No. 21-806

IN THE

Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *ET AL.*,

Petitioners,

v.

IVANKA TALEVSKI, PERSONAL REPRESENTATIVE OF THE ESTATE OF GORGI TALEVSKI, DECEASED,

Respondent.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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September 2022

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer-advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues involving protection of consumers and workers, public health and safety, and maintaining openness and integrity in government. One of Public Citizen's interests is ensuring that federal and state governments comply with laws that affect ordinary citizens. The ability of citizens to enforce those laws, including through the private right of action expressly provided in 42 U.S.C. § 1983, is vital to guaranteeing such compliance. Public Citizen submits this brief to explain that the § 1983 private right of action applies to Spending Clause laws.

SUMMARY OF ARGUMENT

42 U.S.C. § 1983 provides an express private right of action against every person acting under color of state law who deprives another of "any rights, privileges, or immunities secured by the Constitution and laws of the United States." The right of action supplied in § 1983 applies to rights conferred by all federal laws, including Spending Clause laws. So long as a Spending Clause law unambiguously confers a substantive, individual "right," private parties may enforce that right under the § 1983 right of action.

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[1] This brief was not written in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

Because there is no question that § 1983 expressly supplies a private right of action, it does not matter whether the Spending Clause law that created the substantive right for which the plaintiff seeks redress *also* contains a right of action. The plaintiff's claim is brought pursuant to the express right of action provided in § 1983, not pursuant to a right of action in the Spending Clause law. Accordingly, Petitioners' view that private parties cannot sue to enforce Spending Clause laws because Spending Clause laws are akin to contracts, and third-party beneficiaries of contracts cannot sue to enforce contractual terms, is misplaced. Although a contract-law analogy to Spending Clause laws may be appropriate in some circumstances, the analogy does not apply to all issues concerning Spending Clause laws. And the contract-law analogy does not apply here, where Congress has expressly conferred a right of action and the scope of the remedies available under it is not in doubt.

ARGUMENT

I. Section 1983 provides an express cause of action for rights established by all federal laws, including Spending Clause laws.

42 U.S.C. § 1983 provides an express private right of action against every person who under color of state law deprives a United States citizen or person within the United States' jurisdiction of "any rights, privileges, or immunities secured by the Constitution and laws of the United States." Section 1983 provides that every such person shall be "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

The plain language of § 1983 thus provides a "source of *express* congressional authorization of

private suits." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (quoting *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981)); *see also Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (stating that "Section 1983 provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States"). The express cause of action provided in § 1983 provides "a method for vindicating federal rights elsewhere conferred" in the Constitution and federal statutes. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

A. Spending Clause laws are federal "laws" within the scope of the § 1983 right of action.

Section 1983 unambiguously provides an express right of action for violations of rights conferred by *all* federal laws, including laws enacted pursuant to Congress's Spending Clause power. The phrase "the Constitution *and laws* of the United States" in the statutory language of § 1983 makes clear that Congress intended the scope of the § 1983 right of action to cover not just violations of constitutional rights, but also violations of rights conferred by federal laws. 42 U.S.C. § 1983 (emphasis added).

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court confirmed that § 1983 provides a right of action for violations of federal statutory rights, as well as constitutional ones. In *Thiboutot*, the plaintiffs sued under § 1983 to recover public assistance benefits to which they were entitled under provisions of the Social Security Act enacted pursuant to Congress's Spending Clause authority. 448 U.S. at 2–3. Looking

to the statutory text of § 1983, the Court explained that "the phrase 'and laws,' as used in § 1983, means what it says." *Id.* at 4. "Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." *Id.*; *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) ("As the language of the statute plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights.").

Since *Thiboutot*, the Court has refused to carve out categories of laws or rights from the scope of the § 1983 right of action. For example, the Court has "refused to limit the phrase 'and laws' in § 1983 to civil rights or equal protection laws." *Dennis v. Higgins*, 498 U.S. 439, 445 (1991). It likewise has "rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities.'" *Id.* For example, it has "refused to limit the phrase to 'personal' rights as opposed to 'property' rights.'" *Id.* (citing *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972)).

