No. 12-859

IN THE

Supreme Court of the United States

KRISTEN M. PROUD, as Acting Commissioner of the New York State Office of Temporary and Disability Assistance, *et al.*,

Petitioners,

v.

BORIS SHAKHNES, by his next friend Alla Shakhnes, etc., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

By requiring that States participating in Medicaid "provide for granting an opportunity for a fair hearing before the State agency," the federal Medicaid Act, 42 U.S.C. § 1396a(a)(3), grants "any individual whose claim for medical assistance under the [State Medicaid] plan is denied or is not acted upon with reasonable promptness" a statutory right, enforceable under 42 U.S.C. § 1983, to a fair hearing.

The question presented is:

Did the court of appeals correctly hold that, in a Section 1983 action, private litigants can enforce their statutory right to a fair hearing under 42 U.S.C. § 1396a(a)(3) as that right is defined in the statute's implementing regulation, 42 C.F.R. § 431.244(f), which provides that final administrative action be taken within 90 days of a hearing request?

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BRIEF IN OPPOSITION

INTRODUCTION

This case involves the enforcement of individual fair hearing rights that are unambiguously conferred by Congress in the Medicaid Act and enforceable through 42 U.S.C. § 1983.

Respondent Boris Shakhnes, a Medicaid recipient with severe multiple sclerosis, waited more than seven months for an administrative hearing, and waited almost two additional months for a

decision on that hearing, after New York State incorrectly denied his doctor's request for the increased home health services he urgently needed. Respondent Fei Mock, a Medicaid recipient whose severe scoliosis from childhood polio renders her unable to walk or stand on her own, requires nighttime assistance to use the restroom and turn in bed to prevent bedsores and ease her severe back pain. Ms. Mock waited over six months after the denial of her doctor's request for the services she needed before her hearing was held, and over five additional months for a decision, during which time she often had no one to assist her with these and other tasks.[1] Had respondents not filed this lawsuit, hundreds of others like them would remain at serious risk from administrative delays like these.

The federal Medicaid Act, 42 U.S.C. § 1396a(a)(3), grants "any individual whose claim for medical assistance under the [State Medicaid] plan is denied or is not acted upon with reasonable promptness" a statutory right, enforceable under 42 U.S.C. § 1983, to a fair hearing to challenge that denial. Mr. Shakhnes, Ms. Mock, and other Medicaid home health services applicants and recipients in New York who suffered similarly long and dangerous

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[1] Hauser Decl., Ex. K, Decl. of Alla Shakhnes ¶¶ 18-19, at D. Ct. Dkt. 90; *id.*, Ex. L., Decl. of Fei Mock ¶ 21-22, D. Ct. Dkt. 90; Decision After Fair Hearing, *In re the Appeal of Boris Shakhnes*, NYDOH, FH 4429973Q (Sept. 6, 2006), at 1; Decision After Fair Hearing, *In re the Appeal of Fei Mock*, NYDOH, FH 4451550L (Dec. 28, 2006), at 1.

delays brought this action under 42 U.S.C. § 1983 to enforce their statutory right to a fair hearing.

In the district court, the documents produced by petitioners (the State defendants) demonstrated that 86% of applicants for and recipients of Medicaid-funded home health services did not receive hearing decisions until more than 90 days after their hearing requests. That is the time period set by federal regulation for "final administrative action" after a hearing request. 42 C.F.R. § 431.244(f); Pet. App. 119a.

In holding that it could enforce the statutory right and look to the 90-day regulation to construe that statutory right, the decision of the United States Court of Appeals for the Second Circuit was consistent with *Alexander v. Sandoval,* 532 U.S. 275 (2001), and *Gonzaga University v. Doe,* 536 U.S. 273, 284-85 (2002). Under *Sandoval*, where a statute creates a cause of action, "valid and reasonable" regulations that apply the statute "authoritatively construe the statute itself," and are embedded into the enforceable right since "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284. Here, the Second Circuit simply held that respondents were entitled to enforce their statutory right to a fair hearing as it is "define[d] or fleshe[d] out" in the 90-day regulation. Pet. App. 19a.

