unanimously reversed by the Supreme Court. *Frew v. Hawkins*, 540 U.S. 431 (2004). The Court stated: "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."

However, the state of Texas, in its recent appeal, latched on to another statement by the Supreme Court:

"[P]rinciples of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion. The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials."

In its latest appeal, the state argued that in *Frew*, the Supreme Court changed the standards regarding modification of a consent decree to place more weight upon "democratic accountability and federalism concerns." The state argued that they were complying with EPSDT law and therefore the consent decree should be terminated.

The Fifth Circuit strongly disagreed with the state's position. The court held that the state must comply with the terms of the consent decree, which are more detailed than the federal statute. The court noted that the consent decree "speaks to the broader goals of enhancing recipients' access to health care and improving the use of health care services by EPSDT recipients." Since the state had not complied with the consent decree's requirements for medical checkups, dental services, outreach, and case management, the Fifth Circuit refused to terminate the decree.

## Sixth Circuit Rules on ADA Title II

*This article was written by Jennifer Mathis, Senior Staff Attorney with the Bazelon Center for Mental Health.*

A recent Sixth Circuit decision concluded that Congress did not validly abrogate states' sovereign immunity for an ADA Title II claim brought by a woman who used a wheelchair and was sentenced to an inaccessible drug and alcohol treatment program. *Haas v. Quest Recovery Services, Inc.*, 2006 WL 773615 (6th Cir. Mar. 27, 2006). Rachel Haas was charged with driving under the influence of alcohol after she was involved in a car accident in which she was severely injured. Following the accident, Haas' leg was amputated above the knee, a metal rod was placed in her arm, and she began using a wheelchair. After pleading guilty to the criminal charge, she was sentenced by a municipal court judge to 36 days of house arrest and participation in two driver intervention programs at Quest Recovery Services. At Quest, Haas was required to crawl up six flights of stairs because there was no elevator. The program also served her meals in the basement, forcing her to crawl up and down the stairs several times a day. She eventually fell down three flights of stairs and displaced the rod in her arm. Haas ultimately failed the program because of her "unacceptable" attitude, and served six days in jail.

Haas sued Quest and the state of Ohio in federal court, bringing claims under the ADA and Section 504, and additional state law claims against Quest. She sought \$6 million in damages. The district court dismissed the ADA claim against Ohio on Eleventh Amendment grounds but found that Ohio had waived immunity for purposes of the 504 claim. Haas voluntarily dismissed all claims against Quest and settled her 504 claim against the state. She appealed the denial of her ADA claim against Ohio. The Sixth Circuit affirmed the ruling that Congress had not validly abrogated Eleventh Amendment immunity for Haas' ADA claim. It relied on prior circuit precedent (*Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc)) to conclude that Congress could abrogate sovereign immunity for ADA claims that are due process type claims, but not equal protection type claims. Plaintiffs argued that the Supreme Court's *Hibbs* decision clarified that Congress can abrogate immunity based on equal protection principles. The court distinguished *Hibbs* on the ground that it involved Congress's response to a history of gender discrimination, where heightened scrutiny was applied, whereas disability-based equal protection claims receive only rational basis scrutiny. The court also refused to characterize Haas' claims as within the area of "access to courts" for which Congress validly abrogated sovereign immunity under the ADA, per *Tennessee v. Lane* (the court considered the ADA claim against Ohio to include only Ohio's role as the landlord of the inaccessible building that was leased to Quest; it concluded that Ohio could not be liable for the municipal court's decision to sentence Haas to an inaccessible program because judicial immunity applied).

Plaintiffs' decision to appeal the ADA claim after settling the 504 claim is somewhat puzzling. Both claims were based on the same conduct and the ADA would not provide additional relief beyond what 504 would provide. In fact plaintiffs had a much clearer claim for damages under 504 given the law on waiver of immunity. This case points to the need for caution in bringing ADA claims against a state entity when parallel 504 claims exist. In most circumstances, an ADA Title II claim against a state will not

provide any more relief than a 504 claim, and carries significant risks. Those risks should also be weighed carefully, of course, in deciding whether to appeal an unfavorable decision.

In any event, the Sixth Circuit's approach of categorically disallowing ADA Title II claims against states based on equal protection principles seems inconsistent with *Lane*. First, this approach ignores that heightened scrutiny is applied to equal protection claims involving fundamental rights (and many ADA Title II claims involve fundamental rights, although the ADA claim in this case -- as limited by the court to Ohio's duty as a landlord to ensure that the facilities it leases to private entities are accessible -- may not implicate a fundamental right). Moreover, the Supreme Court in *Lane* considered a variety of constitutional violations, including rational basis equal protection claims in areas such as zoning and education, in concluding that Congress acted based on a sufficient record of disability-based discrimination. While it may be difficult to establish that Congress abrogated immunity under the ADA in non-fundamental rights areas, *Lane* suggests that the Sixth Circuit is incorrect in bypassing the congruence and proportionality analysis and categorically determining that no abrogation is possible for any ADA claims based on equal protection principles.

Notably, a number of courts have concluded, using the congruence and proportionality analysis in the wake of *Lane*, that Congress did validly abrogate immunity even for ADA Title II claims that do not implicate fundamental rights. See, e.g., *Constantine v. Board of Rectors of George Mason University*, 411 F.3d 474 (4th Cir. 2005); *Association for Disabled Americans, Inc. v. Florida International University*, 405 F.3d 954 (11th Cir. 2005) (both involving accommodations in higher education). *Lane*'s application of the congruence and proportionality test is sufficiently flexible that reasonable arguments may be made to support abrogation of immunity for at least some ADA claims that do not implicate fundamental rights (though caution should be exercised in raising ADA Title II claims against states in these areas).

The decision was not recommended for publication.

## Supreme Court Preempts State Laws that Impose Medicaid Liens on Beneficiary Settlement Proceeds Greater than Proportion Attributable to Health Care Costs

The U.S. Supreme Court has ruled that a Medicaid program's lien against a personal injury settlement is limited by federal law to the amount of the settlement attributable to the beneficiary's health care costs. *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 126 S.Ct. 1752 (2006). The unanimous decision is noteworthy not only because it resolved a heretofore contentious issue on terms favorable to beneficiary interests. In addition, the Court (with no reference to the issue) applied the doctrine of preemption pursuant to the Supremacy Clause of the Constitution to enforce the Medicaid statute and invalidate an inconsistent state law. The Court also rejected the federal agency's contrary interpretation of the Medicaid statute, with only a cursory reference to the need for deference.

Following Ms. Ahlborn's serious injury in an automobile accident, the Medicaid program paid approximately \$215,000 for medical care provided to her. Ms. Ahlborn's case against tortfeasors was settled for \$550,000, even though Ms. Ahlborn and the Medicaid program subsequently stipulated that her claim had been worth approximately \$3 million.

The Medicaid program assessed a lien for the entire \$215,000, and Ms. Ahlborn challenged this lien in federal court. She alleged that the Medicaid program's claim against her settlement should have been reduced proportionally based on the extent that the settlement amount was short of the stipulated value of her claim. Specifically, the claim was alleged to be reduced appropriately from \$215,000 to approximately \$35,000, because the total recovery had been reduced from its value of \$3 million to the settlement of \$550,000.

The Supreme Court invalidated an Arkansas law that had authorized the Medicaid program to seek repayment against an entire settlement or judgment, regardless to what extent such settlement or judgment was based upon health care expenses. In doing so, the Supreme Court affirmed the Eighth Circuit.