Instead, the Court "give[s] full effect to [§ 1983's] broad language, recognizing that § 1983 provides a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Id.* (internal marks omitted); *accord Livadas*, 512 U.S. at 132. "A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of '*any* rights, privileges, or immunities secured by the Constitution and laws.'" *Dennis*, 498 U.S. at 445 (internal footnote omitted). Accordingly, the Court does "'not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the

deprivation of a federally secured right," and does so only when the text and structure of a statute require such a reading. *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423–24 (1987) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

1. There is no exception to the § 1983 right of action for Spending Clause laws.

Pursuant to the Spending Clause, Congress is empowered to enact legislation "to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. A Spending Clause enactment takes the form of a bill passed by both Houses of Congress and presented to the President, and Article I expressly provides that such a bill "become[s] a Law" when it is signed by the President, not signed within ten days of presentment, or passed over the President's veto. *Id.* § 7, cl. 2. And the Necessary and Proper Clause expressly provides that all of the powers assigned to Congress by § 8, including the Spending Power, are to be "carr[ied] into Execution" by making "Laws." *Id.* § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). In addition, the Court has recognized that Spending Clause statutes preempt conflicting state laws under the Supremacy Clause, which makes "Laws of the United States" "the supreme Law of the Land," U.S. Const. art. VI, cl. 2. *See, e.g.*, *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 478 (1996); *Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 257–58 (1985). Thus, legislation enacted by Congress pursuant to its Spending Clause power is a federal

"law," just as any other legislation enacted by Congress is a federal law.

That some Spending Clause laws are "'much in the nature of a contract'"—because some persons or entities may avoid their requirements by declining funds—does not alter the conclusion that a law enacted pursuant to Congress's Spending Power is a federal "statute[]" that "may be enforced." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1568 (2022) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).[2] Indeed, the Court has rejected the argument that a Spending Clause law is merely "a bilateral contract." *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). "Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Id.*

Because Spending Clause laws are federal laws, they fit comfortably within the plain meaning of the phrase "and laws" in § 1983. *See Thiboutot*, 448 U.S. at 4 (stating that there are "no modifiers" in the statutory text that limit the phrase "and laws"). Indeed, *Thiboutot* itself involved a Spending Clause law, though the opinion did not address an argument that the source of authority for Congress's enactment of the law placed it outside § 1983's scope. And since

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[2] Not all Spending Clause enactments involve conditions imposed on State funding recipients or private intermediaries. For example, Title XVI of the Social Security Act provides supplemental security income (SSI) for the aged, blind, and disabled. The SSI benefits are provided directly to the SSI program's eligible beneficiaries, who have the right under law to receive such benefits. *See* 42 U.S.C. § 1381a.

Thiboutot, this Court has twice explicitly held that rights conferred by Spending Clause laws are within the scope of the express right of action in § 1983: In *Wright*, this Court held that rights provided to tenants under a rent-ceiling provision of an amendment to the Housing Act of 1937, enacted pursuant to Congress's Spending Clause authority, were enforceable under § 1983. 479 U.S. at 432. And in *Wilder*, this Court held that a reimbursement provision of an amendment to the Medicaid Act, another Spending Clause statute, "creates a right enforceable by health care providers under § 1983." 496 U.S. at 509.

2. A Spending Clause law creates a right enforceable under § 1983 if the law unambiguously confers that right.

The relevant question under this Court's precedents is not whether the Spending Clause is a "law," but whether that law confers a "right" within the meaning of the phrase "rights, immunities, and privileges" in § 1983. Only "an unambiguously conferred right" can "support a cause of action brought under § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (stating that "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms"); *see also Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) ("To sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs.").

