No. 12-

IN THE

Supreme Court of the United States

KRISTIN M. PROUD, as Acting Commissioner of the New York State Office of Temporary and Disability Assistance, NIRAV R. SHAH, as New York State Commissioner of Health,

Petitioners,

v.

BORIS SHAKHNES, by his next friend Alla Shakhnes, individually and on behalf of all others similarly situated, by his next friend Mikhail Feldman, individually and on behalf of all others similarly situated, by his next friend Fei Mock, individually and on behalf of all others similarly situated, by his next friend Sha-Sha Willis, individually and on behalf of all others similarly situated, by his next friend Chaio Zhang, individually and on behalf of all others similarly situated,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A provision in the federal Medicaid statute, 42 U.S.C. § 1396a(a)(3), requires States participating in Medicaid to adopt state plans that "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." The federal entity that supervises States' administration of the Medicaid program, the Department of Health and Human Services (HHS), has promulgated a regulation, 42 C.F.R. § 431.244(f), that requires state Medicaid agencies to take final administrative action on requests for Medicaid fair hearings within ninety days of the date on which the Medicaid enrollee requests a fair hearing, except in specified situations where final administrative action must be taken within three days of the request.

The question presented is:

Whether private litigants may enforce the ninety-day administrative time limit established by 42 C.F.R. § 431.244(f) through lawsuits brought under 42 U.S.C. § 1983.

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MISCELLANEOUS AUTHORITIES

The Attorney General of the State of New York, on behalf of Kristin M. Proud, Acting Commissioner of the New York State Office of Temporary and Disability Assistance and Nirav R. Shah, New York State Commissioner of Health, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 689 F.3d 244. The opinion of the district court granting partial summary judgment against petitioners (Pet. App. 51a-117a) is reported at 740 F. Supp. 2d 602. The district court's subsequent order entering an injunction is not reported, but is reproduced in the appendix (Pet. App. 41a-50a).

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2012. On November 7, 2012, Justice Ginsburg granted petitioners an extension of time until January 10, 2013, to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Pursuant to U.S. Supreme Court Rule 35(3), Proud, Acting Commissioner of the Office of Temporary Disability and Assistance, should be substituted for Elizabeth R. Berlin, Executive Deputy Commissioner of the Office of Temporary Disability and Assistance.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are reproduced at Pet. App. 118a-120a: 42 U.S.C. § 1396a(a)(3); 42 U.S.C. § 1983; 42 C.F.R. § 431.244(f).

STATEMENT

This case presents the important question of whether and in what circumstances private plaintiffs may sue state officials under § 1983 to enforce a federal regulation that implements a federal statutory program, enacted pursuant to the Spending Clause, under which States' participation is overseen by federal administrative officials—in this instance, the Medicaid program.

Section 1983 provides a federal cause of action to any person whose "rights, privileges, or immunities secured by the Constitution and laws" of the United States are violated by a person acting under color of state law. 42 U.S.C. § 1983. In a series of cases decided over a decade ago, this Court made clear that federal statutes and regulations governing programs established under the Spending Clause are privately enforceable under § 1983 only if Congress clearly intended to create privately enforceable rights; otherwise, the requirements imposed by those statutes and regulations are properly enforced by the Federal Government, which oversees the programs in connection with the administration of federal funds.

In *Gonzaga University v. Doe*, this Court held that, under such Spending Clause programs, only individual rights that are unambiguously conferred by Congress are

enforceable through private litigation under § 1983. 536 U.S. 273, 285 (2002); *see also Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992). *Gonzaga* was consistent with, and informed by, the Court's decision the previous year in *Alexander v. Sandoval*, which held that language in a *regulation*, as distinguished from language in a statute, is not privately enforceable where it imposes obligations that were not imposed by Congress. 532 U.S. 275, 291 (2001). This Court held that a regulation "may not create a right that Congress has not." *Id.*

In the decade since these cases were decided, the lower federal courts have grappled again and again with the question of when language in a federal regulation may be enforced by private plaintiffs under § 1983. This Court should grant review to provide guidance to the lower courts, the States, and private litigants on this recurring question of federal law. The courts, including the court of appeals here, have generally recognized that private lawsuits under § 1983 may rely on a regulation that merely "fleshes out" or interprets a statute that confers a privately enforceable individual right, but that a regulation may not itself create a right that is enforceable under § 1983. But, as this case demonstrates, the lower courts have struggled to give consistent content to this standard.

