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 FOR THE NATIONAL CENTER FOR YOUTH LAW, THE YOUTH LAW CENTER, THE NATIONAL CENTER FOR LAW & ECONOMIC JUSTICE, *ET AL.* AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations with decades of experience advocating for children and youth in courts and legislatures. Based on their experiences, *amici* know both that Congress anticipates limited private enforcement of Spending Clause legislation and that such enforcement is essential to many federal legislative schemes protecting the rights of children and youth. Because the issues presented may impact *amici*'s work promoting the dignity, safety, and welfare of children and youth, *amici* have filed briefs in other cases addressing private enforcement of Spending Clause legislation. *See, e.g.*, *Blessing v. Freestone*, 520 U.S. 329 (1997). A list of *amici* follows.

For over 50 years, the National Center for Youth Law ("NCYL") has worked to advance the interests of children and youth. NCYL engages in impact litigation and policy advocacy on behalf of children and youth, particularly in the areas of education, health, immigration, child welfare, commercial sexual exploitation, and youth justice.

The Youth Law Center ("YLC") has advocated on behalf of children and youth for over 40 years. YLC is a leader in efforts to build systems that strengthen community and familial support for children and youth and to develop youth-centered national and state policies. YLC has long worked to end inhumane

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[1] Both parties provided blanket consent to the filing of *amicus curiae* briefs. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to fund the brief's preparation or submission.

practices against children and youth in the nation's child welfare and juvenile justice systems.

Since 1965, the National Center for Law and Economic Justice ("NCLEJ") has worked to advance racial and economic justice for low-income, vulnerable individuals through litigation, policy advocacy, and grassroots organizing. NCLEJ focuses on enforcing legally protected civil rights, improving access to public benefits systems, and helping build self-sufficiency for low-income workers and working-class families.

A Better Childhood ("ABC") is a nonprofit legal advocacy organization that works to reform constitutionally and federally inadequate child welfare systems through litigation. Through litigation and in collaboration with policy experts, local organizations, and government officials, ABC develops and implements lasting systemic reform.

Advokids is a California-based nonprofit organization that advocates for the child welfare system to provide the legal rights and protections to which every foster child is entitled under law, including each child's right to safety, security, and a permanent home. Advokids' policy work includes filing and participating in *amicus* briefs on issues that directly affect the rights and well-being of foster children.

For 30 years, the Alliance for Children's Rights ("Alliance") has served impoverished, abused, and neglected children and youth by providing free legal and social services and promoting systemic solutions. Beginning as a collaborative effort to provide free legal services to indigent children in Los Angeles County,

the Alliance later partnered with the juvenile court to serve foster care-impacted youth, and has grown to provide comprehensive legal advocacy to secure rights afforded to children and youth under federal and state law.

The Children's Advocacy Institute ("CAI"), founded at the University of San Diego School of Law in 1989, works to improve outcomes for children and youth, with special emphasis on improving the child protection and foster care systems and enhancing resources available to youth aging out of care. CAI's academic and clinical programs, research, and advocacy, conducted through its offices in San Diego, Sacramento, and Washington, D.C., seek to leverage change for children and youth through impact litigation; regulatory, administrative, and legislative advocacy; and public education.

The Education Law Center-PA ("ELC") is a non-profit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through individual representation, impact litigation, community engagement, and policy advocacy, ELC works to eliminate systemic inequities that lead to disparate educational outcomes based on the intersection of race, gender, gender identity/expression, sexual orientation, nationality, disability status, poverty, and homelessness. During its more than 45-year history, ELC has handled numerous individual matters and impact cases on behalf of students impacted by systemic racism, deep poverty, and discriminatory policies and practices.

Equal Rights Advocates ("ERA") is a California-based national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for people of all marginalized genders. Since its founding in 1974, ERA has led efforts to combat sex discrimination and advance gender equality through litigation, policy reform, legislative advocacy, community education, and free legal assistance to individuals experiencing unfair treatment at work and in school.

Family Violence Appellate Project ("FVAP") is a California and Washington state non-profit legal organization whose mission is to ensure the safety and well-being of survivors of domestic violence and other forms of intimate partner, family, and gender-based abuse by helping them obtain effective appellate representation. FVAP provides appellate legal assistance to survivors of abuse, advocates for survivors on important legal issues, and offers training and legal support for legal services providers and counselors.

Florida Legal Services ("FLS") is a statewide legal services organization dedicated to advancing economic, social, and racial justice and removing barriers that undermine and restrict equal access to justice and basic human needs. FLS helps poor, vulnerable, and hard-to-reach people access needed supports and services, and, together with fellow *amicus curiae*, share a mission to promote the dignity, safety, and welfare of children and youth.

Greater Hartford Legal Aid ("GHLA") is a private non-profit organization that represents low-income people in the greater Hartford area. GHLA attorneys

engage in both direct representation and systemic advocacy and litigation related to public benefits, including those secured by federal law.

Founded in 1975 as the nation's first nonprofit public interest law firm for children, Juvenile Law Center continues to lead in the fight for rights, dignity, equity and opportunity for youth. Through litigation, policy advocacy, and communications, Juvenile Law Center works to secure and enhance legal rights for children and youth in the child welfare and justice systems throughout the country.

