21-5345

No. 21-

In the Supreme Court of the United States

LEONARD THURMAN,

Petitioner,

v.

MEDICAL TRANSPORTATION MANAGEMENT, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Leonard Thurman
Petitioner Pro Se
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Bentonia, MS 39040
662-673-2795

QUESTION PRESENTED

Petitioner Leonard Thurman filed suit against Respondent Medical Transportation Management, Inc. for failure to provide transportation, which is guaranteed by regulation, under 42 C.F.R. § 431.53 ASSURANCE OF TRANSPORTATION.

In its opinion below, the U.S. Court of Appeals for the Fifth Circuit and District Court stated that definitive guidance is lacking from the United States Supreme Court as to whether an administrative regulation may establish a federal right enforceable under 42 U.S.C. § 1983. The District Court order dismissing the case stated that "federal courts are divided as to whether a federal regulation can create a federal right." (App.14a) The Fifth Circuit described the lack of clarity on this issue, stating ("[I]t is not clear that regulations can be considered 'laws' for purposes of creating a right actionable under section 1983.") Citing *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 437-39 (1987) (O'Connor, J., dissenting). The Fifth Circuit also acknowledged a circuit split between the Sixth Circuit and several sister circuits. (App.6a, 7a).

THE QUESTION PRESENTED IS:

Whether an administrative regulation may establish a federal right enforceable under 42 U.S.C. § 1983.

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Fifth Circuit
No. 19-60596
Leonard Thurman v. Medical Transportation Management, Incorporated
Date of Final Order: January 22, 2021

U.S. District Court Southern District of Mississippi (Northern (Jackson))
No. 3:18-cv-00282
Leonard Thurman v. Medical Transportation Management, Incorporated
Date of Final Judgment: June 18, 2019

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The published Opinion of the United States Court of Appeals for the Fifth Circuit, dated January 22, 2021, is included below at App.1a. The Order of the U.S. District Court Southern District of Mississippi (Northern (Jackson)), dated June 18, 2019, is included below at App.10a.

JURISDICTION

In the district court, this case was originated as a civil action "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Specifically, Plaintiff Leonard Thurman asserts a violation of rights owed him under the Medicaid Act, codified at 42 U.S.C. §§ 1396 et seq., and seeks vindication of those rights via 42 U.S.C. § 1983. ROA.12,[1] 157. The district court therefore had original jurisdiction over this action under 28 U.S.C. § 1331.

This petition was initially filed, within 150 days of the final order of the United States Court of Appeals for the Fifth Circuit. This Court has jurisdiction under 28 U.S.C. § 1257(1). The clerk provided petitioner an additional 60 days to correct and resubmit a petition, and this petition has been submitted within that timeframe.

[1] Fifth Circuit Record on Appeal will be abbreviated as ROA.

STATEMENT OF THE CASE

Plaintiff Leonard Thurman is a Medicaid recipient residing in the state of Mississippi. ROA.157, 175. Defendant Medical Transportation Management, Inc. ("MTM") provides non-emergency medical transportation to Medicaid recipients. ROA.175. Thurman alleges he requested pickup for a doctor's appointment to treat complications stemming from a tooth extraction performed two weeks earlier. ROA.14-15. But MTM never showed up to take Thurman to the appointment. ROA.14. Subsequently, Thurman filed an internal grievance with MTM. ROA.24. MTM responded that the trip in question was never confirmed because he did "not provide all trip information" during the scheduling call, placed the MTM representative on hold, and did not come back to the line. ROA.24.

Proceeding pro se, Thurman filed this action on May 3, 2018. ROA.9. He initially asserted claims pursuant to 42 U.S.C. § 1983, *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Americans with Disabilities Act ("ADA"). ROA.12, 27. MTM promptly moved to dismiss all claims. ROA.47-58. In response, Thurman conceded his ADA and *Bivens* claims. ROA.156-159. The parties' briefs on the motion to dismiss focused on a single issue—whether MTM deprived Thurman of a cognizable federal right. ROA.47-58, 156-59, 162-66. MTM did not dispute Thurman's assertion that MTM is a "state entity" jointly funded by state and federal governments. ROA.47-58, 162-66, 177. The district court

therefore assumed MTM was acting under color of state law for the purposes of deciding the motion to dismiss. ROA.177.

The court ultimately granted MTM's motion, and entered a final judgment dismissing Thurman's complaint. ROA.175-181. The court reasoned that 42 C.F.R. § 431.53, which ensures the availability of non-emergency transportation to Medicaid beneficiaries, did not create a right enforceable under Section 1983. ROA.177 (citing *Cuvillier v. Taylor*, 503 F.3d 397, 402-03 (5th Cir. 2007) and *Blessing v. Freestone*, 520 U.S. 329 (1997)). In support of its conclusion, the court cited the Eleventh Circuit's holding in *Harris v. James*, 127 F.3d 993 (11th Cir. 1997), which found that the same regulation did not create a right enforceable under Section 1983. ROA.178-80. However, the Court also noted a split of authority on this issue, citing a Sixth Circuit case reaching precisely the opposite conclusion with respect to the same regulation. ROA.179 (citing *Boatman v. Hammons*, 164 F.3d 286, 289 (6th Cir. 1998)). In its opinion, the Court did not undertake any separate analysis of the statutory language giving rise to the regulation at issue.

Thurman appealed the dismissal to the U.S. Fifth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

I. OVERVIEW

This appeal presents a now decades-old dispute concerning the role of federal regulations in creating rights enforceable under 42 U.S.C. § 1983. The contours of the dispute are defined by divided Courts of Appeal and by a series of Supreme Court decisions that are, at times, seemingly inconsistent. But the real heart of this case is not the novel legal question it presents. It is the disabled individual who seeks to vindicate rights clearly created for his benefit, but that the district court held were beyond his reach to vindicate. This Court should reverse that decision for two reasons.

First, the regulation at issue requires the State of Mississippi to create a Medicaid plan that provides non-emergency transportation to Medicaid recipients. This regulation was promulgated as a result of express statutory authority granted to the Secretary of the Department of Health and Human Services by the Medicaid Act. The regulation, as written, is a permissible construction of the statute's mandate that the State ensure reasonably prompt and beneficial care to its recipients. Under the weight of Supreme Court authority, this regulation bears the force and effect of law, and is entitled to the highest level of deference the Court affords. Because the plain language of Section 1983 allows enforceable federal rights to be found in "the Constitution and laws," regulations with the force of law, like this one, necessarily create such rights.