Here, the Medicaid statute enacted by Congress requires state plans to provide persons with an opportunity for a fair hearing before a state agency when a local agency denies their claims for medical assistance or fails to act reasonably promptly on the claims. The statute does not contain any timing requirement for fair-hearing

decisions, let alone any rigid deadline requiring a fair-hearing decision to issue within a specific number of days. HHS has promulgated a series of regulations specifying numerous detailed requirements for States' fair-hearing programs that are not set forth in the statute. One such regulatory provision mandates that States must take final administrative action within ninety days of receipt of a request for a fair hearing.

The Second Circuit held that the plaintiff class could sue under § 1983 to obtain an injunction requiring strict compliance with the regulation's ninety-day time limit, reasoning that the regulation "merely defined" the statutory requirement that state plans afford persons an opportunity for a fair hearing before the state agency.

The Second Circuit's holding merits this Court's review because it allows a private right of action to enforce a requirement that is found nowhere in the enabling statute, is not implicit in the statute's terms, and does not purport to define any term or language found in the statute. The Second Circuit's holding thus stands in sharp tension with this Court's decisions in *Sandoval* and *Gonzaga*, which require a demonstration of clear *congressional* intent to confer privately enforceable individual rights upon a class of beneficiaries, and do not allow regulations promulgated by federal agencies to create private rights of action that Congress itself has not authorized. The Second Circuit's approach also clashes with the approach of several other courts of appeals, which have required a far tighter connection between the regulatory requirement and a specific statutory right conferred by Congress before permitting private litigation to enforce the regulation.

The Second Circuit's holding also merits this Court's review because it would allow private plaintiffs to subject state officials broadly to litigation costs, attorney's fees, and potential liability based on regulatory requirements promulgated by unelected administrative personnel. Within the arena of Medicaid alone, many of the hundreds of regulatory provisions promulgated by HHS could give rise to § 1983 lawsuits against state officials by individual private plaintiffs or classes of private plaintiffs, merely because the regulatory provision has some connection to its enabling statute.

The issue presented here has enormous public importance. State officials face detailed obligations under a wide variety of federal Spending Clause programs, of which Medicaid is the largest and most significant. The requirements of Medicaid alone are vast and byzantine: the Medicaid statute spans over fifty sections of the *United States Code*, 42 U.S.C. §§ 1396-1396w-5, and HHS's Medicaid regulations cover over four hundred pages of title 42 of the *Code of Federal Regulations*, *see* 42 C.F.R. §§ 430.0-456.725. The court of appeals' approach in this case would allow private plaintiffs to seek to enforce a great many of these myriad Medicaid regulatory requirements through § 1983 lawsuits, so long as they relate to a provision in the Medicaid statute that confers an individual right. Such a rule would greatly expand the costs of the Medicaid program to States by subjecting them to defense costs and awards of attorney's fees, as well as costs of complying with awards of damages or injunctive relief in private lawsuits brought to enforce regulatory requirements.

Permitting such lawsuits by private plaintiffs would also threaten the functioning of the administrative oversight regime that Congress established under Medicaid. That oversight regime charges HHS to exercise discretion to establish priorities and improve state-level compliance through administrative processes. HHS supervises States' implementation of their Medicaid plans on an ongoing basis through periodic reviews and directions to the States to take corrective action. In the course of its administrative oversight, HHS works with state Medicaid agencies to improve compliance over time, identifies priorities among areas in which state implementation may be found lacking, and exercises broad discretion in deciding whether and when to pursue formal enforcement action against a State or state officials. If a broad range of regulatory requirements were enforceable by private litigants, such lawsuits would threaten to divert state resources from the priorities established by HHS.

Regulations may play a role in § 1983 lawsuits when they define language in rights-creating statutory provisions or make explicit a requirement that is already implicit in a particular right conferred by statute. In such cases, the regulation provides a lens to interpret what the statutory right itself guarantees the beneficiary, but does not impose a requirement not found in the statute. Many regulations under a vast and complex program like Medicaid, however, do not define statutory language or spell out matters implicit in a specific statutory right. To the contrary, many regulations, like the ninety-day administrative time limit at issue here, reflect new and additional requirements, not present in any underlying statutory right, that are imposed by an administrative agency to implement the statutory program. Such

regulations do not inform the understanding of an enforceable statutory right itself; they impose additional rules that no statutory right contains. Such rules should be enforced administratively, in the exercise of the agency's discretion, not through private litigation under § 1983.