The Court found that at most a Medicaid program was *required* by federal law to collect against the portion of a settlement attributable to payments for health care. Furthermore, federal law did not *allow* a Medicaid program to go further. Federal law generally does not allow a Medicaid program to place a lien against a recipient's property. The Court inferred an exception -- but only a limited exception -- based on the requirement that a Medicaid applicant assign to the Medicaid program her right to collect against a tortfeasor for any health care expenses that had been paid by the Medicaid program. According to the Court, this assignment is, as relevant here, the extent of a Medicaid program's right to reimbursement.

The state had claimed that the disputed money was not Ms. Ahlborn's property for the purposes of the anti-lien statute, but the Court disagreed. Assessment of a lien was nonsensical if it were assumed that the property already belonged to the state.

The Medicaid program had asked for an exception to the anti-lien rule in cases in which the Medicaid recipient had not cooperated, but again the Court disagreed. The statutory duty to cooperate applies only in proceedings initiated by the state to recover from third parties. In any case, the state had produced no evidence that Ms. Ahlborn had failed to cooperate with the Medicaid program.

The state also urged an exception to prevent manipulation, arguing that plaintiffs might structure settlements and verdicts to minimize the recognition of health care expenses. The Court noted that this issue was not presented by Ms. Ahlborn's specific situation – because the parties had stipulated on the portion of the settlement procedures to be designated for Medicaid-funded health care costs -- and found generally that problems could be avoided “either by obtaining the State’s advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision.”

Neither the Court nor any party appears to have questioned the authority of the federal courts to entertain the suit. All treated the issue as whether in fact the Arkansas statute was consistent or inconsistent with relevant provisions of the Medicaid Act. This is thus the second occasion in three years in which the Court has implicitly accepted the point that the Medicaid Act may be enforced against states via preemption; the other occasion was *Pharmaceutical Research & Manufacturers v. Walsh*, 123 S. Ct. 1855 (2003) – though in that case, unlike *Ahlborn*, the Court declined to preempt the state law in question.

The Court also rejected two decisions by the Departmental Appeals Board of the Department of Health and Human Services (HHS) that supported Arkansas' construction of the Medicaid Act. The Court found that those cases "address a different question from the one posed here, make no mention of the anti-lien provision, and, in any event, rest on a questionable construction of the federal third-party liability provision." The Court "recognize[d] that Congress has delegated 'broad regulatory authority to the Secretary [of HHS] in the Medicaid area, ... and that agency adjudications typically warrant deference.'" But -- without claiming that the Medicaid Act is unambiguous -- "the Board's reasoning coupled internal inconsistency with a conscious disregard for the statutory text" and therefore was not controlling.

Thus, this new decision will lend support to the claim that preemption is available to enforce the Medicaid Act against inconsistent state actions, without regard to whether the challenged action may be challenged under 42 U.S.C. §1983, and even in the face of a contrary interpretation of the Act by HHS.

## Supreme Court Upholds ADA Damages Against States For Constitutional Violations In Prisons

The Supreme Court, in a short unanimous opinion by Justice Scalia, has held that state prisons may be sued for damages under Title II of the Americans with Disabilities Act on claims that also violate the Constitution. *United States v. Georgia*, No. 04-1203, --- S.Ct. ----, 2006 WL 43973 (Jan. 10, 2006). The Court did not reach the issue whether Congress had also validly abrogated state sovereign immunity for purely statutory violations of the ADA, remanding those for further development below. The decision gives individuals with disabilities and others a new remedy against states for constitutional violations even beyond state prisons.

Justice Scalia wrote, “While the Members of this Court have disagreed regarding the scope of Congress’s ‘prophylactic’ enforcement powers under §5 of the Fourteenth Amendment, no one doubts that §5 grants Congress the power to ‘enforce...the provisions’ of the Amendment by creating private remedies against the States for actual violations of those provisions” (citations omitted). States are not generally liable for damages for constitutional violations absent a violation of a statute, like the ADA, that gives plaintiffs a right of action against states. Notably, the Court did not require Congress to show a history and pattern of past state constitutional violations before authorizing a remedy for constitutional violations. The Court’s unequivocal language rejected the position of the Eleventh Circuit that ADA Title II as a whole was invalid in damage actions against state prisons because the statute applied far beyond conduct so extreme that it constituted cruel and unusual punishment.

The opinion likely creates an exception for constitutional violations to the Court’s prior holdings that states may not be sued for damages under the employment discrimination provisions of Title I of the ADA or the Age Discrimination in Employment Act. Yet that may be cold comfort, as the Court has interpreted the Equal Protection Clause to give little protection to claims of age or disability discrimination (and one hopes states will not violate other constitutional provisions, e.g., inflict cruel and unusual punishments, in dealing with their employees).

In the Georgia case, plaintiff Goodman’s claims were “both grave and trivial.” The state did not dispute that Goodman stated violations of both the ADA and the Eighth Amendment in claiming that he was confined in a cell so small that he could not move his wheelchair, could not get to the toilet, was forced to sit in his bodily waste for hours at a time, and broke bones trying to get to the toilet or bed without assistance. But he also challenged the temperature and lighting in his cell and claimed that he was unlawfully segregated in a medical prison due to his disability, among other claims.

The Supreme Court reversed the Eleventh Circuit with respect to the constitutional claims, but remanded for the lower courts to analyze the non-constitutional claims “on a claim-by-claim basis” to determine whether “Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.” Justice Ginsburg, joined by Justice Stevens, wrote a concurrence stressing that the Court’s decision applied to the full range of constitutional violations, and not simply those under the Eighth Amendment.

## Good Holding, Bad Dicta in District Court Case

Disabled adults sought to obtain additional services under a Medicaid Home and Community-Based Services waiver program.

In a case involving disabled adults seeking to obtain additional services, *i.e.* Community Integrated Living Arrangement services, under a Medicaid Home and Community-Based Services waiver program, the United States District Court for the Northern District of Illinois ruled in favor of the plaintiffs on the enforceability of the Medicaid provision but ultimately dismissed the claim on the merits. *Bertrand v. Maram*, 2006 WL 2735494 (Sept. 25, 2006). The decision is noteworthy, because while it follows precedent regarding the enforceability of the Medicaid statute, it sets forth a rationale for overturning this precedent. The judge is Virginia Kendall, who was appointed by President Bush (II), following the recommendations of Senators Obama and Durbin. Her previous experience had been as a federal prosecutor. See <http://durbin.senate.gov/record.cfm?id=246783>.

Plaintiffs sought to enforce 42 U.S.C. § 1396a(a)(8), which provides that medical assistance be “furnished with reasonable promptness to all eligible individuals.” The Court noted that the Court of Appeals for the Seventh Circuit held that this provision is enforceable through 42 U.S.C. § 1983 in *Bruggerman ex rel Bruggerman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003). The district court was critical of the Seventh Circuit for reaching that conclusion “without any analysis.”

The district court noted that, in the absence of Seventh Circuit precedent, it would have found that 1396a(a)(8) does not create a right that could be enforced through § 1983. The district court viewed 1396a as having an aggregate focus, because it indicated that the state must furnish medical assistance instead of the individual shall receive medical assistance. This finding ignores the “Suter fix,” 42 U.S.C. 1320a-2. In the Suter fix, Congress explicitly stated that a provision shall not be deemed unenforceable based on the fact that its requirements are phrased in terms of a state plan. The district court went on to state that the fact that the Secretary of Health and Human Services could suspend payments if the state failed to substantially comply with its obligations, “implies that Congress did not intend to create a private right of action.” To reach this conclusion, the court looked at 42 U.S.C. § 1396c, which was not a basis for suit in the case. The court did not address the fact that a cutoff of funds by HHS would provide no remedy for beneficiaries.