Second, the Supreme Court and Courts of Appeal have held that a regulation read in conjunction with a statute may create a right enforceable under Section 1983. So

long as the statute itself broadly creates a right vested in the claimant, courts may utilize a regulation to give the statute sufficient specificity or to otherwise satisfy the factors for the creation of a federal right. Here, this Court has already found that one of the statutory provisions at issue broadly creates an enforceable right under Section 1983. This Court should read that statute, together with the subject regulation, to find Mr. Thurman has a federal right to non-emergency medical transportation that is enforceable under Section 1983.

II. STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal under Rule 12(b)(6). *Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006). "In doing so, [the Court] accept[s] as true the well-pleaded factual allegations in the complaint." *Causey v. Sewell Cadillac–Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). To survive a Rule 12(b)(6) motion to dismiss, a complaint "does not need detailed factual allegations," but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Likewise, this Court reviews questions of law de novo. *Af–Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 425 (5th Cir. 2006). As this case presents a pure question of law, this Court should consider the legal arguments herein without deference to the district's court's holding.

REASONS FOR GRANTING THE PETITION

I. FEDERAL REGULATIONS WITH THE FORCE AND EFFECT OF LAW CONFER RIGHTS ENFORCEABLE UNDER SECTION 1983.

A. Under the Plain Language of Section 1983, Regulations Bearing the Force of Law May Create Federal Rights.

Section 1983 imposes liability on any person who, acting under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws. . . . " 42 U.S.C. § 1983. It does not, by itself, confer any rights upon litigants. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Instead, Section 1983 provides a procedural vehicle for vindicating existing federal rights. *Id.* Stated differently, it is "a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.,* rights independently 'secured by the Constitution and laws of the United States.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (quoting *id.* § 1983). Accordingly, the first step of a claimant pursuing relief under Section 1983 is to identify the separately secured federal rights he believes have been violated. *Albright*, 510 U.S. at 271. Courts have been clear that a "[v]iolation of federal law is insufficient for redress through section 1983; a plaintiff must assert [a] violation of a federal right." *Cuvillier v. Taylor*, 503 F.3d 397, 402-03 (5th Cir. 2007) (emphasis in original).

On a fundamental level, the question before this Court is where "rights" enforceable under Section 1983 may be found. It is undisputed that the federal Constitution is one source of these rights. Indeed, Section 1983 was first introduced in the Civil Rights Act of 1871, and was primarily aimed at guaranteeing constitutional protections to African-Americans. Bradford C. Mank, *Can Administrative*

 Ergo, the first iteration of Section 1983, by its plain language, protected only rights secured by the Constitution. *Id.* But in 1874, Section 1983 was amended to provide redress for deprivations of "rights . . . secured by the Constitution and laws. . . ." (emphasis added). *Id.* In the years that followed, a number of different viewpoints emerged concerning Congress's intent in adding the "and laws" language. *Id.* Specifically, there was substantial debate whether "and laws" referred to federal statutes generally, or only to civil rights statutes. *Id.*

It was not until 1980, in *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), that the Supreme Court definitively answered this question. The Court's analysis was relatively simple, and focused on the plain language of the statute. It held the term "laws" could not reasonably be read to refer to an undefined "subset of laws," such as civil rights statutes. Rather, Section 1983 "encompasses violations of federal statutory as well as constitutional law." *Id.* (citing *Rosado v. Wyman*, 397 U.S. 397 (1970)).

Unsurprisingly, however, the Court's simple, plain language analysis did not end the debate concerning the source of rights enforceable under Section 1983. Not long after *Thiboutot* was decided, the Court issued a fractured opinion in *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582 (1983). In dissent, Justice Stevens—joined by Justices Brennan and Blackmun—cited *Thiboutot* for the proposition that Section 1983 provides redress for "the deprivation of rights secured

by all federal laws, including statutes and regulations having the force of law." *Guardians*, 463 U.S. at 638 (emphasis added). While Stevens acknowledged that *Thiboutot* involved only federal statutes, and not regulations, he insisted that "[i]ts analysis of § 1983 . . . applies equally to administrative regulations having the force of law." *Id.* at 638 n. 6. In support of this declaration, he relied on the Court's earlier decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), which outlined specific standards for determining whether regulations bore the force and effect and of law.

Petitioner in *Brown* was a government contractor who sought to enjoin disclosure of allegedly confidential information under the Freedom of Information Act. Petitioner argued that disclosure was inconsistent with the Trade Secrets Act, 18 U.S.C. § 1905, which imposes criminal sanctions on government employees who disclose certain information in a manner "not authorized by law." Respondent, however, relied on a federal regulation as "law" authorizing the subject disclosure.

The Court in *Brown* agreed broadly with the premise that "properly promulgated, substantive agency regulations have the 'force and effect of law.'" *Id.* at 296 (quoting *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977)). "This doctrine," the Court noted, "is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause." *Id.* In order to have the force of law, a regulation must have "certain substantive characteristics and be the product of certain procedural requisites." *Id.* Specifically, regulations have the force and effect of law if: (1) they are substantive rules affecting individual rights and obligations, and not merely interpretive rules or general policy statements; (2)

Congress has granted quasi-legislative power to the agency; and (3) the agency has complied with applicable procedures such as the Administrative Procedure Act. *Id.* at 301-03. Although the Court ultimately held the particular regulation at issue in *Brown* did not carry the force and effect of law, its rationale nevertheless establishes that regulations that meet certain criteria may constitute "laws." *Brown*'s holding, applied to Section 1983, suggests federal regulations with the force and effect of law are, by definition, "laws" in which federal rights enforceable under Section 1983 may be found.