The State of New York recognizes that it is important to provide Medicaid applicants and recipients with prompt fair-hearing decisions, and the State is working to improve the efficiency of its fair-hearing process. But HHS's across-the-board requirement that fair-hearing decisions be issued within ninety days should not be enforceable in private § 1983 suits. HHS's ninety-day requirement may reflect its judgment as to the administrative standard that a state Medicaid program should achieve, but state officials' failure to comply with the ninety-day time limit does not mean that the affected individual has been denied the "opportunity to a fair hearing" under the terms of the Medicaid statute. Consequently, a private plaintiff seeking to enforce the ninety-day requirement is not enforcing a statutory right, but rather enforcing a requirement created solely by HHS's implementing regulation.

A. The Medicaid Program

Congress enacted the joint federal-state Medicaid program in 1965 as title XIX of the Social Security Act, Pub. L. No. 89-97, § 121, 79 Stat. 286, 343 (1965) (codified as amended at 42 U.S.C. § 1396 *et seq.*) with the primary purpose "of enabling each State, as far as practicable under the conditions in each State, to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of

necessary medical services." 42 U.S.C. § 1396-1. Title XIX imposes many requirements on the content of state medical assistance plans, enumerated in eighty-three subsections of § 1396a(a), and specified in greater detail in the remainder of Title XIX. HHS reviews plans submitted by States that wish to participate in Medicaid to ensure that they comply with these requirements. § 1396a(b). HHS conducts periodic reviews of States' compliance with their Medicaid plans, 42 C.F.R. §§ 430.32-.33, and has discretion to reduce or cut off a participating State's funding upon a finding that the State has failed to substantially comply with the approved state plan, 42 U.S.C. § 1396c.

B. Medicaid Fair Hearings

This case involves the statutory requirement under Medicaid that a state plan "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." § 1396a(a)(3). The Medicaid statutes contain no further requirement related to fair hearings for Medicaid applicants and recipients beyond this language mandating that state Medicaid plans "grant[] an opportunity for a fair hearing."

In contrast to this limited statutory command, HHS has promulgated extensive regulations detailing elements that must be included in fair-hearing programs under state Medicaid plans. *See* 42 C.F.R. pt. 431, subpt. E. These fair hearing regulations span twenty-five distinct sections in the *Code of Federal Regulations*.

The particular provision in the fair hearing regulations at issue here requires that the hearing decision ordinarily be issued within ninety days after the individual requests a fair hearing, except that the decision must be issued within three working days in certain defined circumstances. *Id.* § 431.244(f); *see also id.* § 438.410(a). HHS's fair hearing regulations have not always imposed a fixed time limit, let alone the same fixed time limit, for issuance of fair-hearing decisions. The first federal regulation related to Medicaid fair hearings made no mention of time limits for final administrative action on fair hearing requests. *See* 34 Fed. Reg. 1144 (Jan. 24, 1969). A provision with time limits was promulgated for the first time in 1971, and required final administrative action within sixty days. *See* 36 Fed. Reg. 3034, 3035 (Feb. 13, 1971). The sixty-day period was increased in 1973 to ninety days. *See* 38 Fed. Reg. 22,005, 22,008 (Aug. 15, 1973). An amendment to the regulation in 2002 added the exception requiring action within three working days in specified situations. *See* 67 Fed. Reg. 40,989, 41,095 (June 14, 2002).

In addition to its provisions regarding the timing of final administrative action on fair-hearing requests, the HHS fair-hearing regulations also prescribe the specific content and timing of notices of intended action by the state agency affecting Medicaid recipients by the state agency. *Id.* §§ 431.210-.214. The regulations further provide that, with limited exceptions, the state agency may not terminate or reduce an existing level of services or benefits until a fair-hearing decision is issued. *Id.* § 431.220. Under this provision, those fair-hearing applicants who are challenging a proposed reduction or discontinuance of services or benefits, rather than a denial of a request for increased services or benefits, receive what is known

as "aid continuing" and are thus not prejudiced by a delay in a hearing decision. Regulations also give the applicant procedural rights at the fair hearing itself, including the right to review the agency's evidence, present and cross-examine witnesses, and present argument. *Id.* § 431.242.