Finally, the court noted that beneficiaries had a right to a fair hearing, and concluded that “the availability of the administrative remedy is evidence that Congress did not intend to create a right enforceable in federal court under § 1983.” The district court cited two Supreme Court cases, *Wright v. Roanoke Redevelopment and Housing Auth.* 479 US 418, 432 (1987) and *Wilder v. Virginia Hospital Ass’n*, 496 U.S. 498 522-23 (1990), which held precisely to the contrary. Indeed, the Supreme Court stated in *Wright*: “the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983.” Similarly, in *Wilder*, the Supreme Court stated in regard to the Medicaid appeal process: “This administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983.”

Despite this dicta clearly aimed at encouraging other courts to reverse decades of case law permitting enforcement of the Medicaid statute under § 1983, the court followed *Bruggerman* and held that section 1396a(a)(8) created a right enforceable under § 1983 to medical assistance with reasonable promptness to all eligible individuals.

On the merits, the State argued that even if the Medicaid reasonable promptness provision is enforceable, the plaintiffs are entitled to no specific services, because the beneficiaries were receiving Medicaid pursuant to a waiver. The court rejected this argument, quoting several cases holding that the reasonable promptness requirement applies to waiver services.

However, the court upheld the state's denial of Community Integrated Living Arrangement services to the plaintiffs, because the waiver explicitly noted that those services would be restricted by Priority Population Criteria. The court explained that the federal government, the Center for Medicare and Medicaid Services, had approved the use of Priority Population Criteria as an appropriate assessment criteria for determining an individual's need. The court found that CMS's decision was entitled to substantial deference.

## High Court Defers to Legislatures on Takings for “Public Use”

The Supreme Court has upheld the City of New London’s plan to acquire private waterfront homes for private economic development, ruling that courts must defer to legislatures about whether a taking is for a “public use” within the meaning of the Fifth Amendment. *Kelo v. City of New London*, No. 04-108, --- S.Ct. ---, 2005 WL 1469529 (June 23, 2005). The 5-4 decision was written by Justice Stevens and joined by the other three liberals and Justice Kennedy. Justice O’Connor wrote a dissent that was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Thomas also wrote his own dissent.

The case is the second big defeat this Term for heightened protection of property rights. Unlike the commercial rent control case last month, however, in this case the property rights that lost out were largely those of low-income, heavily minority residents, whose homes or neighborhoods are deemed expendable for large private developments.

The decision caps a Term in which the Court has repeatedly endorsed deference to legislatures. Yet the fact that the decision was 5-4 with the conservatives in dissent shows that the battle for stricter controls on the authority of both state and federal legislatures may not be over if the composition of the Court changes.

### Majority Opinion

None of the justices disagreed with two “polar propositions” summarized by the majority. First, “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B.” Second, the government “may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.” That is, the courts will defer when government takes property for its own use, or for ownership by a private party that allows public use – as with a railroad or other common carrier, or a stadium.

The question in this case was whether property may be taken for private economic development that has benefits for the public – i.e., an increased tax base, creation of jobs, or the aesthetic benefits of a revitalized area – but does not directly involve public use.

The majority answered a clear “yes.” It endorsed the Court’s earliest takings cases from the 19<sup>th</sup> century, which read the Fifth Amendment as requiring only a “public purpose,” determined by legislatures, not a literal public “use.” “Our earliest cases in particular embodied a strong theme of federalism, emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”

The Court held that public benefit could not be a “mere pretext,” and indicated that a transfer from one single individual to another solely because the later would pay more taxes would be “unusual ... [and] would certainly raise a suspicion that a private purpose was afoot.” But in the instant case, New London was indisputably a “distressed municipality,” and the project involved “an integrated development plan.” Other hypothetical cases could be decided as they arise.

The Court squarely reaffirmed *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which had allowed the State of Hawaii to force 72 landowners, who owned nearly all of the nonpublic land in the state, to break up their land oligopoly and sell their houses to the renters. The Court also reaffirmed *Berman v. Parker*, 348 U.S. 26 (1954), which upheld the District of Columbia's condemnation of a large blighted area that also included a nonblighted department store as part of a large redevelopment project that included schools but also sales of land to private parties.

The majority did not cite or indicate its views on the notorious Michigan Supreme Court case of *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), which upheld Detroit's decision to bulldoze an entire a working-class, immigrant community in order to give it to a General Motors assembly plant. (Justice O'Connor cited the case as a negative example.) The Michigan Court overruled that case last year under its own constitution. *County of Wayne v. Hathcock*, 471 Mich. 415, 684 N.W.2d 765 (2004). The *Kelo* decision, however, would probably make that taking permissible under the federal Constitution.

In short, the deferential standard of review adopted by the Court will make it quite difficult to challenge most government takings under the Public Use Clause.

#### **Justice Kennedy's Concurrence**

Justice Kennedy joined the majority opinion, but also wrote separately to emphasize that "meaningful rational basis review" might still invalidate some takings that, unlike in *Kelo*, were "intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits." He also did not foreclose the possibility of "a more stringent standard of review ... for a more narrowly drawn category of takings ... in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."

#### **Justice O'Connor's Dissent**

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, wrote that the Court "abandons [a] long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable ...."

She did not dispute that government may at times take property for a public "purpose," not just a public "use." But she distinguished cases in which "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society --- in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth." Now, there is no constraint on government takings: "For who among us can say she already makes the most productive or attractive possible use of her property?"

#### **Justice Thomas's Dissent**

Justice Thomas indicated that he would eliminate the entire category of public purpose takings -- overruling *Midkiff* and *Berman* -- and would allow only takings for the government's own use or for acquisition by common carriers whose property may be used by the public. In *Berman*, "if the slums at

issue were truly ‘blighted,’ then state nuisance law ... not the power of eminent domain, would provide the appropriate remedy.”

He based his position on his understanding of the original meaning of the Public Use Clause, supported by his interpretation of early English common law and early state takings cases. He was unconcerned that his theory disregarded most of the U.S. Supreme Court’s taking jurisprudence, since those cases did not begin until the late 19th Century.

Justice Thomas also questioned why courts should defer to legislatures’ interpretation of “public use” but not to their view of whether a search of a home was reasonable. Courts closely scrutinize the search of a home but not “the infinitely more intrusive step of tearing down petitioners’ homes.”

Finally, he observed that the property taken for economic development is overwhelmingly owned or rented by minorities and low income individuals. “In cities across the country, urban renewal came to be known as ‘Negro removal’” (citation omitted). The poor and minorities “are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect ‘discrete and insular minorities,’” this was the case.

### **Commentary**

This is one of those troubling cases where it is difficult to square consistent legal principles with unjust results or rules that are impractical in a modern society. There is a lot of truth to Justice Thomas’s final observation. The majority did not really address his concerns, and the Court’s silence on the Poletown case is telling. Yet, the powerless in society are at the losing end of legislative decisions every day; there is nothing unique about this case.

Conversely, Justice O’Connor was unwilling to limit the takings power to 18th century uses, but once she opened the door to public purposes not tied to public uses, she had difficulty articulating a clear decision line.

Justice Thomas articulated a clear, bright line rule. But it would have outlawed not only 21st Century development projects – many of which do benefit the entire community, including the poor – but even 19th Century statutes governing grist mills and manufacturing plants.