The National Center on Adoption and Permanency ("NCAP") strives to transform the paradigm in child welfare policy and practice from "child placement" to "family success." NCAP provides research and expertise to assist agencies, organizations, advocacy groups, educators, and others in preventing harmful displacements, connecting children with permanent families, and providing consulting services to all parties, including families and professionals.

New Haven Legal Assistance Association ("NHLAA") was founded in 1964 to provide free legal support to low-income neighborhoods in New Haven, Connecticut. NHLAA litigates, educates, and pursues policy and system-wide reform on behalf of individuals suffering from poverty and racism in New Haven and beyond.

The Shriver Center on Poverty Law ("Shriver Center") is a Chicago-based non-profit legal and policy advocacy organization that holds a leadership role in the anti-hunger, health justice, and anti-poverty community. For 54 years, the Shriver Center has

worked to ensure that all people have access to resources and programs that provide for basic needs and advance long-term well-being and opportunity, developing deep expertise in public benefits programs, including SNAP and Medicaid.

The Southern Poverty Law Center (the "SPLC") is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. To advance that work, the SPLC litigates and advocates to make sure access to healthcare is not dependent on a person's race or economic status. This includes advocating for meaningful access to State Medicaid programs in the South.

Amici agree with Respondent that the Court should affirm the decision below. *Amici* write separately to explain, based on decades of firsthand experience in both drafting and enforcing legislation, why: (1) limited private enforcement is built into certain Spending Clause legislation; and (2) limited private enforcement is essential to the continued functioning of Spending Clause legislation. These issues are of primary importance to the children and youth for which *amici* advocate, particularly when states assume custody of children and responsibility for meeting their basic needs, many of which are protected by Spending Clause legislation.

SUMMARY OF ARGUMENT

The Court has long held that certain provisions in Spending Clause legislation create "rights * * *

secured by * * * the laws" of the United States. 42 U.S.C. § 1983. Rightly so. The Court's precedents are consistent with the text and history of both Section 1983 and later congressional enactments securing substantive individual rights. "To change so substantially the rules of the game now could very well subvert the various balances" struck by Congress, state actors, lower courts, and individuals who have learned to navigate a legal landscape informed by the Court's prior decisions. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 32 n.6 (1997).

Millions of children and youth depend on federally funded, state-administered services that assist families in meeting basic needs, help prevent or reduce harms caused by abuse and neglect, and support children's physical and mental health. Federally funded programs provide access to essential health care, combat childhood hunger, prevent unnecessary and dangerous institutionalization, reunite children with their families, and, when reunification is impossible, connect children with other loving, permanent homes. For our most vulnerable children who come into the foster care system, these federal programs help ensure the daily care, safety, and protection of youth separated from their families.

Spending Clause legislation requires states to spend resources in specifically delineated ways to benefit children and youth. When states fail to keep promises they made to obtain federal funds, children and youth may suffer irreparable harms. Section 1983 enforcement is a final backstop to hold states to their word, and children and youth rely on this enforcement

mechanism to prevent and recover from hunger, homelessness, preventable disease, and abuse and neglect.

Petitioners ask the Court to cut an essential, firmly established lifeline for vulnerable Americans. They do so by misstating historical contract principles, distorting the plain meaning of Section 1983, and ignoring entirely the text and history of later congressional enactments.

Contract law principles during the Reconstruction Era, when Section 1983 was enacted and amended, do not create a path to overrule settled law. First, the meaning of Section 1983 is clear on its face: it imposes no limit on future definitions of "rights * * * secured by the * * * laws" of the United States. Second, Reconstruction Era contract principles support third-party beneficiary enforcement of both private and government contracts. Third, Reconstruction Era interpretive methods are consistent with the plain text approach of *Thiboutot*, reinforcing the Court's longstanding recognition that Spending Clause legislation may create and define rights enforceable under Section 1983. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Finally, Congress has ratified *Thiboutot* and its progeny.

The appropriate question is not whether third-party beneficiaries could enforce a contract in the 1870s but instead whether a particular substantive legislative scheme conveys individual rights enforceable through Section 1983. Answering that question requires consideration of precedent, which explains contemporaneously enacted legislation and informs later congressional acts. This Court has

established how to determine whether a particular statutory scheme conveys enforceable individual rights. Because courts must consider the backdrop against which substantive legislation is enacted to give effect to that legislation, the separation of powers demands continued application of this approach.

Like Congress, other actors understand and rely on the Court's decisions, further counseling against Petitioners' request to upheave longstanding precedent. States know the rules and choose to accept them in exchange for federal money. Millions of Americans rely on statutory rights that have been enforced through Section 1983. When individuals bring enforcement actions, not only do they protect their own rights and advance federal policy, they also play an integral and expected role in enforcing federal statutes.

ARGUMENT

I. The question whether a federal right is enforceable under Section 1983 cannot be faithfully resolved by a bright-line rule against all private enforcement of Spending Clause legislation.

A. Section 1983 does not limit future congresses from defining "rights * * * secured by the * * * laws" of the United States.