In addition, if a Spending Clause law establishes a substantive, individual right, "there is only a

rebuttable presumption that the right is enforceable under § 1983," *Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing*, 520 U.S. at 341), which "may [be] defeat[ed] … by demonstrating that Congress did not intend that remedy for a newly created right," *id*. Consistent with this Court's longstanding insistence that congressional "intent" in the abstract lacks legal consequences unless it is manifested in the text and structure of a statute, *see Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496–97 (2022), "[e]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983,'" *Rancho Palos Verdes*, 544 U.S. at 120.

Where this Court has concluded that a Spending Clause statute was not enforceable under § 1983, it has done so because the Court's analysis of the statute's text and structure revealed that the statute did not unambiguously confer a substantive, individual right. *See Gonzaga*, 536 U.S. at 287 (concluding that the nondisclosure provisions of the Family Educational Rights and Privacy Act "fail to confer enforceable rights"); *Blessing*, 520 U.S. at 344 (concluding that the "substantial compliance" provision of Title IV-D of the Social Security Act "does not give rise to individual rights"); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (concluding that the "reasonable efforts" provision of the Adoption Assistance and Child Welfare Act "does not unambiguously confer an enforceable right"). These decisions have not expressed any doubt over the inclusion of Spending Clause laws within the scope of § 1983's express right of action. To the contrary, the

Court affirmed in each that violations of rights established by Spending Clause statutes can come within the scope of the § 1983 cause of action, so long as the Spending Clause statute, as evidenced through the statutory text and structure, unambiguously confers an individual right. *See Gonzaga*, 536 U.S. at 290; *Blessing*, 520 U.S. at 341; *Suter*, 503 U.S. at 357.

Pointing to the characterization of Spending Clause laws as akin to contractual undertakings, Petitioners contend that rights conferred by Spending Clause laws are not "'secured' … by any 'law,' but only by the contract between the recipient and the United States." Pet. Br. 18 (quoting David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 104 (1994)). However, although a funding recipient's acceptance of federal funds may *trigger* the recipient's obligation to comply with conditions attached to those funds, it is the statute itself that creates those conditions and, in some cases, confers corresponding rights against the funding recipient on individuals. *See Blessing*, 520 U.S. at 341 (asking "whether a particular statutory provision gives rise to a federal right"). Therefore, it is the *law*, and not any contractual undertaking, that provides the substantive right within the scope of the § 1983 cause of action.

B. The express right of action in § 1983 does not require a separate right of action in the federal law sought to be enforced.

1. Section 1983 itself does not provide substantive rights; it "merely provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States." *Gonzaga*, 536 U.S. at 282. Thus, the phrase "secured by" in the § 1983 right of action

for the deprivation of "rights … secured by the Constitution and laws of the United States" refers to the protection of a substantive right by the Constitution or federal law, not the provision of a right of action for the enforcement of the constitutional or federal right.

The ordinary meaning of "secured" in § 1983 is that a law or constitutional provision "secures" a right if, as a substantive matter, it "guarantees" that a person has the right. Dictionaries around the time of the enactment of § 1983 reflect this meaning of the term. *See* Noah Webster, *An American Dictionary of the English Language* 1193 (1875) (defining "secure" as "to make certain" or "to assure"); Noah Webster, *An American Dictionary of the English Language*, vol. II, at 66 (1828) (defining "secured" as "[e]ffectually guarded or protected" or "made certain"). Likewise, as the Court has noted, "[t]he preamble of the Constitution, proclaiming the establishment of the Constitution in order to 'secure the Blessings of Liberty', uses the word 'secure' in the sense of 'protect' or 'make certain'." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979).[3]

Under this meaning of the term "secure," the source of the substantive right—here, the Spending Clause law—need not create a remedy for its violation in order to "secure" it. Rather, a right is "secured" under a federal law, and thus within the scope of the private right of action provided in § 1983, if "a statute confers an individual right." *Gonzaga*, 536 U.S. at 285; *see also Blessing*, 520 U.S. at 340 (stating that § 1983

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[3] Professor Engdahl, whom Petitioners cite, construes the term "secured" similarly. *See* Engdahl, 44 Duke L.J. at 104 (equating "secures" with "makes … obligatory").