For both progressives and conservatives, the case also poses a challenge to develop consistent rules about when deference to legislatures is appropriate. It is too easy to have a results-oriented approach that overrules legislatures when they do things that one doesn’t like and defers to them when they do. For progressives, swallowing the consequences of this case (or the medical marijuana case) may be necessary to upholding deference to legislatures that adopt rent control ordinances, *see Lingle v. Chevron*, No.04-163, --S.Ct.--, 2005 WL 1200710 (May 23, 2005), or those that enact accommodations for individuals with disabilities or environmental protections.

For conservatives, they will have to ponder the meaning of a case that has Justice Stevens, not Chief Justice Rehnquist, on the side of federalism.

## N.D. Cal. Holds 1983 Enforceable by Providers

The federal district court of the Northern District of California held that the provider reimbursement provisions of the Adoption Assistance and Child Welfare Act are enforceable pursuant to § 1983. The plaintiff in the case is a non-profit organization representing group homes that care for foster children. The plaintiff alleges that foster care maintenance payments in California are insufficient to cover costs, and as a result, several members have ceased operating or reduced their capacity. *California Alliance of Child and Family Services v. Allenby*, 2006 WL 3068879 (N.D. Cal. Oct. 27, 2006).

The court denied the government's motion to dismiss which alleged that the plaintiff did not have a private right of action to enforce the law. The court noted that the Child Welfare Act specified particular costs that were to be included in foster care maintenance payments, i.e. the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. [42 U.S.C. § 675\(4\)\(A\)](#). The court found that this was distinguishable from the generalized requirement for "substantial compliance" in *Blessing v. Freestone*, 520 U.S. 329 (1997).

The court carefully analyzed *Gonzaga v. Doe*, 536 U.S. 273 (2002). Interestingly, the court rejected the dissent of Justice Stevens, which indicated that *Gonzaga* had overruled *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) and *Wright v. Roanoke Redevel. And Housing Auth.*, 479 U.S. 418 (1987). The court stated: "In his opinion for the majority, Justice Rehnquist made no intimations at overruling *Wright* or *Wilder*."

The court distinguished *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), which held that the Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A), did not confer a private right of action under § 1983. The court noted that the Medicaid provision requires states to establish methods and procedures for payment for services. The court explained: "The list of costs outlined in [Child Welfare Act] goes beyond the requirement of methods and procedures for payments; it requires states to reimburse providers for specific, enumerated costs and is more akin to the spending provisions analyzed in *Wilder* and *Wright*."

The state argued that any rights conferred by the law were aimed at the children and that the providers could not enforce rights belonging to the children. The court disagreed. The court likened the claim of the providers to that of adoptive parents who were found to have individual rights under the Child Welfare Act by the Ninth Circuit. *ASW v. Oregon*, 424 F.3d 970, 976 (9th Cir. 2005), *cert.denied*, 2006 WL 1167416 (2006). The court rejected the defendants' claim that the provision at issue was vague and amorphous, agreeing with another district court that the payment provision contained an explicit provision for determining payment to the providers. *Missouri Child Care Ass'n v. Martin*, 241 F.Supp.2d 1032, 1041 (W.D.Mo. 2003). The court also held that the language of the Child Welfare Act was mandatory not precatory.

The Judge in the case, Marilyn Hall Patel, was nominated by Jimmy Carter.

## State Law Private Cause of Action Upheld

Florida's highest court held that there is a cause of action for breach of a third-party beneficiary contract based on allegations that a health maintenance organization (HMO) violated the state's HMO Act.

Many states have passed strong consumer protection laws in health care and other areas. A recent decision of the Florida Supreme Court upheld a private cause of action to enforce one such law in state court. In addition, cases vindicating consumer rights under federal law may also involve state law claims. This important Florida state court decision could have important and favorable application in such circumstances.

Florida's highest court held that there is a cause of action for breach of a third-party beneficiary contract based on allegations that a health maintenance organization (HMO) violated the state's HMO Act. *Foundation Health v. Westside EKG Associates*, 2006 WL 2971764 (Fla. Oct. 19, 2006). While the case involved a suit on behalf of a provider organization, the holding is equally applicable to suits by insured individuals. Moreover, the principles in this case could be relevant nationwide, based on the common law doctrine that contracts incorporate provisions of state law.

Westside EKG Associates and other providers brought suit against HMOs for violating the Florida prompt-payment provisions of the Florida HMO Act. The HMO Act sets forth timeframes for payment of claims, mandating that HMOs pay or deny a claim no later than 120 days after receipt and that failure to do so results in an uncontestable obligation for the HMO to pay the claim to the provider. The providers alleged that the HMOs did not comply with these statutory timeframes. The HMOs contended that providers had no legal remedy other than administrative relief set forth in the HMO Act. The trial court dismissed the case for lack of a cause of action to enforce the state law.

The intermediate Florida appellate court reversed. The court noted that the HMO Act explicitly stated that it did not create a private cause of action for a provider or subscriber against an HMO, but the court concluded that the provider did have a cause of action for breach of contract based on the HMOs' failure to comply with the applicable state law. The holding was based on "the common law principle that contracts governed by regulatory statutes are deemed to incorporate relevant portions of such statutes," unless the contract discloses a contrary intent. *Westside EKG Associates v. Foundation Health*, 932 So.2d 214, 216 (Fla. 4th DCA 2005).

The Florida Supreme Court affirmed unanimously, holding that the "medical service providers may bring a breach of contract action as a third-party beneficiary of the contract between the HMO and its subscriber based upon the HMO's failure to comply with" the HMO Act. The court noted that the HMO Act did not mandate that the prompt payment provisions be included in the HMO contract, but found that the HMO Act "does not foreclose a common law contract action for breach of the statutorily imposed prompt payment provision." The court held that "unless the terms of the individual HMO contract or the HMO Act properly provides otherwise, [the prompt payment provision] may be incorporated as a term in the HMO contract for the purpose of alleging a breach of third-party beneficiary contract claim."

This case is important to insured individuals (who are also third party beneficiaries of the insurance contract), since there are many provisions in the Florida HMO Act that benefit the insured. For instance, the HMO Act prohibits HMOs from engaging in unfair or deceptive acts and from discriminating based on health status. Moreover, there have been cases upholding the common law principle of permitting enforcement of state law in breach of contract actions in the District of Columbia and all states except Utah. Thus, in all states but one, insured individuals may be able to enforce state insurance laws through breach of contract actions.

## Sixth Cir. Decision in Part 2 of Westside Mothers

In this case, plaintiffs appealed the decision of the court in 2005 that defendants were not required to "effectively" inform potentially eligible children about EPSDT services.

This is the second time that this case has been before the Sixth Circuit on an appeal of the district court's dismissal. In 2002, the Sixth Circuit had reversed the district court's dismissal of the plaintiffs' Medicaid claims. *Westside Mothers v. Havemen*, 289 F.3d 852 (6th Cir. 2002) (*Westside I*). Those claims were a failure to deliver services with reasonable promptness (42 U.S.C. 1396a(a)(8)), violation of the entitlement to services (1396a(a)(10)), violation of the "equal access" provision governing rates(1396a(a)(30)) and the requirement to provide Early and Periodic Screening, Diagnosis and Treatment (EPSDT) (1396a(a)(43)).