The regulations further specify other requirements for the hearing decision, in addition to the ninety-day time-limit at issue here. The fair-hearing decision must be based on evidence introduced at the hearing and must summarize the facts and identify the regulations supporting it. *Id.* § 431.244(b)-(e). The rule also requires that public access be afforded to all fair-hearing decisions, subject to certain detailed confidentiality requirements. *Id.* §§ 431.244(g), 431.300-.307. In addition, the applicant or recipient must be informed of the decision in writing with notice of his right to seek judicial review. *Id.* § 431.245.

C. Proceedings in the District Court

Plaintiffs commenced this class action in the United States District Court for the Southern District of New York against the Commissioners of the New York State Department of Health (DOH) and the Office of Temporary and Disability Assistance (OTDA), as well as officials of New York City's Human Resources Administration (HRA), which implements fair-hearing decisions in New York City. The named plaintiffs are residents of New York City who applied for or received Medicaid-funded home health-care services and requested fair hearings to challenge HRA's determinations concerning their benefits. "Home health services" include home nursing and physical therapy, *see* 42 C.F.R. § 440.70, but most commonly are personal care services, *see* 42 C.F.R. § 440.167, such

as "assistance with eating, toileting, ambulating, food shopping, or turning over in bed." Pet. App. 56a. Plaintiffs alleged, *inter alia*, that the state and city defendants failed to take final administrative action within ninety days of their fair hearing requests, in violation of the Medicaid statute and 42 C.F.R. § 431.244(f). The complaint sought declaratory and injunctive relief, as well as attorney's fees under 42 U.S.C. § 1988.

The district court found that the class of home health-care applicants and recipients in New York City who request fair hearings "numbers at least in the hundreds," Pet. App. 87a, and indeed in 2011 over 2700 fair-hearing requests by class members were logged. The district court certified a class consisting of "[a]ll New York City applicants for, and recipients of, Medicaid-funded home health services, who have requested or will request Fair Hearings challenging adverse actions regarding their home health services, and who are not challenging any decision regarding Medicaid eligibility, and who do not receive final administrative action from Defendants within ninety days of their requests for fair hearings." Pet. App. 116a. The court granted partial summary judgment against the state defendants on the claims asserting violations of the ninety-day time limit in § 431.244(f).[2] First, the court determined that the federal statute guaranteeing Medicaid applicants and recipients a fair hearing to challenge denials of claims for medical assistance "confers a federal right enforceable through § 1983." Pet. App. 67a. The district court then held that

[2]The court denied the plaintiffs' motion for partial summary judgment against the city defendants and also denied the city defendants' motion to dismiss.

the ninety-day time limit "merely fleshes out the right to" a fair hearing, because "a right to action implicitly includes a right to that action occurring within a certain time limit." Pet. App. 70a. The court thus entered a permanent injunction requiring petitioners to issue and implement fair-hearing decisions within ninety days after the request for a fair hearing as to "every New York City applicant for, and recipient of, Medicaid-funded home health services who requests a fair hearing challenging adverse actions regarding his or her home health services, and who is not solely challenging any decision regarding Medicaid eligibility." Pet. App. 43a.

D. The Decision of the Court of Appeals

The United States Court of Appeals for the Second Circuit affirmed in part and vacated in part the district court's injunction. The court of appeals agreed with the district court that the ninety-day time limit could be enforced under § 1983, holding that the regulation "'merely further defines or fleshes out the content' of the right to 'an opportunity' for Medicaid fair hearings." Pet. App. 19a. The court of appeals recognized that "the Medicaid Act does not specify a time frame within which Defendants must provide Plaintiffs with Medicaid fair hearings," but nevertheless held that the regulation merely fleshed out the right to an opportunity for a fair hearing, reasoning that "the right to an opportunity for a fair hearing includes the right to a fair hearing within some period of time, and the regulation's 90-day requirement simply defines what that period of time is." Pet. App. 20a-21a; *see also* Pet. App. 23a ("[T]he regulation merely defines the scope of that [statutory] right with respect to the time frame in which the right must be provided").

The court of appeals vacated the portion of the district court's injunction requiring implementation of a fair-hearing decision within ninety days of the fair-hearing request. The court held that the regulation required the state agency to issue a fair-hearing decision within ninety days, and did not require the state agency, as the district court had held, to both issue a fair-hearing decision and ensure that the decision was implemented within ninety days. Pet. App. 40a.