"safeguards certain rights conferred by federal statutes"). Indeed, the Court affirmed that principle just last term. *See Vega v. Tekoh*, 142 S. Ct. 2095, 2107 n.6 (2022) (stating that "[i]f a § 1983 plaintiff demonstrates that the federal statute *creates* an individually enforceable right in the class of beneficiaries to which he belongs, this gives rise to a rebuttable presumption that the right is enforceable under § 1983" (cleaned up, emphasis added)).

Petitioners urge a contrary view, suggesting that the term "secured" refers to whether a federal law that creates a right also provides a private right of action. *See* Pet. Br. 22–23 (asserting that unless "the statute expressly authorizes private parties to enforce obligations incurred for their benefit," "it cannot be said … that Spending Clause legislation 'secures' the right of a private citizen to compel a state to make good on its statutory obligations"); *see also id*. at 36–37 (suggesting that the right that must be "secured" by the underlying source of law is the *right of action* as opposed to the *substantive* right that the action vindicates). Petitioners cite no authority supporting that view of what § 1983 means when referring to rights "secured by" the Constitution and laws.

Moreover, Petitioners' view that a law or constitutional provision "secures" a right only if it creates a right of action would render § 1983 superfluous because "§ 1983 merely provides a mechanism for enforcing individual rights 'secured' elsewhere." *Gonzaga*, 536 U.S. at 285. The suggestion that Congress needs to have affirmatively created a right of action *twice*—once in § 1983 and again in the Spending Clause law—fails to respect the right of action that Congress created § 1983. Contrary to requiring that Congress affirmatively provide a

second right of action in the Spending Clause statute, this Court has stated that the implication of the express right of action in § 1983 is just the opposite: "Because § 1983 provides an 'alternative source of *express* congressional authorization of private suits,'" the Court "recognize[s] an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively *withdrawn* the remedy." *Wilder*, 496 U.S. at 509 n.9 (emphasis added); *see also Golden State Transit Corp.*, 493 U.S. at 107 (burden on defendant to show that Congress has withdrawn § 1983 remedy).

Further, an interpretation that "secured" requires the provision of a right of action would sharply limit, if not eliminate, the availability of § 1983 for violations of constitutional rights. The Constitution itself, though it creates substantive rights, does not provide express rights of action (or in most cases even implied ones) to protect those rights. *See Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022). It is well-settled, however, that constitutional rights are enforceable under § 1983. *See*, *e.g.*, *Dennis*, 498 U.S. at 445 (stating that the Court has "rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities'").

2. The suggestion that only Spending Clause laws that include rights of action are enforceable under § 1983 conflates the question whether a Spending Clause statute creates a substantive right potentially subject to judicial enforcement with the question whether Congress has conferred a private right of action, which is expressly supplied in § 1983 when such a right exists. *Cf. Gomez-Perez v. Potter*, 553 U.S.

474, 483 (2008) (stating that "the question whether a statute confers a private right of action" is "analytically distinct" from "the question whether the statute's substantive prohibition reaches a particular form of conduct").

Throughout their brief, Petitioners characterize the question presented as whether to "imply" a right of action under a Spending Clause statute. *See*, *e.g.*, Pet. Br. 3 (stating that the Court "should now hold that Spending Clause statutes do not give rise to private rights of action under Section 1983"); *id.* at 11 (discussing "inferring private rights of action from Spending Clause legislation"); *id.* at 20 (referencing "the question of private rights of action under Spending Clause statutes pursuant to Section 1983"); *id.* at 26 (discussing "implying private rights of action in Spending Clause statutes").[4] That is not the right question. When a plaintiff sues under § 1983, the right of action is already expressly supplied by § 1983. Accordingly, whether a right of action exists under the Spending Clause law is irrelevant because the plaintiff's lawsuit is brought pursuant to the express § 1983 right of action. As this Court has explained, "plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Gonzaga*, 536 U.S. at 284. Under § 1983 and this Court's precedents construing its language, the