After the decision in *Westside Mothers I*, and the Supreme Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), which clarified the test for determining whether a statute confers a right enforceable through Section 1983, the defendants moved again to dismiss the claims as unenforceable. The district court found that 1396a(a)(30)(A) was not enforceable, but that the other claims were. However, he found that the plaintiffs had failed to state a claim for violations of 1396a(a)(8) and 1396a(a)(10), because those provisions only guaranteed payment for services - not the services themselves. It also dismissed the 1396a(a)(43) claim, holding that defendants were not required to "effectively" inform potentially eligible children about EPSDT services. *Westside Mothers v. Olszewski*, 368 F. Supp. 2d 740 (E.D. Mich. 2005). The plaintiffs appealed, which led to this decision.

The Sixth Circuit affirmed the dismissal of the 1396a(a)(8), 1396a(a)(10) and 1396a(a)(30) claims. It reversed the dismissal of the 1396a(a)(43) claim.

The court did not explicitly affirm the district court's conclusion that 1396a(a)(8) and 1396a(a)(10) were enforceable. But, it analyzed them as if it had decided that they were. It affirmed the district court's conclusion that these sections mandate only that individuals shall have the right to apply for medical assistance (i.e. payment for services) and that this payment will be provided "to the individual" with reasonable promptness. But, the court held that the plaintiffs could show that the payments were so inadequate that it frustrated plaintiffs' rights to receive medical assistance at all. Accordingly, it reversed the dismissal to one without prejudice and remanded to allow amendment of the complaint.

Finally, in a bright spot, the court reversed the dismissal of the EPSDT claimant holding that the statute through its implementing regulation, 42 C.F.R. 441.56, requires effective informing.

This article was written by Sarah Somers, National Health Law Program.

## Fees Denied in Pendent 1983/Preemption Case

R.J. Reynolds Tobacco Company filed suit against the AG of Washington challenging a Washington law that banned all promotional distribution of free cigarette samples in the state. The complaint alleged that the state law was preempted by the Federal Cigarette Labeling and Advertising Act. A second claim alleged that the Washington law violated the tobacco company's rights to commercial speech protected by the First Amendment of the United States Constitution. The tobacco company moved for summary judgment solely on the basis of the preemption claim and won. Subsequently, the tobacco company sought attorneys' fees under 42 U.S.C. § 1988 on the basis of its First Amendment claim. The district court denied the fee petition. *R.J. Reynolds Tobacco Co. v. McKenna*, 2006 WL 3289624 (W.D. Wash. Nov. 13, 2006).

The court noted that 42 U.S.C. § 1988 authorizes fees for an action seeking to enforce 42 U.S.C. § 1983. To prevail on a claim under § 1983, a plaintiff "must assert the violation of a federal right, not merely a violation of federal law." The court explained that a preemption claim under the Supremacy Clause "simply asserts that a federal statute has taken away local authority to regulate a certain activity." The court noted that a "preemption claim is not a colorable § 1983 action that would allow for recovery of attorneys' fees under § 1988."

The tobacco company argued that it was entitled to fees on the basis of the pendent First Amendment claim plead in their complaint. The tobacco company relied upon cases holding that a plaintiff could obtain fees on a non-fee claim if the claims arise out of a common nucleus of operative facts and the plaintiff demonstrates that the constitutional claim is substantial. *Maher v. Gagne*, 448 U.S. 122, 127 (1980); *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 808 (9th Cir. 2005).

However, the court held that merely asserting a claim in the complaint was insufficient to establish substantiality. The court distinguished this case from one in which constitutional claims were pressed but the court declined to reach them based on the judicial policy of avoiding unnecessary decision of important constitutional issues. Instead, the court likened this case to *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-59 (9th Cir. 1987), in which the constitutional claims "were never pressed beyond the original federal complaint until they were dusted off for use in seeking a fee award under § 1988."

## Supremes Hear Preemption Case Important to Senior and Consumer Advocates

On Wednesday, November 29, the Supreme Court heard argument in a significant case testing the scope of federal agencies' authority to preempt state law. Typical of many such cases, this matter, *Linda A. Watters, Commissioner, Michigan Office of Insurance and Financial Services, v. Wachovia Bank, N.A., et al.*, No. 10-1342, pits business-friendly federal regulators and their industry allies against state regulators and consumer advocates. As subscribers to this listserv know, it is from a line of similar cases, in which the Court has tended to take a broad view of federal authority, that civil rights and safety net beneficiary plaintiffs have recently derived arguments for advancing supremacy clause-based preemption as an alternative to 42 U.S.C. §1983 to ground jurisdiction to challenge state governmental action.

It is hazardous to base forecasts on justices' remarks during oral argument. But in Wednesday's session Chief Justice Roberts and Justice Scalia in particular signaled that, in this case, they may prove as skeptical of business claims to broaden federal power as they often are of liberal advocates' similar contentions in "federalism" cases in which conservative constituencies favor states' rights.

The bottom-line issue of law and public policy at stake in *Wachovia* is whether the National Banking Act empowers the Office of the Comptroller of the Currency, which licenses and regulates national banks, to immunize the subsidiaries of such banks against state banking regulation. Consumer advocates especially fear the nullification of state predatory lending and similar consumer protection safeguards – which generally have little or inadequate counterparts in federal law. In 2004 the OCC issued regulations purporting to have precisely that effect. After Michigan's financial services regulatory agency challenged the regulations, both the District Court and the Sixth Circuit upheld the OCC's preemptive authority. 431 F.3d 556 (6th Cir. 2005)

The Sixth Circuit's decision matched results in other circuits (the Second and Ninth) to which the same question had been presented. Hence, the Supreme Court surprised some observers when it granted Michigan's petition for certiorari, and may have by that act alone foreshadowed sympathy for the states' cause. In any event, both sides saw the case as potentially a watershed. Leading banking associations and conservative think tanks joined Wachovia's side as *amici*, represented by three former Solicitors General and leading banking law experts. All 49 states signed an amicus brief on Michigan's side, led by New York State Attorney General and Governor-elect Eliot Spitzer; the Center for Responsible Lending filed an amicus brief supporting Michigan joined by major consumer groups, including AARP, the Consumer Federation of America, the National Consumer Law Center, PIRG, and other public interest groups as well as 17 law professors.

The Court's grant of *certiorari* specified two questions – whether *Chevron* deference was owed to OCC's determination that the National Banking Act authorized preemption of state regulation of National Bank corporate subsidiaries, and whether the Act, if it could be so construed, violated states' rights prescribed by the 10th Amendment. During the oral argument virtually no attention was paid to either question. Implicitly, the Court appeared to take seriously neither the OCC-Wachovia assertion

that *Chevron* effectively shielded the OCC's action from judicial scrutiny, nor Michigan's assertion that the 10th Amendment shielded its bank regulatory laws from Congressionally authorized preemption – if Congress in fact authorized preemption. Instead, the justices seemed to focus on whether OCC had been justified in concluding that it possessed such broad preemptive authority.

Chief Justice Roberts several times appeared to embrace a catchy argument militating against OCC's decision to equate separate national bank subsidiaries with their parent banks, hence barring state regulation of the former as well as the latter. He asked the lawyers arguing for Michigan, Wachovia, and the United States (supporting Wachovia, of course) wasn't it the case that, by deliberately choosing to conduct mortgage banking activities through a separate subsidiary rather than as a division of the bank, Wachovia was attempting to "have its cake and eat it too?" Roberts suggested that Wachovia was exempting itself from exposure to state law-based liability, and then, by virtue of the OCC's sweeping preemption regulation, immunizing its corporate affiliate from the state regulatory burdens to which the affiliate's state-chartered competitors were subject.