E. The *Menking* Class Action

Another § 1983 class action seeking an injunction and attorney's fees based on allegations that New York's state Medicaid agency has violated the regulatory ninety-day requirement is currently pending in the Southern District of New York. In that case, *Menking v. Daines*, the plaintiff class is not limited to persons requesting or receiving home-health services, but rather covers the entire range of services and benefits under Medicaid.

After the court of appeals issued its opinion in this case, the district court in *Menking* granted certification of the broad class of "[a]ll current and future New York State applicants for, or recipients of Federal Medicaid who have requested or will request fair hearings for whom [D]efendants fail to render a fair hearing decision within ninety days from the date of the request." *See Menking v. Daines*, No. 09-4103, 2012 U.S. Dist. LEXIS 135696, at *2-*3, *18-*19 (S.D.N.Y. Sept. 21, 2012). The district court in *Menking*—bound by the court of appeals' decision in this case—then granted summary judgment to the plaintiff class on the § 1983 claim that the state defendants had violated 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.244(f), as well as §§ 2903.2(A) and 2902.10 of the *State Medicaid Manual*,

an HHS publication that includes interpretation of the ninety-day regulation. *Menking v. Daines*, No. 09-4103, 2012 U.S. Dist. LEXIS 179567, at *28 (S.D.N.Y. Sept. 21, 2012). Because Ms. Menking, the sole named plaintiff, died before the district court certified the class, the state defendants have filed a motion for reconsideration of these two decisions, which remains pending.[3]

REASONS FOR GRANTING THE PETITION

I. There Is Tension Among the Circuits on the Question of When Federal Regulations Promulgated Under Spending Clause Programs are Privately Enforceable.

This case presents the important and unresolved question of when a federal regulatory requirement implementing a Spending Clause program may be enforced against state officials by private litigants under § 1983. The Court should grant the petition to provide guidance to the lower courts in confronting this frequently recurring question of federal law.

In *Gonzaga* and *Alexander*, this Court recognized important limitations on the ability of private plaintiffs

[3]The court of appeals' decision has also been applied by a New York State intermediate appellate court. That court held that when an administrative law judge (ALJ) at a Medicaid fair hearing remands a matter to the local agency that administers Medicaid, the ALJ generally "should specify the time in which the agency must act and report back so that the ALJ can render a final determination within that 90-day period." *Konstantinov v. Daines*, 2012 N.Y. Slip Op. 08777, at *2, 2012 N.Y. App. Div. LEXIS 8705, at *4 (1st Dep't Dec. 20, 2012).

to sue state officials to enforce the requirements of federal programs enacted under the Spending Clause. In *Gonzaga*, the Court held that a federal statute forbidding educational institutions that had received federal funds from making certain unauthorized disclosures of student records was not enforceable by private plaintiffs through a § 1983 cause of action because there was no indication that "*Congress* intended to confer individual rights on a class of beneficiaries." 536 U.S. at 285, 290 (emphasis added). The Court made clear that a federal statute is privately enforceable through the § 1983 cause of action only if "Congress intended to confer individual rights on a class of beneficiaries," *id.* at 285, and also held that nothing "short of an unambiguously conferred right" will support a cause of action under § 1983, *id.* at 283. The Court also observed that the "'typical remedy'" for state noncompliance with federal legislation enacted under the Spending Clause "'is not a private cause of action for noncompliance, but rather action by the Federal Government to terminate funds to the State.'" *Id.* at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)); *see also Blessing*, 520 U.S. at 343-44; *Suter*, 503 U.S. at 360-63.

The holding in *Gonzaga* was consistent with this Court's prior ruling in *Sandoval*, holding that a federal regulation could not be privately enforced if it imposed an obligation not contained in the statute itself. The regulation at issue in *Sandoval* prohibited federal fund recipients from engaging in practices with disparate impact on groups defined by race and national origin, 532 U.S. at 278, while Congress had by statute prohibited only intentional discrimination, and there was no indication that Congress intended to create a privately enforceable right to compliance with those disparate impact regulations, *id.*

at 285. The Court assumed that regulations promulgated under the Act could "validly proscribe activities that have a disparate impact on racial groups," 532 U.S. at 281, even though the statute itself permitted such activities. But the Court concluded that the disparate-impact regulation could not be enforced through a private right of action because the regulation went beyond the private right of action that Congress intended to create: "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* at 291. Although *Sandoval* addressed implied private rights of action and not suits under § 1983, the Court made clear in *Gonzaga* that the analysis as to whether a federal right has been unambiguously conferred is the same in both the § 1983 and implied private right of action contexts. 536 U.S. at 285-86.