Contrary to petitioners' assertion, respondents do not seek to enforce a federal regulation standing alone, nor did the Second Circuit do so. The Second Circuit instead expressly held that regulations do

not independently create rights enforceable under § 1983, nor do regulations expand enforceable statutory rights beyond what was contemplated by Congress. The federal regulation at issue here did neither. Intrinsic to a statutory right to a fair hearing is a decision within a reasonable period of time, so that an individual who has incorrectly been denied a medically necessary service can receive meaningful relief. This modest regulation did nothing more than define that time period.

Other Circuits that have considered when a plaintiff may enforce a statute as defined by a valid and reasonable implementing regulation have all applied the same standard. There is no tension among the Circuits. Instead, there is remarkable uniformity in the way the courts have articulated and applied the standard, consistent with this Court's prior rulings; the results differ because of differences in the specific statutes and regulations under review in each case. Indeed, the Second Circuit not only cited at least one decision of another Circuit with which petitioners now claim the decision below is in "tension," Pet. 14, 16, but explicitly relied thereon. Pet. App. 12a-13a (relying upon *Harris v. James,* 127 F.3d 993, 1009 (11th Cir. 1997) ("valid regulation merely further defines or fleshes out the content of that right")).

The lower courts have demonstrated that they can effectively differentiate between regulations that merely apply or construe a statutory right, and those that expand the substantive right beyond the bounds of the statute:

Where regulations merely apply or construe a statutory right, the courts enforce the statute as defined in the regulations. *See*, *e.g.*, *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (statutory "reasonable promptness" requirement enforceable as "define[d]" in federal timeliness regulations); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 606-07 (5th Cir. 2004) (enforcing statute as "authoritative[ly] interpret[ed]" by regulation defining statutory term "home health supplies"); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 906-07 (6th Cir. 2004) (regulation requiring that alterations make public facilities accessible to those with disabilities "effectuates a [statutory] mandate" that public entities make reasonable accommodations for disabled individuals).

Where regulations "impose obligations different than, and beyond, those imposed by" the statute, courts do not use the regulations to construe the statute and do not permit private enforcement of the regulations. *Iverson v. City of Boston,* 452 F.3d 94, 102 (1st Cir. 2006) ("self-evaluation and transition plan regulations impose obligations on public entities different than, and beyond, those imposed by the ADA"); *see also S. Camden Citizens in Action v N.J. Dep't of Envtl. Prot.*, 274 F.3d 771, 789-90 (3d Cir. 2001) (plaintiffs suing over disparate impact discrimination in air quality permit issuance could not enforce EPA regulations because they "do more than define or flesh out" statutory requirements of Civil Rights Act); *Harris v. James,* 127 F.3d at 1009-10 (statutory right to medical assistance under Medicaid did not include regulatory requirement that State ensure transportation to medical providers).

This Court's decision in *Sandoval*, the Second Circuit's decision in this case, and other Circuit Court decisions addressing this issue form a consistent body of law which makes clear that private parties cannot enforce federal regulations, and enables the courts to distinguish between those regulations which define statutory rights and those which go beyond statutory rights. There is no reason for this Court to address this issue.

STATEMENT

A. The Federal Right To A Medicaid Fair Hearing

Medicaid is a joint federal-state program under which the federal government provides funding for state programs that supply medical assistance, rehabilitation, and similar services to needy individuals. 42 U.S.C. § 1396 *et seq.*; 42 C.F.R. § 430 *et seq.* States that elect to participate in Medicaid are required to comply with federal law. 42 U.S.C. §§ 1396a, 1396c.

The federal Medicaid Act requires all states participating in Medicaid to "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." 42 U.S.C. § 1396a(a)(3). Forty years ago, the Department of Health, Education and Welfare, the predecessor of the Department of Health and Human Services ("HHS"), promulgated a federal regulation that defines and implements the fair hearing right by requiring that "final administrative action" be taken within 90 days

of a Medicaid applicant's or recipient's fair hearing request. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.244(f)(1); 38 Fed. Reg. 22,006 (Aug. 15, 1973).[2] The Second Circuit held that "final administrative action" occurs when the State has scheduled, conducted, and issued a decision after the fair hearing. Pet. App. 25a-34a.