Justice Scalia sounded a "runaway bureaucracy" theme which listserv subscribers will recognize from instances such as *Alexander v. Sandoval*, 532 U.S. 275 (2001) in particular. In *Sandoval*, Scalia opined, for a 5-4 majority, that federal agency regulations banning "disparate impact" (non-intentional) discrimination, purporting to implement a statute the terms of which prohibited only intentional ("disparate treatment") discrimination, did not confer rights that individual victims could enforce in court. In his questions in the *Wachovia* argument, Justice Scalia similarly made much of the fact that the National Banking Act distinguished between national banks and their "affiliates," but that the OCC regulation appeared to obliterate this distinction with no apparent warrant in the statutory text. If the Court's decision in *Wachovia* reflects Justice Scalia's skepticism about federal agencies' power to supersede state authority in the absence of clear statutory direction, that result could reinforce appellate decisions – recently discussed on this listserv – strictly limiting plaintiffs' ability to ground §1983 suits in federal regulatory provisions.

Justices Breyer and Stevens focused on whether the OCC was effectively claiming a species of "field preemption" authority (the authority to "occupy the field" and bar any state regulation in an area) as distinguished from narrower "conflict preemption" authority (the prohibition of only those state measures that actually conflict with the terms or goals of pertinent federal law). The two justices pressed the lawyers for Wachovia and the United States to specify the actual conflict between Michigan's regulatory regime and relevant federal law. Chief Justice Roberts seemed to drive home this characterization of the issue in suggesting to Michigan's Attorney General that the best way to answer a question posed by Justice Breyer would have been to say:

"[T]hey [the federal agency] get to regulate to the extent they want to, and the state does, and if there's conflict, the federal regulation will prevail, but what's the problem here is that they're issuing a categorical regulation saying the state can't regulate at all."

If the Court's decision turns on whether such an actual conflict has been demonstrated, or what the appropriate standards are for making such a demonstration, that would probably tend to reduce the

downside potential of *Wachovia* for listserv subscribers. This is because, in cases where civil rights and safety net beneficiary plaintiffs invoke preemption as an alternative to §1983, an alleged direct violation of pertinent federal law would necessarily be involved – hence, the alleged conflict would be clear in all cases. Neither Justice Scalia, who seemed most attracted to the position of requiring clear Congressional direction for agency displacement of state authority, nor any other justice or party, expressed doubt that a federal regulation would preempt state measures that in fact conflict with its requirements or objectives.

More generally, while oral argument exchanges are no more than straws in the wind, if the final decision reflects the sentiments emphasized on Wednesday, *Wachovia* could bring closer together the two, heretofore disparate, contemporary streams of Supreme Court “federalism” jurisprudence.

## No Private Enforcement of ADA Regulations

The district court of the Eastern District of Pennsylvania held that ADA regulations regarding designation of “key stations” for access to disabled riders were not privately enforceable, either through an implied private right of action or 42 U.S.C. § 1983. The court held that the relevant Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 (RHA) statutory provisions did confer a private right of action, but not the applicable regulations, which were at the heart of the plaintiff’s case. The court granted summary judgment in favor of the Transit Authority. *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Auth.*, 2006 WL 3392733 (ED. Pa. Nov. 17, 2006). The judge, Gene Pratter, is a Bush II appointee.

Disabled in Action (DIA) is a non-profit corporation which acts as an advocate for the civil rights of persons with disabilities. DIA sought declaratory and injunctive relief to compel the Southeastern Pennsylvania Transportation Authority (SEPTA) to make two subway stations accessible to individuals with disabilities, including individuals who use wheelchairs.

DIA argued that the two subway stations at issue were subject to “key station” requirements of the ADA. These two stations had not been designated as key stations by SEPTA. SEPTA moved for summary judgment, arguing that there was no private right of action to compel it to designate these two stations as key stations.

The court held that there is an implied private right of action to enforce section 504 of the RHA, 29 U.S.C. § 794, and section 12132 of the ADA, 42 U.S.C. § 12132, both of which prohibit the exclusion of qualified individuals with disabilities from government services and programs. The court relied heavily on Supreme Court and Third Circuit precedent, citing *Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002), *Three Rivers Ctr. for Independent Living Inc. v. Housing Auth. of the City of Pittsburgh*, 382 F.3d 412, 416 (3d Cir. 2004); and *Bowers v. NCAA*, 346 F.3d 402, 433 (3d Cir. 2003).

The next issue was whether section 12147 of the ADA, 42 U.S.C. § 12147(b), was privately enforceable. This provision requires that it shall be considered discrimination for a public entity that provides public transportation to fail to make key stations in rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. The court stated that the Third Circuit had not decided whether there was an implied private right of action to enforce this provision. The court cited heavily from *Sabree ex rel Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004), which in turn analyzed *Blessing v. Freestone*, 520 U.S. 329 (1997) and *Gonzaga v. Doe*, 536 U.S. 273 (2002). The district court held that this provision of the ADA met all applicable requirements for a private right of action. The court noted that DIA represented individuals with disabilities, including individuals who use wheelchairs, and therefore DIA is among the intended beneficiaries of the act. The court found that the right DIA seeks to enforce, i.e. the right to compel SEPTA to make key stations accessible, is specific and enumerated. The court ruled that the obligations on the public entity were unambiguous and binding. The court determined that the statute contained “rights-creating” language that was “individually focused.” The court concluded that the structure of the ADA clearly supports the existence of a private right.

However, the court found that in order to prevail DIA would have to challenge SEPTA's failure to designate the two stations as "key stations." To do so, DIA had to enforce the regulations which provide that each "public entity shall determine which stations on its system are key stations." The regulation also sets forth the criteria for determining key stations and requires consultation with individuals with disabilities in the planning and public participation process. 49 C.F.R. § 37.47(b). The court stated that under Third Circuit precedent from the *Three Rivers Center* case, regulations would only be privately enforceable if they do no more than construe personal rights that the statute creates. The court held that the 37.47(b) does not construe personal rights that the ADA creates. The court held that §37.47(b) is directed at the public entity and does not focus on the individual beneficiary. The court stated that even though the public entity is required to include individuals with disabilities in the process of determining key stations, the regulation had a clear focus on the public entity, and not on personal rights.

The issue was further complicated by an additional regulation, 49 C.F.R. § 37.53, which created an exception for Philadelphia and provided that the identification of key stations under a June 1989 court settlement (unrelated to the case at bar) was deemed to be in compliance with the regulatory requirements. The court read this regulation to merely impose the requirement that SEPTA make the key stations identified in the settlement agreement accessible, and the two stations over which DIA filed suit were not identified as key stations in the settlement agreement.

Thus, the court concluded that DIA did not have either an implied private right of action or a private right of action under section 1983. The court stated: "Because the rights that the DOT regulations at issue here articulate are not personal rights, DIA cannot enforce those rights under Section 1983."

## No 1983 Right in Voting Rights Case

The federal district court for the Northern District of California held that there is no private right of action under 42 U.S.C. § 1983 to enforce the requirement in the Help America Vote Act (HAVA) for voting systems to be accessible for individuals with disabilities. The suit was brought by Paralyzed Veterans of America, the California Council of the Blind, Inc., the American Association of Persons with Disabilities, and several individuals with visual and manual disabilities. Plaintiffs alleged that the voting systems in San Francisco and Marin Counties did not allow voters with disabilities the opportunity to cast their votes or to have their votes counted privately and independently. The court dismissed the claim that these voting systems violated HAVA, but denied the motion to dismiss plaintiffs' claims under the Fourteenth Amendment. *Paralyzed Veterans of America v. McPherson*, 2006 WL 3462780 (N.D. Cal. Nov. 28, 2006). The judge, Sandra Brown Armstrong, is a Bush I appointee.