Admittedly, the Supreme Court has never explicitly adopted Stevens' reasoning or his conclusion that regulations with the force of law may provide "rights" enforceable under Section 1983. Conversely, the Court also has never expressly rejected Stevens' premise. At least two Courts of Appeal, however, have held that federal regulations have the full force and effect of law. *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985); *Boatman v. Hammons*, 164 F.3d 286 (6th Cir. 1998). In *Samuels*, the D.C. Circuit held that HUD's regulations, enacted pursuant to the United States Housing Act of 1937, had the full force and effect of law, because they were "issued under a congressional directive to implement specific statutory norms and they affect individual rights and obligations." 770 F.2d at 199 (citing *Brown*, 441 U.S. at 301-03). The court further reasoned that "section 1983 provides a legal remedy for the violation of all valid federal laws, including at least those federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law." *Id.* Because the Court in *Thiboutot* refused to

limit Section 1983 to "some subset of federal laws," regulations with the force of law necessarily created the requisite rights. *Id.* at 199-200.

Although the Supreme Court has not specifically carried its "force of law" jurisprudence into the Section 1983 context, it has expanded its view of the deference owed to administrative regulations. In 1984, the Court decided *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* was a Clean Air Act ("CAA") case. *Id.* at 839-40. The CAA required states that had not achieved certain air quality standards to establish a permit program regulating "new or modified major stationary sources" of air pollution. *Id.* at 840. The statute did not define "stationary sources." *Id.* Instead, that term was defined solely by an EPA regulation. *Id.* Plaintiffs were environmental groups who contended the regulation defined "stationary sources" too narrowly. *Id.* at 841. The D.C. Circuit agreed with Plaintiffs, and set aside the regulation. *Id.* The Supreme Court, however, reversed. *Id.* at 866.

In its opinion, the Court explained that the regulation at issue was entitled deference if certain conditions were met. *Id.* at 842-44. In reviewing an agency's construction of a statute, the Court must first discern whether Congress has directly spoken to the precise question at issue. *Id.* at 842-43. If the intent of Congress is clear, the Court and the agency must give effect to the unambiguously expressed intent of Congress. *Id.* If, however, Congress has not directly addressed the precise question at issue, the court "does not simply impose its own construction on the statute. . . ." *Id.* at 843. "Rather, if the statute is silent or ambiguous with respect to the specific

issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* This framework, the Court noted, honors the administrative agency's Congressional authorization to administer a federal program, including the formulation of policy and the making of rules to fill any gaps left—explicitly or implicitly—by Congress. *Id.* at 843-44. The agency's construction need not be the only permissible one, and the court should not substitute its own construction of the statute for a reasonable interpretation made by the agency. *Id.*

While *Chevron* obviously is not a Section 1983 case, it nevertheless creates considerable tension with the notion that regulations are, as a rule, too attenuated from Congressional intent to create an enforceable federal right. *See Harris*, 127 F.3d at 1009 ("we think the regulation too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983"). *Chevron* is built on the premise that Congress's intent is sometimes to entirely defer its legislative authority in a particular area to an agency with greater knowledge and experience. 467 U.S. at 865. It is counterintuitive to find that this type of broad Congressional delegation on one hand entitles the regulations to greater force and deference (*Chevron*), and on the other reduces their viability as a source of federal rights (*Harris*).

Ultimately, *Brown* and *Chevron* both stand for the proposition that the term "laws" as used in Section 1983 should be read to include regulations with the force and effect of law. To hold otherwise is to use the "gap" created by a broad Congressional delegation of authority to an administrative agency as a shield in some proceedings, but as a sword in others. This Court should therefore hold that

regulations with the force and effect of law confer federal rights enforceable under Section 1983.

B. The Regulation at Issue, 42 C.F.R. § 431.53, has the Force and Effect of Law Under *Brown* and Is Also Entitled to *Chevron* Deference.

If this Court accepts the general premise that agency regulations with the force and effect of law may create rights enforceable under Section 1983, it should conclude that the regulation at issue here, 42 C.F.R. § 431.53 ("the Transportation Regulation), creates such rights.

1. The Transportation Regulation has the Full Force and Effect of Law Under *Brown*.

Under the three-part test espoused in *Brown*, this Court should conclude that the Transportation Regulation bears the force of law. It states: A State plan must –

> (a) Specify that the Medicaid agency will ensure necessary transportation for beneficiaries to and from providers; and
>
> (b) Describe the methods that the agency will use to meet this requirement.

42 C.F.R. § 431.53.

This regulation satisfies the first prong of the *Brown* test because it constitutes a substantive rule affecting individual rights and obligations, and not merely interpretive rules or general policy statements. 441 U.S. at 301-02. The plain language of the regulation unambiguously requires the state to provide Medicaid beneficiaries with a specific and tangible right to transportation to and from their medical providers. 42 C.F.R. § 431.53(a). This right inures to the individual beneficiaries of the plan, and is not merely a statement of policy. *Id.* Rather, it

imposes a quantifiable obligation on the state to provide the transportation at issue. *See id.*

Second, the Transportation Regulation's enabling statute makes clear that the Secretary has vast, quasi-legislative authority to affect the goals of the Act. *Id.* at 302-03; *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("To be sure, some administrative agency action—rule making, for example—may resemble lawmaking. . . . This Court has referred to agency activity as being 'quasi-legislative' in character. . . . "). The statute expressly directs the Secretary to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter." 42 U.S.C. § 1302(a). The Transportation Regulation, issued in compliance with the Secretary's statutory rulemaking power, is plainly "issued by an agency pursuant to statutory authority [to] . . . implement the statute." *Batterton*, 432 U.S. at 425 n.9.

Further, and importantly, there is also an identifiable "nexus" between this regulation and a particular delegation of legislative authority by Congress. *Brown*, 441 U.S. at 304. Several provisions of the Medicaid Act expressly direct that a state plan must provide tangible assistance to qualified individuals. Moreover, the statute expressly references non-emergency transportation as among the services it contemplates the state providing. Specifically, Section 1396a(a) requires that a State Plan must:

> (8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such

assistance shall be furnished with reasonable promptness to all eligible individuals.

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with the simplicity of administration and the best interests of the recipients;

(70) . . . provide for the establishment of a non-emergency medical transportation brokerage program in order to more cost-effectively provide transportation for individuals eligible for medical assistance under the State plan who need access to medical care or services and have no other means of transportation. . . .