New York, as a state participating in Medicaid, has designated the New York State Department of Health ("DOH") as the "single state agency" responsible for administering Medicaid in the State, which includes responsibility for maintaining the fair hearing system. DOH has delegated to the New York State Office of Temporary and Disability Assistance ("OTDA") the responsibility to schedule fair hearings, direct whether or not services should be continued or reinstated pending a fair hearing decision (called "aid continuing"), conduct fair hearings, and issue recommended decisions. DOH or its designee reviews these recommendations and issues final decisions.

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[2] A 2002 addition to the regulation requires a shorter 3-day time period in extremely limited and emergent circumstances not relevant here. 67 Fed. Reg. 40989, 41095 (June 14, 2002). Specifically, home health services recipients enrolled in managed care organizations, who have already invoked the organization's internal appeal process, are entitled to expedited state fair hearings where normal resolution could threaten life or ability to function. 42 C.F.R. §§ 431.244(f)(2). This provision was not at issue in this case.

B. Proceedings in the District Court

Respondents (plaintiffs below) are Medicaid applicants and recipients in New York City who cannot independently perform activities of daily living and therefore need home health services to live safely in the community. Plaintiffs Ms. Mock, Mr. Shakhnes, and Mikhail Feldman, like many other Medicaid recipients and applicants, were denied certain home health services, sought fair hearings to challenge those denials, and did not receive hearings or decisions after hearings for a protracted period of time.[3]

In June 2006, plaintiffs brought this action in the United States District Court for the Southern District of New York under 42 U.S.C. § 1983 to enforce their rights under the Medicaid Act, 42 U.S.C. § 1396a(a)(3). Plaintiffs alleged, among other things, that defendant Commissioners of DOH and OTDA (petitioners in this Court) systemically failed to provide fair hearings, by failing to ensure that hearings were scheduled and decisions rendered in a timely manner. Plaintiffs sought declaratory and injunctive relief only; plaintiffs did not and do not seek damages.

Data produced in discovery demonstrated State defendants' "striking noncompliance" with the fair hearing requirement. Pet. App. 108a. Data from

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[3] Other plaintiffs raised issues not relevant to the petition.

2005-06 showed that State defendants issued fair hearing decisions within 90 days in only 13% of cases; that in 69% of cases State defendants took more than 150 days to issue a decision; and that the average time to issue a decision was 255 days—eight and a half months. C.A.J.A. 118. The State failed even to conduct a hearing—much less decide it—within 90 days of a request in almost 70% of cases. *Id.* State data from 2008, two years into the litigation, showed some improvement over the preceding years, but DOH still failed to issue fair hearing decisions within 90 days in 36% of cases. C.A.J.A. 119.

The district court certified the plaintiff class and granted plaintiffs partial summary judgment on their claim that State defendants violated their federal statutory right to a fair hearing, by failing to provide "final administrative action" in a timely manner. The court held that "the fair hearing requirement expressed in 42 U.S.C. § 1396a(a)(3) is enforceable through a 42 U.S.C. § 1983 cause of action." Pet. App. 66a. Invoking the Second Circuit's decision in *D.D. v. New York City Bd. of Ed.*, 465 F.3d 503 (2d Cir. 2006), and the Eleventh Circuit's decision in *Harris v. James*, 127 F.3d 993 (11th Cir. 1997), the district court held that the 90-day provision in the regulation "define[d] the content of" the statutory fair hearing right, and thus the statute was enforceable as so defined. Pet. App. 69a, 76a. The district court held:

> It stands to reason that placing a time limit on government action merely fleshes out the right to that action—a right to action implicitly includes a right to that action

> occurring within a certain time limit. Just as justice delayed is justice denied, so too is action delayed action denied.