1. Section 1983 "means what it says[.]" *Thiboutot*, 448 U.S. at 4. And it says, in no uncertain terms, that individuals may sue state actors who

violate "rights * * * secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Section 1983 neither exempts rights conferred through Spending Clause legislation nor limits the rights that may be "secured" by later congressional acts. It should not be amended by judicial action now—nearly 150 years later—to impose unprecedented new limitations.

Section 1983 is a procedural vehicle authorizing individual enforcement of substantive federal rights, whether created by the Constitution or statute. "[W]hen 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). This is particularly true here because the legislative history is "far too ambiguous to justify [a] restriction on the plain language." *Solorio v. United States*, 483 U.S. 435, 445 (1987); *see Thiboutot*, 448 U.S. at 7–8; *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608–12 (1979); *id.* at 623 (Powell, J., concurring); *id.* at 646 (White, J., concurring in judgment).

2. Petitioners' arguments about the meaning of Section 1983 at the time of enactment are myopic and inaccurate. *See* Pet. Br. 10–22. Congress secures rights through substantive legislation, so the question of whether a right is enforceable demands scrutiny of the text and history of those congressional acts—not simply Section 1983. *See infra* pp. 15–17. Further,

third-party beneficiaries did, in fact, enforce contracts during the Reconstruction Era.

The "rule" against third-party enforcement was manufactured by the English Court of Chancery in *Tweddle v. Atkinson* (1861), 121 Eng. Reprint 762, 1 Best & S. 393. Arthur L. Corbin, *Contracts for the Benefit of Third Persons,* 46 L. Q. Rev. 12 (1930). Prior to *Tweddle*, it was *not* the rule—and had not been for over a century. *Id.* at 18 ("It became the fashion among law writers to regard the English law as settled by [*Tweddle*]."); *id.* at 36 ("*Tweddle* * * * applied a narrow common-law rule that was even then in conflict with a more enlightened decision of a higher court. * * * [N]o account was taken of what the Court of Chancery had done."); *see also Lloyd's v. Harper* (1880), 16 Ch 290 ("Where a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract[.]"); *see also Tomlinson v. Gill* (1756), 37 Eng. Rep. 221, 1 Ambl. 330.

In the United States, too, third-party beneficiaries enforced contracts throughout the 19th Century. *See, e.g.*, *Coleman v. Whitney*, 20 A. 322 (Vt. 1889) (woman could enforce contract between her brother and her estranged husband governing her maintenance); *Lehow v. Simonton*, 3 Colo. 346, 348 (1877) ("[T]he decided preponderance of American authority sustains the action of the beneficiary."); *Chamblee v. McKenzie*, 31 Ark. 155, 162 (Ark. 1876) ("[I]t is a general principle that the party for whose sole benefit the promise was made, may sue thereon in his own name, although the engagement be not directly to or with him."); *Morgan v. Overman Silver Mining Co.*, 37 Cal. 534, 537 (1869) ("[T]he party for

whose benefit the promise is made, may maintain an action against the promisor."); *Mason v. Hall*, 30 Ala. 599, 601 (1857) ("[T]he weight of authority, both in England and America, is decidedly in favor of the proposition, that where a parol promise is made to one, for the benefit of another, an action may be maintained upon it by him for whose benefit it was made."); *Eddy v. Roberts*, 17 Ill. 505, 508 (1856) ("Where one enters into a simple contract with another, for the benefit of a third, such third person may maintain an action for breach."); *Brewer v. Dyer*, 61 Mass. 337, 340 (1851) ("When one person * * * engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.").

Nor was there any rule against third-party enforcement of government contracts; the line between private and government contracts reflects a distinctly modern concern and does not, in any event, apply to Spending Clause legislation. *See infra* pp. 15–20. Historically, third-party enforcement of government contracts was taken for granted. Before and during the Reconstruction Era, the Court allowed noncitizens to enforce international treaties. *See Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Hughes v. Edwards*, 22 U.S. 489 (1824). Indeed, "[i]f one surveyed judicial decisions from 1789 to 1975, one could not find a single decision endorsing the * * * presumption against individual enforcement of treaty rights." David Sloss, *When Do Treaties Create Individually Enforceable Rights?: The Supreme Court*

Ducks the Issue in Hamdan *and* Sanchez-Llamas, 45 Colum. J. Transnat'l L. 20, 27 (2006).

3. Moreover, the relevant question is not which specific claims the Reconstruction Era Congress contemplated but instead whether it intended to limit the later creation of federal statutory rights. The answer is no: Section 1983 does not confine the rights securable by law; rather, it serves as a procedural vehicle for enforcement of those rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) ("[Section] 1983 merely provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States" (quoting *Chapman*, 441 U.S. at 617.)). Congress did not intend to limit future definitions of federal rights when it enacted Section 1983. *See id.*; *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997); *Thiboutot*, 448 U.S. at 7–8.