The plaintiffs argued that *Gonzaga University v. Doe*, 536 U.S. 273 (2002), was not applicable, asserting that *Gonzaga* applied only to Spending Clause statutes. *Gonzaga* held that for a statute to confer rights under section 1983, it had to be "phrased in terms of the persons benefitted" and use "explicit rights-creating terms." 536 U.S. at 284.

The court found that "No case has directly decided whether *Gonzaga* applies outside the context of Spending Clause legislation." The court noted that a dissent had opined that *Gonzaga* was "confined to Spending Clause statutes." *Save Our Valley v. Sound Transit*, 335 F.3d 932, 961 n.13 (9th Cir. 2003)(Berzon, J., dissenting). The court also noted that *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1265 n.2 (10th Cir. 2004), a Telecom case, assumed without deciding that *Gonzaga* is not limited to spending clause statutes.

The California court decided that *Gonzaga* "contains broad language indicating that its analytical framework should apply to non-Spending Clause statutes." The court stated that plaintiffs had not provided a reason why *Gonzaga* would be inapplicable to statutes enacted pursuant to Congress' power to regulate elections and that plaintiffs had not proposed any alternative test. The court rejected plaintiffs' argument that *Gonzaga* is inapplicable because HAVA is not a Spending Clause statute.

Applying the *Gonzaga* framework, the court held that there was no private right of action under section 1983. The court stated that it was a "close, difficult question," but the court found that the statute was not sufficiently focused on individual rights. The applicable provision states that voting systems in federal elections shall "be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." 42 U.S.C. § 15481(a)(3)(A). The court noted that the provision is "framed in terms of requirements for voting systems, which are chosen by state and county officials." The court held that even though the statute used the word "individuals," the provision "is more accurately characterized as referring to the benefitted group in the aggregate."

## Illinois Appellate court preemption decision

The state intermediate appellate court in Illinois reached the merits of whether the federal Medicaid statute preempts state law regarding seeking spousal support from a community spouse's income after the institutionalized spouse has been declared eligible for Medicaid. The court reversed the trial court on the merits and held that the state law was not preempted by federal law. *Poindexter v. State ex rel. Dept. of Human Services*, 2006 WL 3628956 (Ill.App. 4 Dist., Dec. 12, 2006).

Preliminarily, the court rejected the state's argument that the case should be dismissed for failure to exhaust administrative remedies. The court held that the issue "is purely one of law," and therefore "this is not an issue that falls within the particular expertise of an administrative agency." The state also argued that plaintiffs forfeited their claims by not raising them before the administrative agency. The court rejected this contention. The court stated that "plaintiffs' argument insists that the law itself is unconstitutional based on federal preemption." That question is "outside the purview of the administrative agency," and therefore was not forfeited.

The court then turned to the merits of the preemption issue. The court stated that the federal Medicaid statute, specifically in this case, the Medicare Catastrophic Coverage Act of 1988 (MCCA), 42 U.S.C. § 1396r-5, would preempt state law "if it is impossible to comply with both federal and state law or where the state law stands as an obstacle to accomplishment and execution of the full purpose and intent of Congress." Plaintiffs relied on the provision of MCCA which states that "no income of the community spouse shall be deemed available to the institutionalized community spouse." 42 U.S.C. § 1396r-5(b)(1). However, the court ruled: "in light of the overarching goals of Medicaid and existing precedent at the time the MCCA was enacted, it becomes apparent that the seemingly definite language, 'no income of the community spouse,' was not meant as a barrier to spousal support." The court found support for its holding in US Supreme Court precedent, including *Wisconsin Dept. of Health & Family Services v. Blumer*, 534 U.S. 473 (2002), as well as cases from New York and Connecticut.

One judge dissented on the merits, stating that the clear language of "MCCA restricts the State from seeking support from the income of a community spouse, even if his or her income is more than the monthly needs allowance, for his or her 'institutionalized spouse' receiving Medicaid."

## Alaska Supreme Court Upholds 1983 Rights

The Supreme Court of Alaska ruled that several Alaskan Native Villages could bring suit under 42 U.S.C. § 1983 against the Acting Director of the Division of Family and Youth Services for alleged systematic violations of the Adoption Assistance Act and the Indian Child Welfare Act. *State of Alaska, Dept. of Health & Social Services v. Native Village of Curyung*, 2006 WL 3691727 (Ala. Dec. 15, 2006).

The court first addressed whether the Villages are “Persons” capable of pursuing claims under § 1983. The court carefully analyzed *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 712 (2003), a case involving a search warrant for employment records as part of an investigation of Native American tribe members for alleged welfare fraud. The US Supreme Court ruled that “the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims.” The Alaska Supreme Court interpreted that case to “leave open the possibility that villages might under the proper circumstances be able to bring suit under § 1983.” The Alaska court noted that lower courts “are divided over whether sovereigns may bring non-*parens patriae* claims in their own right under § 1983, [but] where sovereigns have pressed § 1983 claims using the doctrine of *parens patriae*, several courts have allowed those claims to go forward.” The court held that the villages could bring suit as *parens patriae* to prevent future violations of the Adoption Act and the Indian Child Welfare Act but that the villages could not bring suit on their own behalf.

The Villages sued the State directly. The superior court allowed the Villages to sue the State, reasoning that Alaska had waived its sovereign immunity by entering into a contract pursuant to the Adoption Act that third-party beneficiaries could enforce. The Alaska Supreme Court held that whether or not Alaska waived its sovereign immunity was irrelevant, since there was no cause of action to sue the state under § 1983. Nevertheless, the Villages also sued the Acting Director of the Division of Family and Youth Services. The court held that under *Ex Parte Young*, 209 U.S. 123 (1908), “a state officer who violates federal law or the federal constitution is presumed to be acting without the authority of the state, [and therefore suits against the officer] are simply deemed not to be suits against the state, so they do not implicate a state’s sovereign immunity.” Since the Villages sought only injunctive and declaratory relief, their claims against the Acting Director in his official capacity were proper under § 1983 and not prohibited by sovereign immunity.

The court then turned to the question of whether the statutes at issue in the case conferred enforceable rights. The state argued that the applicable provisions of the Adoption Assistance Act did not create enforceable rights under the test set forth in *Gonzaga University v. Roe*, 536 U.S. 273 (2002). The Adoption Act requires the state to have a plan to develop individual case plans and to provide a case review system. The Alaska Supreme Court held that these requirements passed the *Gonzaga* test. The court held that the requirements are expressly directed toward individual child in foster care. The court held that “the right to a state plan is not vague or amorphous. A state either has a plan or it does not.” The court found the language of the statute to be mandatory and enforceable.

However, the court emphasized the limited nature of the enforceable right. The court stated that it does “not read these provisions as guaranteeing that an individual case plan meeting all requisite

elements will actually be provided in any particular case. As we read these provisions, the enforceable right they create is systematic: it ensures that the state will develop, adopt, and enforce a statewide system designed to provide each family and child with a class plan that meets the statute's specifications; but it does not give all parents and children a case-by-case guarantee of a satisfactory plan." Thus, the court held that only systemic violations of the Adoption Act were actionable, not merely an allegation of a violation in an individual case.