Pet. App. 70a. On the basis of plaintiffs' "conclusive evidence of unlawful administrative delay," the district court enjoined State defendants to ensure that final administrative action is provided within 90 days of a fair hearing request. Pet. App. 113a.[4]

C. The Decision of the Court of Appeals

The United States Court of Appeals for the Second Circuit affirmed the district court's injunction in modified form. Pet. App. 40a.[5]

In the court of appeals, the State defendants did not contest plaintiffs' right to bring a § 1983 action to enforce their statutory fair hearing rights, nor did they contest the factual record on which the district court based its grant of summary judgment. Pet.

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[4] Consistent with the position taken by both plaintiffs and State defendants in the district court, the district court held that "final administrative action" included not only rendering a decision, but also beginning to provide the services, if any, required by that decision. Pet. App. 42a-43a.

The district court did not resolve separate claims against the Commissioner of the New York City Human Resources Administration; those claims are not at issue before this Court.

[5] The court of appeals held that "final administrative action" merely required that a decision be made within the permitted time period, not that services begin in that time period. Pet. App. 34a.

App. 11a-12a. Instead the central issue before the court of appeals was the way the court enforced that statutory right, since its injunction invoked the time limitations in the federal regulation. To resolve that issue, the Second Circuit applied the standard set forth in the Eleventh Circuit's decision in *Harris v. James*, 127 F.3d at 1009:

> [S]o long as the *statute itself* confers a specific right upon the plaintiff, and a *valid regulation merely further defines or fleshes out the content of that right*, then the statute—in conjunction with the regulation—may create a federal right as further defined by the regulation.

Pet. App. 12a-13a. The court held that the 90-day regulation "merely further defines or fleshes out the content" of the Medicaid Act's fair hearing right,

> such that Plaintiffs have a right—enforceable under § 1983—to final administrative action "ordinarily, within 90 days" of their request.

Pet. App. 19a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT—OR EVEN "TENSION"—AMONG THE CIRCUITS, WHICH UNIFORMLY HAVE HELD THAT COURTS CAN ENFORCE STATUTORY RIGHTS AS DEFINED IN VALID REGULATIONS.

A. The Question Presented in the Petition—Whether Private Plaintiffs May Enforce a Federal Regulation—Is Not Actually Presented in this Case.

Although the Petition repeatedly states that this case presents the question whether "private plaintiffs may sue . . . to enforce a federal regulation" under § 1983, this case does not present that question. Pet. 2; *see also* Pet. i, 14.

In this case, both the Second Circuit and the district court enforced a federal statute, using a federal regulation merely to define and construe that statute. The Second Circuit, like its Sister Circuits, expressly confirmed that regulations cannot independently create rights enforceable under § 1983. Pet. App. 11a-12a.

The Second Circuit held that plaintiffs can enforce their *statutory* right to a fair hearing, a right that undisputedly is enforceable under § 1983, as that right is "define[d] or fleshe[d] out" in 42 C.F.R. § 431.244(f), the regulation that describes the time frame in which the hearing must be decided. Pet. App. 23a-25a. Contrary to petitioners' portrayal, all this narrow regulation does is to define a reasonable time frame for determining whether a Medicaid applicant or recipient will receive health-sustaining

care. The district court and the Second Circuit merely looked to the regulation's 90-day period to "define or flesh out" the statutory right. And indeed, petitioners have conceded that when Congress granted Medicaid recipients and applicants the statutory right to a fair hearing, Congress intended that right to include the right to a decision after the hearing without extreme delay—the very right the regulation protects. Pet. 19.

In short, the question whether "private plaintiffs may sue . . . to enforce a federal regulation" under § 1983 is not presented in this case.

B. The Second Circuit Correctly Applied This Court's Standards to Address Whether Private Parties Can Enforce Statutory Rights as Interpreted by Valid Regulations.

The decision of the Second Circuit in this case, and uniform approach of the courts of appeals, adheres to this Court's decisions in *Alexander v. Sandoval* and *Gonzaga Univ. v. Doe*.