In the decade since *Gonzaga* and *Sandoval* were decided, the federal courts have generally read the two decisions together to mean that private plaintiffs may sue under § 1983 for violation of a requirement contained in a federal Spending Clause program only if the right is granted by a statute, not by a regulation. *See, e.g.*, *Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003); *S. Camden Citizens in Action v. N.J. Dep't of Env'tl Prot.*, 274 F.3d 771, 790 (3d Cir. 2001); *Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987) (regulation "cannot create an enforceable § 1983 interest not already implicit in the enforcing statute"). A federal regulation may help define, or "flesh out," the scope of the right guaranteed by statute, but may not create additional rights whose deprivation may be the subject of a private lawsuit under § 1983. *S. Camden Citizens*, 274 F.3d at 790; *Harris*, 127 F.3d at 1009. The lower courts have differed as to the content of

this general standard, however, and this Court has not, since *Gonzaga* and *Sandoval*, addressed the meaning of the standard.

Some courts have required a close relationship between a regulation and a rights-creating statute before permitting private suits to enforce a requirement stated in the regulation. In *Harris*, for example, the Eleventh Circuit held that there was no private right to enforce a Medicaid regulation (42 C.F.R. § 431.53) that requires States to "ensure necessary transportation for recipients to and from providers" of services. 127 F.3d at 995. The Eleventh Circuit held that "the nexus between the regulation and Congressional intent to create federal rights is simply too tenuous to create an enforceable right to transportation." *Id.* at 1010. The court found that although the regulation "furthers the broad objectives" of provisions in the Medicaid statute that might confer privately enforceable rights, such advancement of the objectives of rights-conferring provisions was insufficient. *Id.* at 1011.

Similarly, in *Smith*, the Fourth Circuit held that there was no private right to enforce a regulation promulgated under the Social Security Act that required States to provide vocational rehabilitation services without regard to economic need. 821 F.2d at 984 n.4. After concluding that the Social Security Act itself did not bar the State from using an economic-needs test, the Fourth Circuit rejected the plaintiffs' claim based on the regulation, holding that "[a]n administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." *Id.* at 984. *See also Iverson v. City of Boston*, 452 F.3d 94, 101 (1st Cir. 2006) ("the dispositive question is whether the regulation either

forbids conduct that the statute allows or imposes an obligation beyond what the statute mandates"); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004) (regulation not enforceable because "it creates obligations not necessarily required by" rights-creating statute).

The standard applied by the Second Circuit in this case differs markedly from the standard applied by the First, Fourth, Sixth and Eleventh Circuits in the cases discussed above. Although the Second Circuit purported to apply a test similar to that applied by the other courts—stating that the ninety-day time-limit regulation is privately enforceable because it "merely further defines or fleshes out" the statutory right to an opportunity for a fair hearing—its understanding of that test reflects a much less rigorous approach to determining whether regulations bear a tight enough connection to a specific statutory right as to be privately enforceable.

The Second Circuit held that the regulation merely fleshed out the statute because, in its view, the right to an "opportunity for a fair hearing" includes "the right to a fair hearing within some period of time." Pet. App. 21a.[4] But the court of appeals had no basis for concluding that ninety days—the standard set forth solely in HHS's regulation—is the point at which a delay in issuance

[4]This Court has not decided whether 42 U.S.C. § 1396a(a)(3), the statutory fair hearing provision, itself confers enforceable rights on Medicaid applicants and recipients, nor has it since *Gonzaga* decided that any provision of the Medicaid statute confers rights enforceable under § 1983. Petitioners' argument above shows that even if 42 U.S.C. § 1396a(a)(3) confers such rights, the ninety-day time-limit regulation goes too far beyond statutory text to be enforceable.

of a fair-hearing decision effectively denies a person a meaningful opportunity for a fair hearing. A Medicaid recipient who receives a fair-hearing decision ninety-one days after requesting a fair hearing has not been deprived of the "opportunity for a fair hearing" that is required by the Medicaid statute. Consequently, a person alleging a failure to comply with the regulatory time limit for issuance of fair-hearing decisions has not thereby alleged a deprivation of the statutory requirement of a fair hearing.