The state did not contest the Villages' claim that the Indian Child Welfare Act created enforceable rights; instead, the state contended that the Indian Child Welfare Act provides a remedy that displaces any remedies under § 1983. The Alaska Supreme Court reviewed the factors for determining whether Congress intended to foreclose remedies under § 1983, as set forth in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). The court noted that there are three applicable factors: (1) whether the statutory remedy would normally be available under § 1983 or whether the remedy expands upon those available under § 1983; (2) whether the statutory remedy creates procedural limitations that are more stringent than those provided in § 1983; (3) whether allowing a party to proceed under § 1983 would be inconsistent with the compromises reached in the statute.

The court held that in passing the Indian Child Welfare Act, Congress intended to preserve the remedies available under § 1983. First, the court found that the statute adds remedies to those available under § 1983, which weighs in favor of a conclusion that Congress intended the Act to supplement and not displace § 1983. Second, the court found that the lack of any statute of limitation could not "reasonably be construed as an attempt to displace the broader range of relief offered under § 1983." Third, the court found that § 1983 would not undermine the Indian Child Welfare Act, because while § 1983 addressed systemic violations, the Indian Child Welfare Act was directed toward individual challenges of individual placements. The court found that "regardless of whether the villages are allowed to proceed [under § 1983], individual parents, children, guardians, and tribes will still be able to invalidate improper placements and improper terminations of parental rights."

The Alaska Supreme Court remanded the case for a decision on the merits.

## 2 Prisoner Religious Freedom 4th Cir. cases

The Fourth Circuit issued two opinions upholding the rights of prisoners under the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). Two of the three judges on the panels were identical. The judge writing the opinion in one of the cases dissented in the other case. The decisions were decided on the same day, and they discuss the power of Congress and the Eleventh Amendment. *Madison v. Commonwealth of Virginia*, 2006 WL 3823181 (4th Cir. Dec. 29, 2006); *Lovelace v. Lee*, 2006 WL 3823127 (4th Cir. Dec. 29, 2006).

The *Madison* case was the second appeal to the Fourth Circuit regarding the denial of a prisoner’s request for kosher meals. Ira Madison is a Hebrew Israelite and member of the Church of God and Saints of Christ. Local prison officials approved the request for kosher meals, but the Central Classifications Services (CCS), an agency of the Virginia Department of Corrections, overturned the approval. CCS found that the daily regular, vegetarian, and no-pork prison menus afforded him adequate dietary alternatives and questioned the sincerity of his religious beliefs, after considering his history of disciplinary problems. In its first decision in the case, the Fourth Circuit held that the RLUIPA did not violate the Establishment Clause of the Constitution and remanded for consideration of whether RLUIPA exceeded Congress’ authority under the Spending and Commerce Clauses. *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003). On remand, the district court held that RLUIPA is a valid exercise of Congress’ Spending Clause power and that Virginia had waived its sovereign immunity for damages by accepting federal funds. *Madison v. Riter*, 411 F.Supp.2d 645 (W.D.Va. 2006).

The Fourth Circuit agreed with the lower court that RLUIPA is a valid exercise of Congress’ spending power. The court noted that it was joining four other courts of appeals in so holding, citing *Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002).

Virginia argued that RLUIPA is unconstitutionally coercive because it conditions one hundred percent of federal funding for state prisons on compliance with RLUIPA. The court noted that Virginia received a mere 1.3% of prison funding from the federal government. The court found that Congress has a legitimate interest in protecting the religious freedoms of inmates and not funding systems that violate it. The court held that the state was not coerced by the withholding of funds, since the funds were only a small fraction of the corrections budget.

The Fourth Circuit held that, by taking federal funding for state prisons, the state had waived its Eleventh Amendment immunity to suit for injunctive and declaratory relief under RLUIPA, since the statute contains an express private right of action to file suit for “appropriate relief.” However, the court found that the term “appropriate relief” did not contain the necessary unequivocal textual waiver of sovereign immunity for damages. The court concluded that the inmate’s claims for damages were barred by the Eleventh Amendment, reversing the decision of the district court.

The *Lovelace* case involved a prisoner who sought to observe Ramadan, the Islamic holy month of fasting and prayer. The prisoner, Leroy Lovelace, was on a list of inmates participating in the prison’s

Ramadan observance program, in which pre-dawn and post-sunset meals were served. After six days, he was denied access to the special evening meal and informed that he had been taken off the list of participants. A correctional officer claimed that Lovelace had eaten the regular lunch meal. Lovelace denied this, and while exhausting his administrative appeals, he suggested that prison officials review surveillance tapes and hear testimony from twenty witnesses who would attest that he never left the housing unit during lunchtime that day. The prison officials refused to do so and did not reinstate him. After exhausting his administrative remedies, he filed suit for declaratory relief, injunctive relief, and punitive damages.

In its response to the suit, the correctional officer claimed that he had made an “honest mistake” in identifying Lovelace as the prisoner who had eaten lunch that day. He acknowledged that several inmates had told him that Lovelace had remained in his housing unit during the entire lunch period that day, but he insisted that he did not realize his mistake until after Ramadan was over. The district court granted summary judgment to the prison officials, holding that officials were entitled to qualified immunity and that no constitutional violation occurred because the actions of the prison officials were negligent rather than intentional.

The Fourth Circuit began by finding that Lovelace’s observance of Ramadan qualified as religious exercise under the RLUIPA and that his removal from the Ramadan observance pass list qualified as a substantial burden on his religious practice under the RLUIPA. The court noted that the burden then shifted to the prison to justify its exclusion policy as compelled by considerations of security or good order. The court remanded the case for consideration of the prison’s justifications. Yet, the court added the instruction that even if the asserted governmental interest is compelling, the defendants would have to show that the exclusion policy is the least restrictive means of furthering this interest.

The court found that only the state Warden who issued the challenged policy was liable in his official capacity, and not the Assistant Warden. The court noted that it had already decided in the *Madison* case issued on the same day that damages are barred by the Eleventh Amendment.

Lovelace further sued the prison officials in their individual capacities. RLUIPA confers individual liability on a state official if the official imposes a substantial burden on an inmate’s religious exercise without compelling justification. The court inferred into RLUIPA a fault requirement and held that negligence would not suffice to impose individual liability on officials. The court held that if an official intended to burden free exercise, then the official would be liable under RLUIPA. The court concluded that there was sufficient evidence of culpability to defeat the correctional officer’s motion for summary judgment. The court found that there was a genuine question of fact whether the correctional officer acted intentionally in depriving Lovelace of his free exercise rights. The court reviewed the evidence and found that a reasonable fact-finder could conclude that the correctional officer acted maliciously in misidentifying Lovelace and in failing to correct his error during the remainder of Ramadan. The district court had held that the correctional officer was entitled to qualified immunity since the constitutionality of RLUIPA was under question. The Fourth Circuit reversed and held that the proper inquiry was whether a reasonable person would have understood that his conduct violated clearly established rights. The court denied the motion for summary judgment based on qualified immunity. However, the

Assistant Warden and Warden could not be held liable under RLUIPA, since they only negligently relied upon the correctional officer's insistence that he had seen Lovelace obtain a lunch tray.

The court of appeals similarly vacated the finding of summary judgment and remanded for further factual development Lovelace's constitutional claims under the Free Exercise and Due Process Clauses.

Although Judge Wilkinson wrote the *Madison* decision, he wrote a 15 page dissent in *Lovelace*. Judge Wilkinson was nominated by Reagan and was George Will's top choice for a Supreme Court vacancy in July 2005. See <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/08/AR2005070801689.html>. He concurred in the judgment remanding the case for further proceedings against the correctional officer, but dissented from the holding that the prison's exclusion policy may have violated RLUIPA.