In *Sandoval,* this Court considered whether private individuals had a right to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act. 532 U.S. 275, 278 (2001). The Court concluded that the regulations were not enforceable because they proscribed an entire class of conduct that the statute did not reach. *Id.* at 285. But the Court made clear that unlike the regulations at issue in that case, "valid and reasonable" regulations falling within the cause of action to enforce the statute "authoritatively construe the

statute itself," and thus merge with the enforceable statutory right. *Id.* at 284. For such regulations,

> it is . . . meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

Id.; *see also id.* at 291 ("Language in a regulation may invoke a private right of action that Congress through statutory text created . . . .").

Gonzaga v. Doe, decided the following year, confirmed in the § 1983 context that a statutory provision is enforceable only if its language reflects congressional intent to confer an individual right. 536 U.S. at 290. Read together, *Gonzaga* and *Sandoval* require a court asked to enforce a statutory right as construed by a regulation to undertake a two-part inquiry. First, the court must determine if there is an enforceable statutory right, either implied from the statute itself or under § 1983.[6] Second, the court must ask whether the regulation being invoked is a "valid and reasonable" "authoritative construction" of the statute—in which case it becomes part and parcel of the statutory right

[6] As *Gonzaga* explained, the inquiries in the private right and § 1983 contexts overlap somewhat, but not entirely. 536 U.S. at 283-85.

itself—or instead substantively expands the right in unfounded directions—in which case its language cannot inform interpretation of the statutory right.

The Second Circuit applied precisely this analysis in the decision below. The court first confirmed that "regulations may not independently create individual rights enforceable under § 1983," but noted that the observation was "beside the point" because plaintiffs were enforcing a "*statutory* right." Pet. App. 11a (emphasis in original). Indeed, in both the court of appeals and this Court, State defendants have not disputed that the Medicaid Act's fair hearing provision creates a right enforceable under § 1983. Pet. i, 14 n.4; Pet. App. 11a-12a.[7]

Having identified an enforceable statutory right to a fair hearing, the Second Circuit correctly concluded that the federal regulation, 42 C.F.R.

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[7] Courts uniformly have held that the statutory fair hearing right under § 1396a(a)(3) is enforceable via § 1983. *Gean v. Hattaway*, 330 F.3d 758, 772-73 (6th Cir. 2003); *Fishman v. Daines*, 743 F. Supp. 2d 127, 140-44 (E.D.N.Y. 2010); *McCartney v. Cansler*, 608 F. Supp. 2d 694, 699 (E.D.N.C. 2009); *D.W. v. Walker*, No. 09 Civ. 00060, 2009 WL 1393818, at *5 (S.D. W. Va. May 15, 2009); *Kerr v. Holsinger*, No. Civ. A.03-68-H, 2004 WL 882203, at *5 (E.D. Ky. Mar. 25, 2004). *See also Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (§ 1396a(a)(8) enforceable); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 183 (3d Cir. 2004) (same); *Bryson v. Shumway*, 308 F.3d 79, 88-89 (1st Cir. 2002) (same); *M.K.B. v. Eggleston,* 445 F. Supp. 2d 400, 428 (S.D.N.Y. 2006) (same); *Rabin v. Wilson-Coker*, 362 F.3d 190, 202 (2d Cir. 2004) (§ 1396r-6 enforceable).

§ 431.244(f), which requires a state to take "final administrative action" within 90 days of a Medicaid applicant's or recipient's fair hearing request, "merely further defines or fleshes out the content of" the statutory fair hearing right. Pet. App. 23a. The Court reasoned that

> the right to an opportunity for a fair hearing includes the right to a fair hearing within some period of time.

Pet. App. 21a. State defendants concede that point here. Pet. 19 ("[A] delay in a fair-hearing decision could . . . be so extreme as to become tantamount to the denial of the federal right to an opportunity for a fair hearing."). Because a timeliness requirement is inherent in the statute itself, the court continued, the regulation's 90-day requirement

> may reasonably be understood to be part of the content of the right to an opportunity for Medicaid fair hearings; the regulation merely defines the scope of that right with respect to the time frame in which the right must be provided.