42 U.S.C. §§ 1396a(a)(8), (19), (70). Read together, these statutory provisions establish a clear connection between the statute itself and the right the regulation purports to provide. There can be no doubt Congress intended the Secretary to regulate State Plans respecting transportation and appropriate medical care for Medicaid recipients. A nexus therefore exists between the Congressional delegation of authority and the right created by the regulation.

Finally, there is no indication that the Secretary has failed to comply with the Administrative Procedure Act or any other procedural requirements in its promulgation of the subject regulations. *Brown*, 441 U.S. at 301-03. As a number of courts have held that regulations under the Medicaid Act have the force and effect of law, it appears the Secretary has acted lawfully respecting the regulatory process. *See, e.g., Smith v. Miller*, 665 F.2d 172 (7th Cir. 1981).

At least one court in this Circuit has also held that the Medicaid Act regulations issued by the Secretary pursuant 42 U.S.C. § 1302 "are to be given the full force and effect as the statute themselves. . . ." *Smith v. Powell*, 379 F. Supp. 139, 152 (W.D. Tex. 1974) *aff'd* 504 F.2d 759 (5th Cir. 1974) (Table). The Sixth Circuit in *Boatman*

went a step further, expressly holding that 42 C.F.R. § 431.53 has "the force of law, [and] must be characterized as law under § 1983." 164 F.3d at 289. These authorities, together with *Brown*, confirm that this regulation should be given the full force and effect of law.

2. The Transportation Regulation Is Entitled to *Chevron* Deference.

The Transportation Regulation is also entitled to *Chevron* deference. This is because "[t]he Medicaid Act commits to the federal agency the power to administer a federal program." *Douglas v. Indep. Living Ctr. of Southern Ca., Inc.*, 565 U.S. 606 (2012). "And here," in promulgating a specific regulation requiring state plans to provide non-emergency transport of Medicaid recipients, "the agency has acted under this grant of authority." *Id.*

Further, 42 C.F.R. § 431.53 satisfies the specific elements of the *Chevron* analysis. The statute itself does not directly speak to the responsibility of the State Plan to provide non-emergency transportation. *See* 42 U.S.C. § 1396a. Accordingly, a "gap" exists for the agency to fill. *Chevron*, 467 U.S. at 843-44. The fact that this gap is implied and not express is not an impediment to deference. *Mank*, *supra*, at 872-73 ("*Chevron* suggests that in filling such gaps an agency could, in some circumstances, reasonably clarify or amplify rights that are only inchoate or implicit in an ambiguous statute or one that contains obvious gaps.") When the statutory scheme is read as a whole, it is plain that Congress intended for the Secretary to promulgate regulations effectuating its directive to provide prompt, quality care to Medicaid beneficiaries. *See id.* §§ 1396a(a)(8), (19), (70); 42 U.S.C. § 1302(a). The agency's determination that the mandated prompt, quality care necessitates non-

emergency transportation is a reasonable and permissible construction of the statute. It is therefore entitled to deference.

As acknowledged herein, *Chevron* deference does not, by itself, mean a regulation creates a "right" under Section 1983. Nevertheless, that this regulation would be enforced in the same manner as law in other substantive contexts counsels in favor of a holding that accords it the full force and effect of law.

II. IN THE ALTERNATIVE, A STATUTE READ IN TANDEM WITH A REGULATION MAY CONFER A FEDERALLY ENFORCEABLE RIGHT IF THEY SATISFY THE FACTORS SET FORTH IN *WILDER* AND *GONZAGA*.

Even if this Court rejects the arguments asserted in Part I, it should still reverse the district court's holding. The Supreme Court and most Courts of Appeal have either implicitly or explicitly allowed regulations to be read in conjunction with a statute in order to find a federal right enforceable under Section 1983. Stated differently, courts have used federal regulations to fill statutory gaps that might otherwise prevent the statute from creating a federal right. Here, relevant portions of the Medicaid Act, when read in conjunction with the Transportation Regulation, create a clear right to transportation enforceable under Section 1983. This Court should therefore reverse the district court's dismissal and hold Thurman has stated a plausible cause of action.

A. Supreme Court Authorities Expressly Contemplate that a Statute and Regulation May be Read Together to Establish a Federal Right.

Since its holding in *Thiboudot*, the Court has issued at least five opinions assessing various statutes to determine whether they create a federal right enforceable under Section 1983. Within these cases, the Court developed a practice

of utilizing statutes and regulations together to fill in the analytical framework for discerning these rights. For instance, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987) the Court considered HUD regulations together with the Brooke Amendment to determine whether plaintiffs could proceed under Section 1983. The relevant portion of the Brooke Amendment set a maximum percentage of income that public housing tenants should pay as rent. *Id.* at 421.

Plaintiffs argued that the Housing Authority unlawfully failed to include a reasonable amount for utility use in determining its tenants' rent. *Id.* at 421-22. Acknowledging that the statute itself did not reference utilities, plaintiffs explicitly relied on HUD regulations that defined the term "rent" to include utility payments in support of their claim. *Id.* The district court granted summary judgment to the Authority, holding that a private cause of action was unavailable to enforce the Brooke Amendment. *Id.* at 422. The Fourth Circuit affirmed, noting that "while the Brooke Amendment confers certain rights on tenants, these rights are enforceable only by HUD, not by the individual tenant. . . . " *Id.*

But the Supreme Court reversed. It explicitly rejected the premise that only HUD could enforce the rights guaranteed by the Brooke Amendment. *Id.* at 423-25. While HUD certainly had enforcement authority in certain contexts, there was no evidence of a remedial scheme created by Congress that was "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 424 (quoting *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 20 (1981)).