While we cannot divine precisely Congress's motivations in amending Section 1983 to include a right to enforce the "laws of the United States," *see Thiboutot*, 448 U.S. at 7–8, we do know how the Court of the time would have resolved that question—by looking no further than the unambiguous statutory text, *United States v. Bowen*, 100 U.S. 508, 511 (1879). In *Bowen*, the Court considered whether a statutory revision was attributable to a transcription error. *Bowen*, 100 U.S. at 513. Its conclusion? The statute's history was irrelevant because the text was clear: "When the meaning is plain, the courts cannot look to * * * see if Congress erred * * * ." *Ibid.* Then, as now, the "words Congress chose" control. *See Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792–93 (2022). The

Congress of 1874 "was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended." *Thiboutot*, 448 U.S. at 7–8. "[R]ights * * * secured by the * * * laws" of the United States plainly means *all* "rights secured by the * * * laws" of the United States, including laws enacted pursuant to Congress's Spending Power.

4. Congress has reinforced and ratified the rule that individual rights secured through Spending Clause legislation may be enforced through Section 1983. The Court has called on Congress to weigh in. *Thiboutot*, 448 U.S. at 8. Congress has responded repeatedly, demonstrating that it understands its power and the Court's Section 1983 jurisprudence. For example, following *Pulliam v. Allen*, 466 U.S. 522 (1984), Congress narrowed Section 1983 in the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853, to prohibit injunctive relief in actions against judicial officers. Most tellingly, Congress amended the Social Security Act in response to *Suter v. Artist M.*, 503 U.S. 347 (1992), ratifying the rule that individuals may, consistent with the Court's prior decisions, enforce individual rights conferred through Spending Clause legislation. Improving America's Schools Act of 1994 (Schools Act), Pub. L. No. 103-382, § 555(a), 108 Stat 4057-4058 (42 U.S.C. 1320a-2); Social Security Act Amendments of 1994, Pub. L. No. 103-432, § 211(a), 108 Stat. 4460 (42 U.S.C. 1320a-10); *see* Br. of United States as *Amicus Curiae* at 18–20.

Attempting to negate the significance of congressional reliance, Petitioners ask this Court to jettison centuries of case law by declaring Section 1983

a common-law statute. Pet. Br. 35–38. Setting aside that this argument undermines entirely Petitioners' request to apply 19th Century contract principles, it exposes the arrogance of Petitioners' position—Petitioners ask the Court to upend not only its own precedent but all legislation enacted in reliance upon that precedent. Appropriately, "*stare decisis* carries enhanced force when a decision * * * interprets a statute. * * * All of [the Court's] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Like Respondent, *amici* do not suggest the Court read overmuch into congressional inaction but only note the "affirmative action taken by Congress." *Girouard v. United States*, 328 U.S. 61, 70 (1946); *see Kimble*, 576 U.S. at 471–72 (Alito, J., dissenting).

B. The appropriate question is whether a particular substantive statute confers enforcement rights to third-party beneficiaries.

1. A faithful inquiry into whether a statutory scheme provides individual enforceable "rights * * * secured by the Constitution and laws" must begin with the statutory scheme itself. The Court's precedents recognize this precept. The first question, always, is "whether Congress *intended to create a federal right*." *Gonzaga*, 536 U.S. at 283.

In questions of statutory interpretation, the original meaning of the statutory text controls. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074

(2018). Often relevant to that inquiry is the "backdrop against which Congress enacted" a law. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005); *see FCC v. AT&T Inc.*, 562 U.S. 397, 404 (2011). Thus, congressional reliance and contemporaneous contract principles are more relevant to determining the enforceability of a particular statutory scheme than Reconstruction Era contract rules.

Lower courts can perform the necessary review. "To be sure, 'historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.'" *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (quoting *McDonald v. Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring)). If judges and parties can ask what Congress meant in 1874 when it amended Section 1983 in relevant part, they can ask what Congress meant when enacting later, substantive laws pursuant to its spending power. This is the "right question[]." *See United States v. Vaello Madero*, 142 S. Ct. 1539, 1566 (2022) (Gorsuch, J., concurring) ("[S]ettling this question right would raise difficult new ones. * * * But at least they would be the right questions.").

Petitioners nonetheless ignore the bulk of the relevant statutory language and historical context—failing to give any attention to the original meaning of the Federal Nursing Home Reform Act of 1987 ("FNHRA"). FNHRA was drafted, debated, and enacted with full knowledge of the Court's precedents. *See* Resp. Br. 13–16. Congress addressed the concern identified in *Pennhurst State School & Hospital v.*

Halderman with private enforcement of rights upon which federal funds are not clearly conditioned, 451 U.S. 1, 18 (1981), by conditioning participation in Medicaid and Medicare on compliance with a Residents' Bill of Rights, 42 U.S.C. §§ 1395i-3(c), 1396r(c). FNHRA uses clear, individual rights-conferring language, 42 U.S.C. § 1396r(c), and preserves existing individual remedies, 42 U.S.C. § 1396r(h)(8). The question presented cannot be resolved fairly by ignoring FNHRA's text and history entirely, particularly given Petitioners' misstatement of Reconstruction Era contract principles.