It is possible that a delay in a fair-hearing decision could, on the totality of circumstances, be so extreme as to become tantamount to the denial of the federal right to an opportunity for a fair hearing. But the court of appeals had no basis to conclude that, in every case, a delay beyond ninety days deprives a person of the opportunity for a fair hearing. A rigid time limit on decisions after fair hearings is not part of this Court's description of the essential components of a fair hearing in *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970),[5] nor is it within the general understanding of what constitutes a fair hearing, *see, e.g.*, Henry J. Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1278-95 (1975) (discussing elements of a fair

[5]*Goldberg* identifies the following essential elements of a fair hearing prior to termination of welfare benefits: "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally," 397 U.S. at 267-68; the right to retain counsel at the hearing, *id.* at 270; and a right to an impartial decisionmaker who will "state the reasons for his determination and indicate the evidence he relied on," so as to satisfy the requirement that "the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing," *id.* at 271.

hearing). Nor is there any reason to conclude that HHS's regulation represents a judgment that a delay beyond ninety days is tantamount to a denial of a fair hearing, rather than a judgment as to the administrative standard that state Medicaid programs optimally should achieve.[6]

Because the Second Circuit's decision holds privately enforceable a regulation that goes so far beyond the statutory right to an opportunity to a fair hearing, the decision creates significant tension with the approaches taken by other courts of appeals, and with the principle recognized in *Sandoval* and *Gonzaga* that only those specific rights unambiguously conferred by Congress under Spending Clause programs are enforceable through private litigation. The Second Circuit required only a general connection between the statutory right to a fair hearing and the regulatory time limit on fair-hearing decisions. The court of appeals' decision thus reflects an overly broad approach for concluding that a regulation "merely further defines" a statutory right.[7]

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[6]The court of appeals also disregarded the fact that a large percentage of fair-hearing requests, including the majority of requests involving the plaintiff class here, involve "aid-continuing" situations, where an individual continues to receive his or her previous level of benefits while an initial decision to reduce or discontinue those benefits is being reviewed through the fair hearing process. In such cases, delay in rendering a decision does not harm the person requesting the decision—indeed, it may prolong medical assistance that the fair-hearing decision will ultimately find the person ineligible to receive.

[7]The Second Circuit's failure to require a sufficiently tight connection between a statutory right and an implementing regulation is also shown by the fact Congress itself easily could have imposed a time limit for fair-hearing decisions in the Medicaid

The Court should thus grant the petition to give guidance to the lower courts and resolve the varying standards they have applied.

II. The Question of When State Officials May Be Subjected To Private Litigation Under § 1983 Seeking To Enforce Regulations Under Medicaid and Other Programs Has Tremendous Importance.

A. Allowing Private Enforcement of Regulations That Go Beyond Rights Conferred By Congress Would Significantly Increase the Costs of Medicaid and Other Federal Programs To the States.

The question of whether and in what circumstances a federal regulation may be enforced in private § 1983 lawsuits has enormous importance for the States and state officials. Under the Second Circuit's overly relaxed standard for concluding that a regulation merely "fleshes out" a statutory right conferred on individuals under a Spending Clause program, States and state

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statute, but chose not to do so. Congress also could have required more generally that a "prompt determination" be made following a fair hearing, as it has in other public assistance programs, *see* 7 U.S.C. § 2020(e)(10) (fair hearings for Supplemental Nutrition Assistance Program); 42 U.S.C. § 1786(f)(8)(A) (fair hearings for special supplemental nutrition program for women, infants, and children). But Congress did not do that either. The absence of any language concerning timing from 42 U.S.C. § 1396a(a)(3) is evidence that Congress did not, explicitly or implicitly, impose any rigid time frame for fair-hearing decisions, and that the ninety-day deadline in the regulation expands, rather than merely applies or fleshes out, the underlying statute.

officials would likely be exposed to litigation expenses, injunctive relief, damages in their personal capacities, and attorney's fees under 42 U.S.C. § 1988 for a broad range of Medicaid regulations that private plaintiffs may seek to enforce. This result would increase the States' costs of participating in Medicaid, and might encourage States to discontinue providing benefits and services that are optional under the federal Medicaid program, such as most home health services.