More importantly for this Court's purposes, the Court rejected the Authority's argument that "neither the Brooke Amendment nor the interim regulations gave the tenants any specific or definable rights to utilities, that is, no enforceable rights under § 1983." *Id.* at 429-30. Instead, without any separate commentary on the role of the regulations in creating a right under Section 1983, the Court relied on the language of the Amendment and the regulation together to conclude they imposed a mandatory limitation on rent that inured to the benefit of the individual tenants. *Id.* at 430. Further, the Court held the HUD regulations' requirement that at a "reasonable" amount of utilities be included in rent was entitled to deference under *Chevron* as a valid interpretation of the statute. *Id.*

The Court likewise overruled the Authority's claim that the regulations' provision of a "reasonable" allowance for utilities was "too vague and amorphous to confer on tenants an enforceable 'right' within the meaning of § 1983. . . . " *Id.* at 431. In doing so, the Court noted that "[t]he regulations . . . defining the statutory concept of 'rent' as including utilities, have the force of law. . . . " *Id.* (citing *Brown*, 441 U.S. at 294-95) (emphasis added). Thus, "the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under . . . § 1983," and are not "beyond the competence of the judiciary to enforce." *Id.* at 432. On these bases, the Court allowed plaintiffs to proceed with their Section 1983 claim against the Authority.

Admittedly, the majority's dictum concerning regulations' force and weight drew fire from some members of the Court. In dissent, Justice O'Connor found "troubling"

the Court's insinuation that regulations alone might create rights enforceable under Section 1983. *Id.* at 437. Her primary concern was that allowing agency regulations to create such rights would entirely untether them from Congressional intent. *Id.* at 438. Still, O'Connor stopped short of declaring that she would find agency regulations could not create federal rights under any circumstances. *Id.* Instead, she merely posited that the "interim" regulations the majority found authoritative in *Wright* should not be construed to create such rights. *Id.*

Despite these concerns, the Court again relied in part on regulations to find an enforceable Section 1983 right in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). Like *Wright*, *Guardians*, and *Thiboutot* before it, *Wilder* involved "spending clause" litigation. Specifically, plaintiff healthcare providers brought a Section 1983 action to challenge the state's methods of reimbursement under the Medicaid Act. 496 U.S. at 501. The Medicaid Act, the Court explained, creates a cooperative federal-state program through which the federal government provides financial assistance to states so they may furnish medical care to needy individuals. *Id.* at 502. "Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Id.* To qualify for federal assistance, the state must submit and have approved a "plan for medical assistance" containing a number of specific features enumerated by the Act. *Id.* One of those features, the Boren Amendment, requires reimbursement to providers according to rates that the "State finds, and makes assurances satisfactory to the

Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." *Id.* at 503 (quoting 42 U.S.C. § 1396a(a)(13)(A)). Plaintiffs in *Wilder* sued under Section 1983 seeking revision of Virginia's state plan, which they claimed did not meet the requirements of the Boren Amendment to provide "reasonable and adequate" rates for reimbursement. *Id.* at 504-05.

Whether the Boren Amendment creates a federal right enforceable under Section 1983, the Court held, turns on whether "the provision was intend[ed] to benefit the putative plaintiff." *Id.* at 509 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989)). If so, "the provision creates an enforceable right unless it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit . . . or unless the interest the plaintiff asserts is 'too vague and amorphous such that it is 'beyond the competence of the judiciary to enforce.'" *Id.* (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981) and *Golden State*, 493 U.S. at 106)).[2]

Looking to the plain language of the statute, the Court concluded the plaintiff health care providers were the intended beneficiaries of the Boren Amendment. *Id.* at 510. The Amendment, the Court noted "is phrased in terms benefiting health care providers" in requiring the state plan to provide the requisite payments. *Id.*

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[2] While not succinctly articulated as a three part test, these same three factors are outlined by the Court in *Blessing v. Freestone*, 520 U.S. 329 (1997)—and relied on by the district court here—as the test for determining whether a "law" creates a federal right enforceable under Section 1983. ROA.177.

Specifically, the statute required the plan to provide payment "of the hospital services, nursing facility services, and services in an intermediate care facility." *Id.* (quoting 42 U.S.C. § 1396a(a)(13)(a)). These explicit references to healthcare providers erased any doubt that they were statutes' intended beneficiaries. *Id.*

With respect to the second element of its inquiry—whether the Boren Amendment creates a binding obligation on the states—the Court again concluded that the plain language of the statute controlled. *Id.* at 512. That language, the Court explained, is cast in mandatory, rather than precatory terms, providing that a state plan "must" provide for payment according to reasonable and adequate rates. *Id.* Moreover, the fact that the Secretary was "authorized to withhold funds for noncompliance" with the statute supported the Court's finding that the obligation it created was mandatory. *Id.*

Finally, the Court considered whether the obligation was "too vague and ambiguous" to be judicially enforceable. *Id.* at 519. With respect to this factor, the Court considered both the applicable regulations and the statute. *Id.* at 519-20. Noting that the "statute and regulation set out factors which a court must consider in adopting its rates," the Court held that assessing a state's findings concerning reasonable and adequate rates was "well within the competence of the judiciary." *Id.* at 520.

Although the Court in *Wilder* made no direct statements respecting the role of regulations in creating enforceable rights under Section 1983, it is nevertheless significant for two reasons. First, the *Wilder* majority openly characterized its earlier

holding in *Wright* as suggesting that "the [statute] and its implementing regulations did create rights enforceable under Section 1983." This statement, while dictum, reinforces the notion that *Wright* intentionally and meaningfully utilized regulations as part of its analysis for finding enforceable federal rights. Second, *Wilder* dealt broadly with the Medicaid Act, the same statute giving rise to the rights at issue in this case. While not all of the *Wilder* Court's conclusions apply to the statutory provisions at issue here, its specific finding that the Medicaid Act's internal enforcement scheme did not foreclose a private right of action is significant. Although this case features different statutory provisions and regulations, they share an enforcement scheme with the laws at issue in *Wilder*. The Court's finding that this scheme was not so comprehensive as to foreclose a private cause of action under Section 1983 eliminates one hurdle to finding a federal right in this case.

Two subsequent Supreme Court cases applied the same three factors used in *Wilder* to determine whether certain statutes created a federal right enforceable under Section 1983. *See Suter v. Artist M.*, 503 U.S. 347 (1992) and *Blessing v. Freestone*, 520 U.S. 329 (1997). While these cases came to the opposite conclusion of *Wright* and *Wilder*—holding that the statutes at issue did not create rights enforceable under Section 1983—the Court in both openly considered federal regulations to determine the existence of such rights. *Id.* Specifically, the Court in *Suter* noted that the regulations at issue lacked the specificity of the regulations relied on in *Wright* and *Wilder*. *Suter*, 503 U.S. at 357, 59, 61-62. This was among the factors counseling against the finding that federal right existed. *Id.* The

regulations in *Blessing* suffered the same deficiency—a lack of specificity—and also factored into the Court's ultimate holding. *Blessing*, 520 U.S. at 345. Although these cases pulled the reins on the Courts' findings of enforceable rights under Section 1983, they also reinforced that federal regulations could be appropriately used to satisfy the standard used to discern those rights' existence.