2. To resolve the question of whether a substantive legislative scheme creates enforceable rights, contemporary common-law contract principles may reveal the operative meaning of the statutory text. *Monsasky v. Taglieri*, 140 S. Ct. 719, 733 (2020) (Thomas, J., concurring in part) (contemporaneous sources are evidence of original meaning). On that point, the rules relevant to modern-era Spending Clause legislation are clear. Intended beneficiaries may take legal action to induce performance by a promisor, Restatement (Second) of Contracts § 307 (Am. L. Inst. 1981), or to secure contract damages, *id.* § 310.

The existing common-law definition of "intended beneficiary" hews closely to the rule Petitioners ask the Court to overturn. In relevant part, a "beneficiary of a promise is an intended beneficiary if [(a)] recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and (b) "the circumstances indicate that the promisee intends to give the beneficiary the benefit of

the promised performance." Restatement (Second) of Contracts § 302. Likewise, the rule developed through *Thiboutot* and its progeny ensures that Section 1983 enforcement is available only if (a) an individual enforcement right is consistent with the overall statutory scheme, *Gonzaga*, 536 U.S. at 284 & n.4; *Blessing*, 520 U.S. at 341, and (b) Congress clearly intended to convey an enforceable right, *Gonzaga*, 536 U.S. at 283.

Much has been made of the *Armstrong* plurality's statement that modern rules preclude third-party enforcement of government contracts: "[T]he modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—much less to contracts between two governments." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 329, 332 (2015) (internal citations omitted). The plurality's statement rests on two misconceptions of modern contract law.

First, third-party beneficiaries can and do enforce government contracts. *See* Restatement (Second) of Contracts § 313 ("promisor who contracts with a government or governmental agency" potentially liable to third-party beneficiary when "the terms of the promise provide for such liability" or "a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach"); *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002) (question is whether the promisor "made any promises * * * that were expressly intended to benefit the [third-party plaintiffs] personally"); *see also, e.g.*, *Doe v. Dist. of Columbia*, 796 F.3d 96, 109 (D.C. Cir. 2015) ("Third

parties to a consent decree, involving the government or not, must demonstrate that they are the intended beneficiaries in order to have enforcement rights.") (citation omitted); *Carter v. United States*, 102 Fed. Cl. 61 (Ct. Fed. Claims 2011) (livestock producer could enforce contract between United States and states, through which states received nonfat dry milk to distribute to livestock producers).

Second, individuals can and do enforce contracts between two governments—again, so long as the contracts confer individual rights. Not only were individual enforcement actions possible when Section 1983 was enacted, *see supra* pp. 12–13, they are brought in the modern era in limited circumstances. *See, e.g.*, *Elk v. United States*, 87 Fed. Cl. 70, 79 (Fed. Cl. 2003) ("[T]he 1868 Treaty's 'bad men' provision created an individual third-party contractual right through which an individual claimant could directly pursue a suit against the United States.").

Importantly, the rationale for limiting third-party enforcement of government contracts does not apply here. Limitations on enforcement exist "[b]ecause every member of the public is in some sense an intended beneficiary of a government contract." Robert S. Adelson, Note, *Third Party Beneficiary & Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 Yale L. J. 875, 878 (1985). By focusing on whether a particular legislative scheme confers individual rights, the Court has dispensed with this concern. *Gonzaga*, 536 U.S. at 283 ("[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of [Section 1983]." (emphasis in original)). The

Restatement, published contemporaneously to and consistent with *Thiboutot*, makes this point clear: "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries *unless a direct intention is manifested*." Restatement (Second) of Contracts § 313 cmt. a. To determine whether a government contract "was intended to create contractual rights in third parties, the nature of the agreement, the identity of the alleged intended beneficiaries and the specific duty said to have been created toward them are all factors" to consider. Reporter's Note, *id.*

Even more to the point, it is unnecessary to draw analogies to cases involving contractual or quasicontractual claims because *Thiboutot* and progeny directly address the issue of when Spending Clause legislation is enforceable under Section 1983. Spending Clause legislation is "much in the nature of a contract," but it is not identical to a private contract. *Pennhurst*, 451 U.S. at 17. There is no need to resort to common-law rules governing non-statutory claims.

II. A bright-line rule barring all private enforcement of Spending Clause legislation would upend the vertical and horizontal balances of powers and exacerbate harm suffered by individuals when state actors violate rights secured by federal law.

A. When Congress enacts Spending Clause legislation, it operates within the boundaries of this Court's prior decisions.

1. Since deciding *Thiboutot* in 1980, the Court consistently and correctly has reaffirmed that

Spending Clause legislation can give rise to federal rights enforceable under Section 1983. The Court has never withdrawn the general rule that individuals may enforce "rights * * * secured by the * * * laws" of the United States, including rights that are secured by Spending Clause legislation. 42 U.S.C. § 1983.

Congressional enactments incorporate rules the Court develops. The Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *Clay v. United States*, 537 U.S. 522, 527 (2003) (quoting *United States v. Wells*, 519 U.S. 482, 495 (1997)). "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [the Court's] precedents," and it is similarly appropriate to read congressional enactments "in conformity with them." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979)).