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[4] In addition, *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), both of which Petitioners repeatedly cite, examine whether the statutes at issue provided implied rights of action, not whether they conferred substantive rights enforceable through the express right of action provided in § 1983.

determinative question is whether the law creates a substantive, individual right. If so, the deprivation of that right is presumptively within the § 1983 right of action. *Vega*, 142 S. Ct. at 2107 n.6 (citing *Rancho Palos Verdes*, 544 U.S. at 120).

To be sure, the Court observed in *Gonzaga* that its decisions limiting the availability of implied rights of action are not entirely "separate and distinct from [its] § 1983 cases." 536 U.S. at 283. Both reflect the same concern about recognizing private rights of action when the statutory language and structure do not manifest congressional intent to do so. *See id.* at 285–86. But in § 1983 cases, that question is presumptively answered when a statute's "text and structure" show that the statute "create[s] new individual rights." *Id.* at 286. In such circumstances, § 1983 unambiguously provides a right of action for deprivation of those rights by a state actor, and no further manifestation of congressional intent to create a private remedy is necessary. *Id.* at 284.

II. The contract-law analogy is inapplicable here because § 1983 supplies an express right of action.

A. This Court employs the contract-law analogy when the statute lacks clarity on the type of conduct or remedy for which a funding recipient may be liable.

In interpreting the scope of a funding recipient's liability under a Spending Clause law, this Court has analogized Spending Clause laws to contracts. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Cummings*, 142 S. Ct.

at 1568 (2022) (alteration in original) (quoting *Pennhurst*, 451 U.S. at 17). Because "Spending Clause legislation operates based on consent," "the legitimacy of Congress' power to enact Spending Clause legislation rests … on whether the recipient voluntarily and knowingly accepts the terms of that contract." *Id.* at 1570 (cleaned up). "There can … be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. Accordingly, "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously,'" so that the State has "clear notice" of those conditions. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

The contract-law analogy, however, is just that: an analogy. Indeed, the Court has explicitly rejected the notion that the law of contract should be adopted "wholesale" for Spending Clause statutes. *Cummings*, 142 S. Ct. at 1574. And it "ha[s] been careful not to imply that all contract-law rules apply to Spending Clause legislation." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002); *id.* at 188 n.2 (stating that the Court "do[es] not imply … that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise"); *Cummings*, 142 S. Ct. at 1573 (cautioning that "[the Court's] cases do not treat suits under Spending Clause legislation as literal 'suits in contract,' subjecting funding recipients to whatever 'governing rules' some general federal law of contracts would supply" (internal citation omitted)).

The Court has applied the contract-law analogy only in narrow circumstances "as a potential limitation on liability" for funding recipients,

Cummings, 142 S. Ct. at 1573 (citation omitted and emphasis removed), in assessing the "scope of conduct" for which a recipient might be held liable and the "scope of available remedies," *id.* at 1570 (citations omitted). For example, in *Gebser v. Lago Vista Independent School District*, the Court concluded that a funding recipient may not be held liable for damages under Title IX of the Education Amendments of 1972 solely because of acts of teacher-on-student sexual harassment that it did not know (and, indeed, could not have known) would place it in violation of Title IX's prohibitions, but may be held liable for deliberate indifference to known acts of harassment. 524 U.S. 274, 277 (1998). Similarly, in *Davis v. Monroe County Board of Education*, the Court stated that "private damages actions [under Title IX] are available only where recipients of federal funding had adequate notice that they could be held liable for the conduct at issue." 526 U.S. 629, 640 (1999). Accordingly, the Court limited a school board's liability for student-on-student sexual harassment to cases involving deliberate indifference to known acts. *Id.* at 633.