Pet. App. 23a; *see also* Pet. App. 19a (regulation "construed" statute). In other words, the court of appeals essentially found that the regulation's requirement is the type of "authoritative[] constru[ction]" of the statutory right that, under *Sandoval*, becomes part of the right itself. *Sandoval,* 532 U.S. at 284.

Petitioners contend that the court of appeals "had no basis for concluding that ninety days . . . is the point at which a delay in issuance of a fair-

hearing decision effectively denies a person a meaningful opportunity for a fair hearing." Pet. 18-19. But this argument ignores that the regulation reflects the expert judgment of HHS, the agency charged with administering Medicaid, on the time period necessary to effectuate the statutory right. That regulatory interpretation deserves judicial deference as an "authoritative[] construc[tion] [of] the statute itself." *Sandoval*, 532 U.S. at 284 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

As the court of appeals explained, "[i]t is well-settled that, 'as an agency interpretation of a statute, a regulation may be relevant in determining the scope of the right conferred by Congress.'" Pet. App. 12a (citing *Save Our Valley v. Sound Transit*, 335 F.3d 932, 943 (9th Cir. 2003)); *see also Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430-31 (1987) (agency's view, as expressed in regulations implementing statute supplying § 1983 right, "is entitled to deference as a valid interpretation of the statute"). An agency interpretation should receive even greater weight where it is "longstanding," particularly where Congress has revised other aspects of the statute "without pertinent change." *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974). That Congress has chosen not to disturb the regulation at issue here in the forty years since it was promulgated, notwithstanding repeated amendments to the Medicaid Act, "is persuasive evidence that the interpretation is the one intended by Congress." *Id.*

Petitioners contend that because *Goldberg v. Kelly* did not impose a "rigid time limit" for hearing decisions, such limits must not be "essential" to make hearings fair. Pet. 19. But the issue in *Goldberg* was whether any post-deprivation hearing could afford due process; the Court held that due process required *pre-termination* hearings for the plaintiffs there. *Goldberg v. Kelly*, 397 U.S. 254, 260-64 (1970). The Court therefore had no reason to consider time limits of the type at issue here. *Goldberg* certainly does not stand for the idea that hearing delays are unimportant. And the *Goldberg* court did hold as a general matter that a fair hearing must be held "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. at 267.

Enforcing the statutory fair hearing right as HHS has construed it also facilitates consistent enforcement by courts. Without the administering agency's judgment for guidance, courts would have to determine in a vacuum the length of delay that effectively denies a fair hearing right. *See Doe v. Chiles*, 136 F.3d 709, 718 & n.16 (11 Cir. 1998). Myriad separate determinations about what delays violate the Medicaid Act could lead to a patchwork of standards across circumstances and jurisdictions.[8]

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[8] Petitioners' point that "aid-continuing"—that is, aid pending a fair hearing's resolution—obviates a timeliness requirement misses the mark. Pet. 20 n.6. Many individuals do not qualify for aid-continuing, including those seeking increases in life-

In short, the Second Circuit correctly applied the *Sandoval-Gonzaga* analysis here—just as it has done in the past. In *D.D. v. N.Y.C. Board of Education*, the Second Circuit found that the Individuals with Disabilities Education Act ("IDEA") granted plaintiffs a statutory right enforceable under § 1983 to a free appropriate education, achieved through an "Individualized Education Program" ("IEP"). 465 F.3d 503, 510-12 (2d Cir. 2006). The Court expressly found that a regulation requiring IEP implementation "as soon as possible" did not, "standing alone," create a right enforceable under § 1983. *Id.* at 513. "Instead, it is the IDEA that creates the right to a free appropriate public education enforceable through § 1983. [The regulation] merely *defines the scope of that right* with respect to the requisite time frame for implementing an IEP." *Id.* (emphasis added).