Petitioners' proposed bright-line rule threatens the balance of constitutional powers. Far from "arrogating legislative power," as Petitioners claim, Pet. Br. 23–24 (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020)), the Court's longstanding recognition of private enforcement in limited circumstances gives necessary force to duly enacted federal policies, *Pereida v. Wilkinson*, 141 S. Ct. 754, 766–67 (2021) ("Only [Congress's] policy choice, embodied in the terms of the law Congress adopted, commands this Court's respect."). Changing the rules now would pull the rug out from under Congress's feet and subrogate Congress's will to the Court's. It would upend legislative programs enacted in reasonable reliance

upon precedent—programs that improve the lives of millions of Americans.

2. The Adoption Assistance & Child Welfare Act of 1980 ("CWA") provides a helpful case study of the relationship between Congress and Court. Pub. L. 96-272, 94 Stat. 500. The CWA was enacted contemporaneously with the Court's decision in *Thiboutot* and amended following later consistent rulings.[2] Thus, the court's precedents "reflect the statute's original meaning." *Baldwin v. United States*, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from denial of certiorari) (agencies' interpretations of statutes "around the time of the statute's enactment * * * might reflect the statute's original meaning"). The CWA's history, text, and statutory design show that, at times, Congress intentionally creates individual rights enforceable under Section 1983 pursuant to its Spending power.

The CWA was enacted to increase federal oversight of state foster care systems. Considering ballooning numbers of children and youth in foster care, Congress passed the CWA in 1980 to "modif[y]" "the incentive structure of present law * * * to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children." S. Rep. No. 96-336, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 1448, 1450. Audit results

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[2] For its part, *Thiboutot* was consistent with the weight of prior Supreme Court and lower court decisions. *Thiboutot*, 448 U.S. at 4–5; *see, e.g.,* Restatement (Second) of Contracts § 313 cmts. a–c (collecting cases in which third-party beneficiaries successfully sued to enforce government contracts as of 1980); *see also* Resp. Br. 5–8.

demonstrated "significant weaknesses in program management which had adverse effects on the types of care and services provided to foster children," including: licensure problems; mixing foster and juvenile justice systems; and inadequate care plans and eligibility determinations. *Id.* at 10–11, 1980 U.S.C.C.A.N. at 1460. Although many states had subsidized programs to assist adoptive parents, only "about 18,000 subsidized adoption placements had been made" over the preceding 10 years, while over 500,000 children remained in some form of foster care. *Id.*

Consistent with the CWA's original purpose, Congress continues to legislate to reduce states' removal of children from families and to increase timely and safe placements with permanent adoptive families. In 1997, Congress passed the Adoption and Safe Families Act, encouraging permanent placements for children who could not be reunited with their birth families, specifically when interstate placement is available: States cannot "den[y] or delay[] the placement of a child for adoption when an approved family is available outside of the jurisdiction with responsibility for handling the case of the child." Pub. L. 105-89, § 202, 111 Stat. 2115 (1997). Most recently, through the Family First Prevention Services Act of 2018, Congress provided federal funding for prevention services through "the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services," to prioritize keeping families together and reducing placement in foster

care as the primary door to needed services. Pub. L. No. 115-123, § 50702, 132 Stat. 132 (2018).

States may receive funds for foster care and adoption assistance only if their programs work to keep families intact and reduce harm to children caused by frequent displacement. State programs also must meet specific statutory criteria, including, *inter alia*: development of individualized case plans and reviews, 42 U.S.C. § 671(a)(16); non-race-based placement criteria, *id.* § 671(a)(18); preference for placement with relatives, *id.* § 671(a)(19); background checks for foster and adoptive parents, *id.* § 671(a)(20); health insurance coverage for children with special needs, *id.* § 671(a)(21); due diligence in providing notice and recitation of rights to eligible adult relatives, *id.* § 671(a)(29); reasonable efforts to maintain relationships between siblings, *id.* § 671(a)(31); protocols to report sex trafficking and to locate missing children, *id.* § 671(a)(34) & (35); and regular certification that the state will not implement policies to "significant[ly] increase * * * the population of youth in the State's juvenile justice system," *id.* § 671(37). While some provisions do not confer sufficiently clear rights to be enforceable, others do. *See* 42 U.S.C. § 1320a-2 (overriding the analysis in *Suter v. Artist M.*, 503 U.S. 347 (1992) without disturbing the holding that a particular CWA provision is unenforceable through Section 1983).

Participating states must submit a plan that describes how they will meet the requirements in federal law. The Department of Health and Human Services Secretary must approve the state plan. But the agency's only enforcement mechanism is to cut off

federal funding, 42 U.S.C. § 671(b), "an extremely drastic remedy. If used, it will likely help no one and at the same time will destroy the program." Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283, 292 (1996); *see also* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 123 Yale L. J. 248 (2014) (arguing for funding cutoffs but agreeing that they are almost never deployed).

Children and youth in state custody are already severely disadvantaged. *See infra* pp. 28–29. Existing agency enforcement mechanisms do not protect children from serious harms including abuse and neglect, frequent displacements, improper healthcare, and separation from siblings. U.S. Dep't of Health & Human Servs., *Child & Family Servs. Reviews Aggregate Report: Fiscal Years 2015–2018*, iii, 10 (June 5, 2020). Even assuming for the sake of argument that the agency would cut off funding and that cutting off funding could improve child welfare services over time, the intended beneficiaries of the CWA would only suffer further harm in the interim: cutting federal funding cannot remedy the *immediate* violation of children's *individual* rights secured by federal law. But Section 1983 enforcement can.