Critically, the Supreme Court's later holdings in *Alexander v. Sandoval*, 532 U.S. 275 (2001) and *Gonzaga*, 536 U.S. at 273 do not weaken the role of federal regulations in the *Wilder/Blessing* analysis. Although the 2001 decision in *Sandoval* did not involve a claim under Section 1983, it is nevertheless significant. 532 U.S. at 278. Plaintiffs in *Sandoval* asserted an implied right of action, rather than an enforceable right under Section 1983. *Id.* Before *Sandoval* and *Gonzaga*, the private right of action inquiry, while similar to the Section 1983 "rights" analysis, was considered to be "a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." *Wilder*, 496 U.S. at 508 n. 9. However, the Court in *Gonzaga* later held the two standards overlap in one meaningful respect—in either case, the Court "must first determine whether Congress intended to create a federal right." 536 U.S. at 283. Thus, by finding a common thread in to the two analyses, *Gonzaga* made *Sandoval*'s conclusions about private rights of action relevant to the Section 1983 inquiry. *See id.*

Plaintiffs in *Sandoval* sued the Alabama Department of Transportation under Title VI of the Civil Rights Act of 1964. 532 U.S. at 279. Although Section 601 forbids intentional discrimination, plaintiffs claimed they could seek redress for disparate

impact (*i.e.* unintentional) discrimination under a federal regulation prohibiting the state from administering programs that have the effect of subjecting individuals to discrimination based on protected characteristics. *Id.* at 278-79. This regulation was promulgated under a separate statutory section, Section 602. *Id.* at 278.

Starting from the premise that "private rights of action to enforce federal law must be created by Congress," the Court began its inquiry with the text and structure of Title VI. *Id.* at 286 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). First, the Court found there was an absence of "rights-creating" language in Section 602. *Id.* at 288. To prove this point, the Court contrasted the language of Sections 601 and 602. *Id.* at 288-89. While Section 601 decreed that "[n]o person . . . shall . . . be subjected to discrimination," Section 602 stated that "[e]ach Federal department and agency is authorized and directed to effectuate the provisions of [§ 601]." *Id.* Moreover, because Section 602 focused on the agency, and not on the individuals protected, the Court determined there was no indication Congress intended to create a private right of action for those individuals. *Id.* at 289. Similarly, the Court also highlighted the complexity and restrictive nature of the administrative enforcement scheme of Section 602, and suggested those procedures "contradict a congressional intent to create privately enforceable rights through § 602 itself." *Id.* at 289-90.

Importantly, the Court also rejected the plaintiffs' argument that rights-creating language in the regulations created a private right of action. *Id.* at 291. "Language in a regulation" the Court explained, "may invoke a private right of action that Congress

through statutory text created, but it may not create a right that Congress has not." *Id.* (citing *Redington*, 442 U.S. at 577 n.18). Nevertheless, the Court conceded that "when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." *Id.* "But it is most certainly incorrect," the Court added, "to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.*

While the Court's pithy reference to the sorcerer and his apprentice have sometimes been used to diminish the role of regulations in the establishment of private rights, its context tells a different story. Indeed, the Court in *Sandoval* actually reinforced the notion that a "general" statutory authorization may be augmented by a more specific regulation. *Id.* More importantly, this regulatory "augmentation" may be determinative in whether or not the right sought is privately enforceable. *See id.* The Court's comments in *Sandoval* are, in fact, consistent with its prior use of regulations to fill statutory gaps in *Wright*, *Wilder*, *Suter*, and *Blessing*.

While the Court in *Sandoval* did not directly address rights enforceable under Section 1983, the Court in *Gonzaga* did. There, a student tried to enforce provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA") via Section 1983. *Gonzaga*, 536 U.S. at 277. The provision of the statute at issue provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting

> the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. § 1232g(b)(1). In finding that no right enforceable under Section 1983 existed, the Court reiterated that unless Congress "speak[s] with a clear voice," and manifests an "unambiguous" intent to confer individual rights, federal funding provisions provide no basis for enforcement by § 1983. *Gonzaga*, 536 U.S. at 280. In reviewing its precedents, the Court reaffirmed that the statutes at issue in *Wright* and *Wilder* aptly demonstrated this unambiguous intent. *Id.* at 280-81.

The Court, however, criticized some of the language it used in *Wilder* and *Blessing* to describe the three-part test for identifying a right enforceable under Section 1983. *Id.* at 282-83. Specifically, the Court took issue with the first element of the test, which according to *Blessing*, requires that "Congress must have intended that the provision in question benefit the plaintiff." *Id.* (quoting *Blessing*, 520 U.S. at 340-41). The Court clarified that this "benefit" language should not be read to imply that any plaintiff who falls "within the general zone of interest that the statute is intended to protect" can enforce a statute under Section 1983. *Id.* at 283. Instead, the Court expressly rejected "the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* To find such a right, the statute, by it terms, must grant private rights to an identifiable class. *Id.* at 283-84. It does this by being "phrased in terms of the persons benefited." *Id.* at 284. Once a plaintiff demonstrates that the statute confers an individual right, "the right is presumptively enforceable under § 1983." *Id.*

The Court ultimately held that FERPA lacked "rights-creating" language critical to showing the requisite congressional intent. *Id.* at 287. FERPA's "aggregate" focus bolstered the Court's conclusion that it did not create new individual rights. *Id.* at 289. Likewise, FERPA's complex enforcement scheme counseled against a finding that Congress intended to confer an individual right, particularly as contrasted with *Wright* and *Wilder*. *Id.* at 289-90.