In *Abrahams v. MTA Long Island Bus*, 644 F.3d 110 (2d Cir. 2011), the Second Circuit applied a similar analysis in the private right of action context

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saving Medicaid services, or do not receive aid-continuing even when it is ordered. Petitioners claim that delay may prolong services for those ultimately found ineligible, but such individuals may be forced to reimburse the administering agency for the cost of those services. *See* 42 C.F.R. § 431.230(b). In any event, HHS in its expert judgment both provided for aid-continuing, 42 C.F.R. § 431.230, and imposed a 90-day decision deadline for all requests without regard to aid-continuing status, on the understanding that it provided a reasonable, workable framework for ensuring that hearing delays do not deprive individuals of their statutory fair hearing rights.

but found that the regulation exceeded the scope of the statutory right—thus differentiating between regulations that "simply apply" statutory rights and those that "create a right that Congress has not." *Id.* at 117-118; *see also Sandoval*, 532 U.S. at 285, 291. *Abrahams* found a private right of action under 42 U.S.C. § 12143, the ADA provision granting a right to participate in the *initial* development of a public entity's paratransit plan. *Abrahams*, 644 F.3d at 118. Applying *Sandoval*—and noting the Second Circuit's adherence to the decisions of other Circuits—the Second Circuit determined that the regulation on which plaintiffs relied, which required *ongoing* participation in the management of paratransit services, did not "'simply apply'" the statutory provision, but rather "substantively expanded" it beyond just participation in the initial plan. *Id.* at 118-20 & n.7 (quoting *Sandoval*, 532 U.S. at 285). The Second Circuit accordingly held that the statute could not be enforced as defined by that regulation. *Id.* at 119-20.

C. All of the Circuit Courts Have Applied The Same Standard To Determine Whether Private Parties Can Enforce Statutory Rights as Interpreted by Valid Regulations.

All of the other Circuits to consider the question of when statutory rights may be enforced as further defined by implementing regulations have applied an approach substantively identical to the Second Circuit's. Indeed, petitioners acknowledge that all of the courts of appeals have applied the same "general standard"—that private parties may enforce regulations that "define, or 'flesh out,' the scope of the right guaranteed by statute." Pet. 16-17.

Petitioners' assertion that there nonetheless is "tension" among the Circuits is unfounded; the cases petitioners claim evidence this "tension" in fact demonstrate remarkable uniformity. Thus review by this Court is unnecessary.

The analysis in *Harris v. James*, 127 F.3d 993 (11th Cir. 1997), for example, differs in no meaningful way from the Second Circuit's analysis below. Petitioners contend that *Harris* "clashes" with the Second Circuit's approach and "required a far tighter connection [than did the Second Circuit] between the regulatory requirement and [the] specific statutory right." Pet. 4. Not so. The Second Circuit relied heavily on *Harris* and cited it as the source of the "applicable standard"—that is, where "'the *statute itself* confers a specific right upon the plaintiff, and a *valid regulation merely further defines or fleshes out the content of that right*, then the statute—in conjunction with the regulation—may create a federal right as further defined by the regulation.'" Pet. App. 12a-13a (citing *Harris*, 127 F.3d at 1009). Applying precisely that standard, *Harris* found that a regulation requiring a State to provide transportation to and from medical providers was "too far removed" from the general statutory provisions directing States to provide "methods of administration" of the Medicaid program, provide "safeguards" for the program's administration, and require that a State plan "be in effect" in the State. *Id.* at 1009-12; *see also id.* at 1012 (regulation was not "part of the *content*" of those statutory provisions). In other words, both *Harris* and the Second Circuit here used the same standard; they reached different outcomes only because they applied that standard to different statutory and

regulatory provisions. The nexus between the statute and the regulation in *Harris* was simply "too tenuous to create an enforceable right." *Id.* at 1010.

The Eleventh Circuit's later decision in *Doe v. Chiles* confirms that its approach aligns with the Second Circuit's. Citing *Harris*, the *Chiles* Court found that the regulation at issue there—which, like the 90-day regulation here, imposed specific timeframes for determinations guaranteed by statute—"further define[d] the contours of the statutory right to reasonably prompt provision of assistance." 136 F.3d 709, 714, 717 (11th Cir. 1998).