By no means does the CWA "impliedly" rebut the presumption of enforceability "by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *See Blessing*, 520 U.S. at 341. Instead, the CWA anticipates and requires individual enforcement of

provisions that confer sufficiently specific rights. *See id.* at 344–46 (courts must "separate out" individual provisions to determine enforceability); *also, e.g.*, *N.Y. State Citizens' Coal. for Children v. Poole*, 922 F.3d 69, 85 (2d Cir. 2019) (foster parents can sue to receive payments the state has withheld); *D.O. v. Glisson*, 847 F.3d 374 (6th Cir. 2017) (same); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974 (9th Cir. 2010) (same); *but see Mw. Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013).

3. Congress did not legislate into a void when it enacted the CWA in 1980 and again each time it passed new laws improving protections for children and youth. Congress operates in reliance on the Court's precedent and in response to failures in state systems, crafting exhaustive statutory schemes intended to benefit directly children and youth. The Court cannot upend its precedent without also upending validly enacted, comprehensive statutory schemes.

B. When states elect to participate in federal programs that grant rights enforceable under Section 1983, they knowingly and voluntarily accept the risk of enforcement actions.

Congress understands the Court's prior decisions. So too do states that agree to participate in federal programs. When states choose participation, they cannot violate individual rights upon which that participation is conditioned. Further, the history of litigation under Section 1983 gives notice that participation in Spending Clause programs carries with it expectations and attendant consequences.

States are aware of the Court's precedents and the terms of federally funded programs—as evidenced by 22 states' participation in this case as *amici curiae*. *See* Br. of Indiana and 21 Other States. Indeed, *amici* National Conference of State Legislatures, *et al.* argue that "future private actions" may cause "some States [to] choose simply to opt out of receiving federal funds"—*i.e.*, states may decline to participate in Spending Clause programs to avoid being sued. Br. of Nat'l Conf. of State Leg. *et al.* at 5. That this has not yet occurred—despite longstanding rules and innumerable lawsuits—suggests that the Court is being asked to sweeten the deal by modifying the terms of existing agreements rather than clarify a shared understanding of program requirements.

The only remedy for partial noncompliance with most Spending Clause schemes is the withdrawal of funding, which would raise new, significant concerns. *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.) (requirement that states expand Medicaid or lose all funding is "a gun to the head"); *see also* Sasha Samberg-Champion, Note, *How to Read* Gonzaga*: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 Colum. L. Rev. 1838, 1859 (2003) (explaining improbability of funding cuts). Far better, then, that states face targeted enforcement actions alleging specific infringements of specific federal rights.

C. Individual enforcement of "rights * * * secured by" Spending Clause legislation is, at times, necessary to give effect to legislation.

At times, Section 1983 is the only viable means to enforce individual federal rights violated by state actors. *See supra* pp. 24–25. When it comes to children and youth, agency intervention will come far too late to redress injuries against them and to ensure future compliance with federally funded programs before they age out of the system.

Children who experience hunger, abuse, neglect, improper medical care, and unnecessary institutionalization in their early years face lifelong harm, including higher mortality rates, higher rates of incarceration, lower rates of academic achievement, higher rates of mental health disorders, increased unemployment, and a greater probability of long-term reliance on public benefit systems. *See, e.g.*, E. Jason Baron & Max Gross, Working Paper, *Is There a Foster Care-to-Prison Pipeline? Evidence from Quasi-Randomly Assigned Investigators*, Nat'l Bureau of Econ. Res. (April 2022) [3] (*short-term* placement in foster care followed by family reunification decreases risk of adult crime); Children's Bureau, U.S. Dep't of Health & Human Servs., *Factsheet: Long-Term Consequences of Child Abuse & Neglect* (April 2019)[4] (childhood maltreatment linked to poor physical and mental health outcomes, causing individual and

[3] Available at https://perma.cc/S32W-MKA7.

[4] Available at https://perma.cc/S8UA-XTWD.

societal harm); Children's Health Fund, *Unfinished Business: More than 20 Million Children in U.S. Still Lack Sufficient Access to Essential Health Care* (November 2016) [5] (poor access to pediatric care increases economic costs by worsening adult health outcomes, interfering with school performance, and reducing adult earnings); Greg Duncan et al., *The Importance of Early Childhood Poverty*, *Social Indicators Research* 108(1), 87–98 (2012) (childhood poverty negatively affects future employment and earnings), Peter J. Pecora et al., *Improving Family Foster Care: Findings from the Northwest Foster Care Alumni Study* (April 5, 2005) (adults who spent time in foster care as children likelier than general population to suffer from mental health disorders, require public assistance, and be unemployed; short-term stays, few displacements, and reunification associated with better outcomes).

Delayed or non-existent system-wide agency enforcement cannot fix these problems because it does not address individual injuries, especially when that injury is immediate. In contrast, Section 1983 enforcement is responsive to deprivations of individual rights, providing children and youth a route to secure statutory rights designed to give them a chance to escape poverty and lead fulfilling, productive lives.