The contract-law analogy also has been applied to limit remedies under Spending Clause statutes where the availability of a right of action was clearly established but the scope of the remedy was uncertain. In *Barnes v. Gorman*, the Court held that punitive damages were not an available remedy under Title VI of the Civil Rights Act of 1964 (and, accordingly, under section 202 of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973, both of which provide remedies coextensive with Title VI). 536 U.S. at 189. The Court observed that although the availability of a private right of action under Title VI was "beyond

dispute" in light of congressional ratification of this Court's decisions finding an implied right of action under the statute, *id.* at 185 (citation omitted), "[i]t is less clear what remedies are available in such a suit," *id.* To resolve that uncertainty, the Court applied the contract-law analogy, explaining that "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.* at 187. Because "punitive damages … are generally not available for breach of contract," the Court concluded that punitive damages were not available under Title VI. *Id.*

Similarly, in *Cummings v. Premier Rehab Keller*, the Court held that another category of damages—emotional distress damages—was not available under Title VI, Title IX, § 504 of the Rehabilitation Act, and § 1557 of the Patient Protection and Affordable Care Act. 142 S. Ct. at 1576. The Court explained that "the statutes at issue are silent as to available remedies." *Id.* at 1571. Accordingly, the Court applied the contract-law analogy, explaining that where "it is less clear what remedies are available," *id.* at 1570 (quoting *Barnes*, 536 U.S. at 185), the Court's "consideration of whether a remedy qualifies as appropriate relief must be informed by the way Spending Clause 'statutes operate,'" *id.* (quoting *Gebser*, 524 U.S. at 286). Because "a funding recipient is aware that, for breaching its Spending Clause 'contract' with the Federal Government, it will be subject to the *usual* contract remedies in private suits," and "[i]t is hornbook law that 'emotional distress is generally not compensable in contract,'" the Court concluded that emotional distress damages

were not available under the statutes. *Id.* at 1571–72. "[W]e … cannot treat federal funding recipients as having consented to be subject to damages for emotional distress," reasoned the Court. *Id.* at 1572.

In short, where the Court has applied the contract-law analogy, it has done so because the statute was not clear on the particular conduct prohibited or the type of relief available in a private right of action. Because the text of the statute did not itself provide the "clear notice" required in Spending Clause cases, *Arlington*, 548 U.S. at 296, the Court looked to contract law to assess whether the funding recipient was on notice of the disputed condition attached to its acceptance of federal funds. Conversely, where there is no doubt as to the type of conduct prohibited or the remedy available under a Spending Clause law, there is no basis to analogize to contract law.

B. The contract-law analogy is inapplicable to § 1983 claims.

Although this Court has used the contract analogy to resolve uncertainty about the scope of both substantive obligations under Spending Clause statutes and the relief available in private rights of action to enforce those obligations, the Court has not analogized to contract law where Congress has spoken with clarity as to the existence of a private right of action. Amicus has found no case in which the Court applied the contract-law analogy to bar a plaintiff from asserting a private damages action where a Spending Clause statute unambiguously conferred substantive rights on the plaintiff and Congress had provided an express right of action to protect such rights—either in the Spending Clause statute itself or in § 1983.

That the Court has not applied the contract-law analogy in such cases reflects that the analogy's rationale does not apply to statutes like § 1983 that provide an express right of action. As explained above, the reason for analogizing to contract law is to consider whether the funding recipient had "clear notice" of the conditions attached to its acceptance of federal funds. *Arlington*, 548 U.S. at 296. Where a Spending Clause statute unambiguously confers a substantive right, the text of § 1983 and this Court's precedents provide clear notice to state actors of their potential liability for § 1983 claims by private parties—just as the text of an express right of action within a Spending Clause law provides notice of potential liability for claims within its scope. As this Court has explained repeatedly, a cause of action under § 1983 "remains a generally and presumptively available remedy for claimed violations of federal law." *Livadas*, 512 U.S. at 133.