There are three critical takeaways from *Gonzaga*. First, *Gonzaga* did not make any direct statement about the role of regulations in the creation of an enforceable right under Section 1983. Rather, by incorporating the *Sandoval* analysis, the Court reinforced the notion that specific regulations can be used to augment more general rights-granting language in a statute. Second, *Gonzaga* did not overrule *Wright*, *Wilder*, or *Blessing*. To the contrary, the Court seemingly went to great effort to reinforce its analyses in those cases while simultaneously distinguishing the relevant features of the statutes at issue. *Gonzaga*, 526 U.S. at 280-81. Accordingly, those cases' reliance on regulations to show the existence of an enforceable right remains undisturbed.[3]

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[3] The Eighth Circuit has suggested that *Gonzaga* overruled *Wright*, *Wilder*, and *Blessing sub silentio*. *Does v. Gillespie*, 867 F.3d 1034, 1040 (8th Cir. 2017). That interpretation is contrary to the opinion itself, which preserves the holdings of those cases. *Gonzaga*, 526 U.S. at 280-81. Equally important, the vast majority of Courts of Appeal, including this one, have continued to rely on *Wright*, *Wilder*, and *Blessing*, while simply acknowledging *Gonzaga*'s clarification of *Blessing*'s first factor. *See Cuvillier*, 503 F.3d 397, 402-03.

Third, and perhaps most importantly, when read in conjunction with *Sandoval*, it is clear that *Gonzaga*'s requirement that a statute "unambiguously" confer an individual right is not inconsistent with the premise that the language conferring that right may be general. As long as the statute itself confers a right, "the intent displayed in each regulation can determine whether or not it is privately enforceable." *Sandoval*, 532 U.S. at 291. *Gonzaga*, when taken together with the other authorities discussed herein, allows regulations to be used to augment, explain, or clarify a right unambiguously conferred by statute.

After *Gonzaga*, Courts of Appeal have continued to rely on regulations to satisfy parts of the *Wilder/Blessing* test. In 2003, the First Circuit assessed the impact of *Gonzaga* in a case asserting a private right of action under Section 1983 for violation of the Nursing Home Reform Amendments to the Medicaid Act. *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003). The Court specifically held that it was appropriate to consider regulations to the extent they "invoke a private right of action that Congress through statutory text created. . . . " *Id.* at 52. The Court further held that the agency view, as expressed through its regulations, was entitled to deference under *Chevron*. *Id.* Expressly relying on the regulations to provide the definition of the pivotal term in the statutory language, the Court ultimately held that the regulation and statute together were not too vague and amorphous to be amenable to judicial enforcement. *Id.* at 53-54.

Likewise, in *Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012) the Second Circuit considered the arguments of certain Medicaid recipients that they could enforce the

statute's fair hearing provision—"as construed by the regulation"—through an action under Section 1983. *Shakhnes*, 689 F.3d at 249. The Court noted that a regulation was undoubtedly relevant in determining the scope of a right conferred by Congress, and expressly relied on the applicable regulation, in conjunction with the statute, to find an enforceable right under Section 1983. *Id.* at 251.

Even Courts that have read *Gonzaga* more broadly than the First and Second Circuits have not held that regulations may not augment or clarify a statute that confers a federal right. The Ninth Circuit, for one, acknowledged that there was "some role for agency regulations in applying the three-prong *Blessing* test to statutes." *Save Our Valley v. Sound Transit*, 335 F.3d 932, 941 (9th Cir. 2003). Likewise, while the Sixth Circuit held, post-*Gonzaga*, that regulations cannot "create enforceable rights of their own accord under § 1983," it did not foreclose or dismiss the notion that regulations may elucidate a right granted by the statute. *Johnson v. City of Detroit*, 446 F.3d 614, 627-28 (6th Cir. 2006); *see also Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1198 n. 5 (8th Cir. 2013) (using administrative regulation to support its conclusion that the statute did not confer an enforceable right under Section 1983).

In view of these precedents, this Court should hold that the weight of authority favors continued reliance on regulations, in conjunction with a statute, to find federal rights enforceable under Section 1983.

B. Read Together, Relevant Provisions of the Medicaid Act and 42 C.F.R. § 431.53 Satisfy the *Wilder/Blessing and Gonzaga* Standards for Creation of a Federal Right.

Applying the standards set forth by the Supreme Court, this Court should find that the following provisions of Medicaid Act, together with 42 C.F.R. § 431.53 confer a federal right on Thurman that is enforceable under Section 1983. The rights-conferring portions of the statute are as follows:

> (a) Contents
>
> A State plan for medical assistance must—
>
> (8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.
>
> (19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with the simplicity of administration and the best interests of the recipients;

42 U.S.C. §§ 1396a(a)(8), (19).

The accompanying regulation provides:

> A State plan must –
>
> Specify that the Medicaid agency will ensure necessary transportation for beneficiaries to and from providers; and
>
> Describe the methods that the agency will use to meet this requirement.

42 C.F.R. § 431.53.

The first step of the *Blessing* test, as modified by *Gonzaga*, requires this Court to find that the statutory provision at issue unambiguously creates a federal right. To do this, it must be phrased in "explicit rights-creating terms"—"in terms of persons benefitted." *Gonzaga*, 536 U.S. at 284. It must clearly confer an "individual

entitlement" and have an "unmistakable focus on the benefitted class." *Id.* at 287. A provision does not confer an individual right when it "speak[s] only in terms of institutional policy and practice," or when it has an "aggregate focus" and is "not concerned with whether the needs of any particular person have been satisfied." *Id.* at 288.

This Court, along with the First, Third, and Eleventh Circuits has expressly concluded that Section 1396a(a)(8) does, in fact, unambiguously create a right under these standards. *Romano v. Greenstein*, 721 F.3d 373 (5th Cir. 2013); *Sabree ex. rel Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004); *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002); *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998). This Court held Section (a)(8)'s "reasonable promptness" clause is "clearly intended to benefit 'eligible individuals,'" making the Medicaid recipient the intended beneficiary. *Romano*, 721 F.3d at 378.[4] Moreover, this provision does not focus on "the [entity] . . . regulated rather than the individuals protected." *Sandoval*, 532 U.S. at 289; *Romano*, 721 F.3d at 379 (Section (a)(8) does not have an aggregate focus, but is instead "concerned with whether the needs of [particular individuals] been satisfied]. Nor do the statutory

[4] Indeed, the Medicaid Act as a whole clearly exists for the benefit of eligible individuals. The statute's earliest available legislative history shows the aims of the Act were directed expressly towards elderly and disabled persons. Specifically, the Act was created "[t]o provide a hospital insurance program for the aged under the Social Security Act with a supplementary medical benefits program and an expanded program of medical assistance. . . . Pub. L. 89-97, July 30, 1965, 79 Stat. 286.

references to the individual appear "in the context of describing the type of 'policy or practice' that triggers a funding prohibition." *Gonzaga,* 536 U.S. at 288.