Many federal programs in which the States participate contain extensive and detailed requirements stated in federal regulations. Medicaid is the broadest and largest of those programs. Both the Medicaid statute itself and the regulations HHS has adopted to implement it are vast and labyrinthine: 42 U.S.C. § 1396a, which lays out the basic requirements of State Medicaid plans, itself fills dozens of pages of the *United States Code*, and the implementing regulations fill hundreds of pages of the *Code of Federal Regulations*. Moreover, "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J.). In New York, Medicaid expenditures amount to nearly thirty percent of state annual expenditures. *See* Nat'l Ass'n of State Budget Officers, *State Expenditure Report: Examining Fiscal 2010-2012 State Spending* 11, tbl. 5 (2012). These expenditures serve nearly five million New Yorkers who are eligible for Medicaid, of whom nearly 3.1 million reside in New York City. N.Y. Dep't of Health, *Number of Medicaid Enrollees by Category of Eligibility by Social Services District—Calendar Year 2011*, http://www.health.ny.gov/statistics/health_care/medicaid/

eligible_expenditures/el2011/2011-cy_enrollees.htm. This large number of Medicaid enrollees is reflected in the number of fair hearings requested in New York. In 2011, for example, the State received nearly fifty-four thousand requests for Medicaid fair hearings. These requests are routed to approximately one-hundred hearing officers and twenty supervisory hearing officers, who adjudicate not only Medicaid fair hearings, but also approximately 240,000 requests for fair hearings arising from other public assistance programs.

The breadth of the Medicaid program and its importance to the States' fiscal integrity make it especially important for the States to have clear guidance as to whether and when private class-action or individual plaintiffs may sue state officials under § 1983 to enforce a requirement set forth in an HHS Medicaid regulation. Such suits subject the State to substantial litigation costs and potential awards of attorney's fees, as well as potential costs of complying with any court order for damages or injunctive relief.

Under the approach taken by the Second Circuit here, a broad range of regulatory requirements implementing the Medicaid program could be found to be, or at least asserted by private litigants to be, enforceable under § 1983. For example, the subpart of the *Code of Federal Regulations* governing fair hearings by Medicaid applicants and recipients alone contains twenty-five sections, each connected in some degree to the statutory requirement that Medicaid applicants and recipients be given an opportunity for a fair hearing. Each of these sections might be asserted to give rise to a cause of action under the Second Circuit's approach. Accordingly, the

standard adopted by the Second Circuit will likely spawn considerable litigation against state officials concerning alleged violations of Medicaid regulations, thereby increasing significantly the costs of the Medicaid program to New York and other States.

B. Permitting Private Enforcement of a Broad Range of Medicaid Regulations Would Fundamentally Change the Medicaid Enforcement Regime Adopted By Congress and Agreed To By the States.

In addition to imposing additional burdens on the States and state officials, private litigation to enforce the myriad regulatory requirements under Medicaid would work a dramatic change in the nature of the federal-state relationship under that program. Congress has charged HHS with supervising administratively the States' Medicaid programs. Pursuant to that oversight responsibility, HHS conducts periodic reviews of state agencies' compliance with their state Medicaid plans, recommends corrective action where appropriate, and engages in consultation with state agencies to improve their compliance. 42 C.F.R. §§ 430.32-.33.

If a wide range of HHS regulations were enforceable by private litigants under § 1983, in addition to being enforceable in the administrative discretion of HHS, it would radically change the nature of Medicaid enforcement. Private lawsuits seeking to require compliance with federal regulations that impose additional requirements not present in the Medicaid statute would disrupt Medicaid's cooperative federal-state framework by diverting state resources from priorities established

by HHS, the designated federal overseer of Medicaid, and redirecting those resources to address priorities chosen by numerous, diverse, and uncoordinated private litigants. The Medicaid statute and regulations are imbued with the cooperative nature of the program—a program that depends on negotiation and consultation for most compliance problems, and uses formal enforcement action by HHS when more informal, consultative methods fail to achieve satisfactory results. *See, e.g.*, 42 C.F.R. § 430.35(a)(2) (compliance hearings "are generally not called until a reasonable effort has been made to resolve the issues through conference and discussions"). That cooperative feature would be endangered if a large number of HHS's implementing regulations were enforceable not only by the agency as part of its overall supervision of a State's comprehensive Medicaid plan, but also through the courts at the behest of individual or class-action plaintiffs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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