Moreover, none of the limited circumstances in which the Court has applied the contract-law analogy—to evaluate the type of conduct or damages for which a funding recipient is liable in the context of a statute where such issues are unclear—is present in cases where § 1983 is invoked to redress violations of rights unambiguously conferred by Spending Clause statutes. Unlike in *Gebser* and *Davis*, the question whether a statute imposes damages liability for the kind of conduct that is alleged by the plaintiff is not at issue in such cases. *See Gebser*, 524 U.S. at 287–88 (applying the contract-law analogy to determine whether the alleged misconduct was within the scope of Title IX); *Davis*, 526 U.S. at 639–40 (same).

In addition, here there is no doubt as to the type of remedy that is available for a § 1983 claim, as there

was under the statutes at issue in *Barnes* and *Cummings*. *See Barnes*, 536 U.S. at 189 (holding that punitive damages were not available); *Cummings*, 142 S. Ct. at 1576 (holding that emotional distress damages were not available). It is well-settled that § 1983 authorizes money damages and attorney's fees for violations of statutory or constitutional rights. *Cf. Rancho Palos Verdes*, 544 U.S. at 123 (stating that a "successful plaintiff may recover not only damages but reasonable attorney's fees and costs" (citing *Thiboutot*, 448 U.S. at 9)); *see also Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding that punitive damages may be available under § 1983). Thus, unlike in *Barnes* and *Cummings*, because there is no question what remedies are authorized by § 1983, there is no basis to apply the contract-law analogy in the context of a § 1983 claim. *See Cummings*, 142 S. Ct. at 1570 (applying the contract-law analogy to assess the remedy because "it is less clear what remedies are available" under the Spending Clause statutes (quoting *Barnes*, 536 U.S. at 185)).

C. The third-party beneficiary theory urged by Petitioners is unfounded.

Petitioners contend that the contract-law analogy should be extended to provide that the rights that Spending Clause statutes grant to individuals who are not funding recipients are not judicially enforceable because third-party beneficiaries of contracts could not sue to enforce the contracts at the time § 1983 was enacted. Even if Petitioners' account of 19th-century contract law were correct (*but see* Resp. Br. 28–31; U.S. Amicus Br. 18–21), their reasoning is unsound.

Taken seriously, Petitioners' reasoning would suggest that Congress lacks authority to provide even express private rights of action for Spending Clause laws, because Petitioners' argument seems to presume that the contractual nature of the Spending Clause (which was obviously enacted before § 1983) imposes a purported limitation on Congress's power to authorize private lawsuits under § 1983. Accordingly, Petitioners assert that "when Section 1983 was enacted, private suits to enforce *government* contracts are almost always *verboten*." Pet. Br. 11; *id.* at 13 (similar); *id.* at 18 (referencing "the even stronger common law rule barring third parties from suing to enforce *government* contracts"). Although the logical implication of Petitioners' argument would seem to be that the Spending Clause's contractual nature forbids enforcement by third parties of requirements imposed on funding recipients by Spending Clause laws, even Petitioners disavow that consequence: They acknowledge that courts "should recognize" the "causes of action and remedies expressly provided for in Spending Clause legislation." *Id.* at 25.

Petitioners' rejection of the logical consequence of their argument is compelled by this Court's precedents, which leave no doubt that private rights of action (express or implied) created by Spending Clause laws may be asserted by "third-party beneficiaries" of those statutes. For example, the Individuals with Disabilities Education Act provides certain aggrieved parties under the Act with an express right of action. 20 U.S.C § 1415(i)(2). Title VI and Title IX provide implied rights of action where "private individuals may sue to enforce both statutes." *Cummings*, 142 S. Ct. at 1569 (quoting *Alexander*, 532 U.S. at 280). Title II of the ADA provides a private

right of action for money damages by expressly incorporating the right of action recognized by this Court at the time of the ADA's adoption, *see United States v. Georgi*a, 546 U.S. 151, 154 (2006) (citing 42 U.S.C. § 12133); *Barnes*, 536 U.S. at 185 (same), and the Rehabilitation Act and Affordable Care Act likewise provide a private right of action by expressly incorporating Title VI rights and remedies, *Cummings*, 142 S. Ct. at 1569 (citing 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 18116(a)).