Critically, the "rights creating language" also satisfies the exacting standards set forth in *Gonzaga.* As the Third Circuit noted, the Court in *Gonzaga* "identified the text of Titles VI and I as exemplars of rights-creating language." *Sabree,* 367 F.3d at 190 (citing *Gonzaga,* 536 U.S. at 287). "Viewing Titles VI and IX," the Third Circuit explained, "we find it difficult, if not impossible, as a linguistic matter, to distinguish the import of the relevant [Medicaid Act] language-'A State plan must provide'-from the 'No person shall' language of Titles VI and IX." *Id.* Just as in Titles VI and IX, the relevant terms used in Title XIX are "mandatory rather than precatory." *Id.* (citing *Blessing,* 520 U.S. at 341).

Second, "the right to reasonably prompt assistance is not so 'vague and amorphous' as to exceed the jury's competence." *Romano,* 721 F.3d at 378. This conclusion is supported by *Wilder,* in which the Supreme Court held that a statutory provision requiring reimbursement at rates a "State finds . . . are reasonable and adequate. . . . " was not too vague and amorphous to be unenforceable under Section 1983. 496 U.S. at 501-02. Further, this Court noted that like the statutory provision in *Wilder,* Section (a)(8) has accompanying regulations that "clarify the scope of the 'reasonable promptness" duty." *Romano,* 721 F.3d at 378.

Finally, Section (a)(8) "unambiguously impose[s] a binding obligation on the States with its mandatory language that state plans 'must' provide that medical assistance 'shall' be furnished with reasonable promptness. *Id.* (citing *Blessing,* 520

U.S. at 341) (quotation marks omitted). Together with the other factors, Section (a)(8) plainly creates a right enforceable under Section 1983.

This analysis applies equally to 42 U.S.C. § 1396a(a)(19), which features the same mandatory "A State plan must" language and expressly focuses on "the best interests of the recipients." This language compares favorably with the statute at issue in *Wilder* in terms of its specificity and amenability to enforcement by the judiciary.

However, even if either or both of these regulations alone do not meet all of the *Blessing* standards, the Transportation Regulation augments both statutes to interpret the "reasonable promptness" and "best interest of the recipients" standards to require non-emergency transportation to and from their medical providers. 42 C.F.R. § 431.53. As discussed above, the text of these statutes unambiguously creates a federal right vested in individual Medicaid recipients. The Transportation Regulation merely "defines and fleshes out the content of that right." *Shakhnes*, 689 F.3d at 251. In so doing, it adds greater specificity and enables more apt enforcement by the judiciary. Read together with the statutory language itself, this regulation creates an enforceable right to transportation for Mr. Thurman under Section 1983.[5]

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[5] It bears mention that the Supreme Court in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015) found that a separate portion of the Medicaid Act did not create a federal right enforceable under Section 1983. In dicta, the Court commented that certain features of the Medicaid Act did not counsel in favor of finding an enforceable right under Section 1983. *Id.* at 331-32 (acknowledging the majority was addressing an issue the parties had not raised). Some of those assertions are directly contrary to the analyses in *Wright* and *Wilder*. *See id.* This dictum is not binding and should not

In holding the statute and regulation at issue here create a federal right, this Court must necessarily reject, at least in part, the Eleventh Circuit's decision in *Harris*, 127 F.3d at 1005-1012. Interestingly, however, the Court in *Harris* actually agrees with the premise that regulations may, in conjunction with a statute, confer rights enforceable under Section 1983. *Id.* at 1009. It merely came to a different conclusion concerning the language of the statute and regulation at issue. Specifically, in reading Section 1396a(a), the *Harris* court determined that the statute itself did not create a right, and that the regulation could not do so on its own. This Court should reject the *Harris* Court's analysis for two reasons.

First, this Court has found that one of the statutory provisions at issue in *Harris*—42 U.S.C. § 1396a(a)(8)—does, in fact, create a right enforceable under Section 1983. *See Romano*, 721 F.3d at 389. Thus, in order to follow *Harris*, this Court would have to disregard its holding in *Romano*.

Second, the *Harris* Court's analysis is inconsistent with *Wright*. While the *Harris* Court paid substantial lip service to the Supreme Court's holding in *Wright*, it ultimately treated applicable federal regulations with far less regard than did the Court in *Wright*. Specifically, the statute in *Wright* stated only that a tenant could be charged no more than a certain percentage of his income as "rent." 479 U.S. at 420. Utilities were not mentioned in the statute at all. *Id.* Instead, it was a HUD regulation that broached the subject of utilities and defined them as a part of the "rent"

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impact this Court's decision. *Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.")

calculation. *Id.* Despite the fact that the regulation introduced a new, narrower benefit into the broader right created by the statute, the *Wright* Court utilized the two together to find an enforceable right. *Id.* at 429-30. Yet the Court in *Harris* dismissed the regulation here because it could not find an explicit right to transportation in the statutory language. 127 F.3d at 1010-12. It failed to recognize the broader right created by the statute and apply the regulation to define and flesh out that right. This approach is contrary to both *Wright* and *Sandoval*, which contemplate that a regulation can clarify or define the content of broader statutory right.

For these reasons, this Court should find that the 42 U.S.C. §§ 1396a(a)(8) and (19) create broad rights to reasonably prompt and beneficial medical care that, when read together with 42 U.S.C. § 431.53 create a right to non-emergency transportation that is enforceable under Section 1983.

CONCLUSION

In view of the foregoing, Thurman respectfully requests that this Court reverse the district court's judgment dismissing this matter for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and court of appeals affirmation of that decision, and remand to the Court below for proceedings not inconsistent with this Court's holding.

Respectfully submitted,

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