Consider, for example, the federal Supplemental Nutrition Assistance Program ("SNAP"). Through the

[5] Available at https://perma.cc/7H6D-MRTA.

Food and Nutrition Act, 7 U.S.C. §§ 2011-2036d, [6] Congress intended to ameliorate hunger and malnutrition in low-income households by increasing their food purchasing power. 7 U.S.C. § 2011. Approximately 10.2 percent of American families—over 13.5 million households—lacked resources to feed themselves adequately in 2021. Families with "very low food security" constituted 3.8 percent of families, or over 5 million households. Alisha Coleman-Jensen, Matthew P. Rabbitt, Christian A. Gregory, and Anita Singh, USDA Econ. Res. Serv., *Household Food Security in the U.S. in 2021*, at 17 (Table 2) (September 2022). [7] Children in these households often face severe outcomes, including delayed mental and physical growth, underperformance in school, and behavioral and mental health disorders. Anna D. Johnson & Anna J. Markowitz, *Associations Between Household Food Insecurity in Early Childhood*, 89 Child Development, Issue 2, pp. e1-e17.

Because the harm caused by hunger is immediate, Congress requires states to provide SNAP benefits within thirty days of application for eligible households, 7 U.S.C. § 2020(e)(3), and within seven days for severely impoverished households, *id.* § 2020(e)(9). The thirty- and seven-day deadlines "create * * * specific requirement[s] that must be

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[6] Effective October 1, 2008, the federal Food Stamp Program was renamed the Supplemental Nutrition Assistance Program, and the federal Food Stamp Act was renamed the Food and Nutrition Act of 2008. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 4001, 4002, 122 Stat. 1651, 1853–60.

[7] Available at https://perma.cc/VYU3-7T92.

followed for every [SNAP] applicant, rather than a generalized 'policy or practice.'" *Briggs v. Bremby*, 792 F.3d 239, 244–245 (2d Cir. 2015). These statutory mandates create a clear, enforceable federal right to timely receipt of financial assistance funded by the federal government for the direct benefit of individuals living with hunger. *Id.* at 246; *see also Barry v. Lyon*, 834 F.3d 706, 716–18 (6th Cir. 2016) (federal law "grants a right to food assistance to households that meet federally-established eligibility criteria" and a right to a due process hearing following denial of benefits). When state systems fail, federal agency oversight cannot timely correct or prevent individual harms. *See* 7 U.S.C. §§ 2025(c)(1) (outlining federal enforcement mechanisms, including withdrawal of funding). Federal litigation is the only means to enforce effectively Congress's clear command that the benefits it funds are provided to individuals at the time of need.

Similarly, the Medicaid Act's Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") benefit focuses on necessary interventions for children's mental, behavioral, and physical health. Children and youth eligible for Medicaid are entitled to vision, hearing, dental, and medical screenings, including assessment of mental health development. 42 U.S.C. § 1396d(r)(1)-(4). States must provide all "necessary health care, diagnostic services, treatment, and other measures * * * to correct or ameliorate defects and physical and mental illnesses and conditions." 42 U.S.C. § 1396d(r)(5). By design, the benefit "is more robust than the Medicaid benefit for adults and is designed to assure that children receive

early detection and care, so that health problems are averted or diagnosed and treated as early as possible." Ctr. for Medicare & Medicaid Servs., *EPSDT—A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents* at 1 (2014).[8] Thus, not only does the EPSDT benefit improve outcomes for individual children, it also reduces future costs for taxpayers.

Compliance with EPSDT terms is not optional for participating states. States accept federal funds earmarked for children whose families cannot pay for necessary healthcare services with full knowledge of the program's terms. And, despite successful Section 1983 litigation, the sky has not fallen, and states are not turning down federal money. Instead, children have received necessary medical care, and healthcare systems have improved. *See, e.g.*, *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), *vacated on other grounds sub nom.*, *Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1147 (2007); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004); *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002); *S.R. v. Pa. Dep't of Human Servs.*, 309 F. Supp. 3d 250 (M.D. Pa. 2018); *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015); *John B. v. Emkes*, 852 F. Supp. 2d 957 (M.D. Tenn. 2012); *Salazar v. Dist. of Columbia*, 729 F. Supp. 2d 257 (D.D.C. 2010); *Parents' League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 895 (S.D. Ohio

[8] Available at https://perma.cc/AM7C-DP5D.

2008); *Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007).

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Children enter this world and become uniquely vulnerable through no fault of their own; they have neither responsibility for nor control over many aspects of their lives. When states assume the responsibility of providing essential services and care—including in custodial settings—children and youth depend on them to meet their basic needs. Recognizing the importance of state-operated child-serving programs and the need for consistent minimum standards, Congress has empowered states to provide necessary services and has created universal standards for federally funded programs. Within some of these programs, Congress has secured federal rights to individual children and youth. Congress intended those rights to be enforceable.

CONCLUSION

Rights secured under the laws of the United States should continue to be enforceable under Section 1983.

Respectfully submitted.

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