Moreover, the third-party beneficiary theory urged by Petitioners would suggest that a host of this Court's decisions in Spending Clause cases were incorrectly decided. For example, in *Cummings*, the plaintiff was, under Petitioners' theory, a "third-party beneficiary" of the Spending Clause statutes at issue. The Court recognized that "[n]one of these statutes expressly provides victims of discrimination a private right of action to sue the funding recipient in federal court." *Id.* However, the Court did not suggest that the plaintiff could not sue for damages to enforce requirements imposed on a funding recipient. The Court said just the opposite: "[I]t is 'beyond dispute that private individuals may sue to enforce' the antidiscrimination statutes we consider here." *Id.* at 1569–70 (quoting *Barnes*, 536 U.S. at 185).

Petitioners' assertion that § 1983 lawsuits brought by "third-party beneficiaries" "scramble[] a state's expectations" because "states … have no way to anticipate—or budget for—possible litigation costs or jury awards," and damages awards "may" circumvent state damages caps, also proves too much. Pet. Br. 25–26; *see also id.* at 3 (stating that "[i]t is doubtful that third-party enforcement actions, with sky's-the-limit damages, are among the commitments that

contracting states expected to shoulder"). That same argument would apply to *any* damages action brought pursuant to statutes with express rights of action.

In any event, Petitioners' assertion rings hollow in the context of § 1983 lawsuits for violations of rights conferred by Spending Clause laws. Funding recipients have long been aware that, under *Wright* and its progeny, they may be subject to liability for violations of rights conferred by Spending Clause laws. Judicial precedent provides states with notice of their potential liability. *See*, *e.g.*, *Arlington*, 548 U.S. at 300–03 (examining this Court's precedents to determine whether a state had "unambiguous notice" of liability for expert fees and finding that it did not). Moreover, where the funding recipient infringes rights expressly granted by a Spending Clause law, "th[e] notice problem does not arise" because "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74–75 (1992). Because states are on notice that they may be subject to § 1983 liability for violations of the rights that they agreed to provide as a condition of receiving federal funds, state expectations are not "scrambled" when they are faced with private lawsuits claiming violations of those rights.

Finally, although Petitioners note that their third-party beneficiary theory was "not raised in early cases" and has not been "squarely addressed" by the Court, Pet. Br. 3, the Court has previously been presented with the argument and declined to adopt it. In *Gonzaga*, the petitioners, like Petitioners here, invoked the contract-law analogy and urged the Court to hold that third-party beneficiaries could not sue to

enforce Spending Clause laws. *See* Pet. Br., *Gonzaga*, 2002 WL 332055, at *39–42 (U.S. Feb. 25, 2002); Pet. Reply Br., *Gonzaga*, 2002 WL 538062, at *16–20 (U.S. Apr. 8, 2002). The respondents opposed that position, as did the United States. *See* Resp. Br., *Gonzaga*, 2002 WL 485131, at *46–49 (U.S. Mar. 27, 2002); U.S. Amicus Br., *Gonzaga*, 2002 WL 354729, at *18–23 (U.S. Feb. 22, 2002). The Court's ultimate decision, though it did not mention the third-party beneficiary argument, is flatly inconsistent with it: The Court repeatedly made clear that violations of rights granted by Spending Clause laws *are* enforceable by private parties under § 1983, so long as the rights are "unambiguously conferred." *Gonzaga*, 536 U.S. at 283.

In short, it remains "beyond dispute" that Congress can authorize beneficiaries of a Spending Clause statute to sue funding recipients for damages based on violations of rights granted by the law. *Cummings*, 142 S. Ct. at 1569 (quoting *Barnes*, 536 U.S. at 185). Whether the express authority to sue is provided by the Spending Clause legislation itself or by § 1983 makes no difference.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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September 2022