Nor is *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987) in "tension" with the Second Circuit. Pet. 17. *Smith* did not even *address* whether a right-creating statutory provision may be enforced in conjunction with a valid implementing regulation; *Smith* found that the Social Security Act provision in question did not create an enforceable right. 821 F.2d at 983-84. *Smith* then merely confirmed that regulations could not create an enforceable § 1983 interest "not already implicit in" the authorizing statute. *Id.* at 984. This finding was completely consistent with the Second Circuit's holding here that regulations cannot "independently" create enforceable rights, but can "constru[e]" enforceable rights created by statute, Pet. App. 11a, 19a. The Fourth Circuit's decision in *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007), which, unlike *Smith*, did examine the role of regulations in further defining statutory rights enforceable under § 1983, concluded that federal timeliness regulations "define[d]" the statute's "reasonable promptness" requirement by providing specific timeframes. *Id.* at 356.

Contrary to petitioners' argument, the First and Sixth Circuits have also applied the same approach as the Second Circuit. Pet. 18. *Iverson v. City of Boston*, relying on *Sandoval*, held that a regulation "may invoke a private right of action that Congress through statutory text created" where it "simply effectuates an express mandate contained in the organic statute," but not where it "announces an obligation or a prohibition not imposed by the organic statute." 452 F.3d 94, 100-101 (1st Cir. 2006). Whereas the ADA provision in that case generally forbade excluding disabled individuals from participation in public programs, the regulation plaintiffs invoked required states to develop "transition plans." *Id.* at 100. Because a public entity could comply with the statute's requirements without developing such a plan, the regulation "impose[d] an obligation beyond the statutory mandate." 452 F.3d at 101.

The Sixth Circuit applied the same standard in *Ability Center of Greater Toledo v. City of Sandusky*: "[I]f the regulation simply effectuates the express mandates of the controlling statute, then the regulation may be enforced via the private cause of action available under that statute." 385 F.3d 901, 906 (6th Cir. 2004). The Court found that a regulation requiring that alteration of public facilities should make the facilities accessible to those with disabilities "effectuates a mandate of Title II," which requires public entities to make reasonable accommodations for disabled individuals, and "is therefore enforceable through the private cause of action available under the statute." *Id.* at 907.

The Third, Fifth, and Ninth Circuits, which the State defendants do not mention, have articulated the same standard as well. *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh,* 382 F.3d 412, 429-31 (3d Cir. 2004) (where statute creates privately enforceable rights, plaintiffs may enforce those rights as construed by statute's implementing regulations, but statute in question did not create any individual rights for regulations to construe); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 607 (5th Cir. 2004) (holding, under *Sandoval*, that Medicaid regulation defining statutory term "home health supplies" is "authoritative interpretation[]" of statute because rights-creating language was in statute itself, and thus statute could be enforced as defined by regulation); *Ball v. Rodgers*, 492 F.3d 1094, 1114 (9th Cir. 2007) (although Medicaid regulations specifying waiver requirements are not independently enforceable, they were still "'relevant in determining the scope of the right conferred by Congress' and 'Congress's intent'" (quoting *Save Our Valley v. Sound Transit*, 335 F.3d 932, 943 (9th Cir. 2003))); *Save Our Valley v. Sound Transit*, 335 F.3d at 936 (holding that regulation alone is unenforceable under § 1983, but recognizing, as in *South Camden Citizens in Action* and *Harris*, that "Congress creates rights by statute, and that valid regulations merely 'define' or 'flesh out' the contents of those rights" (quoting *S. Camden Citizens in Action v N.J. Dep't of Envtl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001))).

The decisions of the district courts and courts of appeals demonstrate that they clearly understand this Court's guidance on how properly to determine when statutes found to confer individual rights may

be enforced as construed by their implementing regulations. Though some courts have articulated the standard using slightly different terms, they all have held the same thing: plaintiffs may rely on a requirement in a regulation *only* where it "defines" or "construes" or "interprets" a statutory right (this case,[9] *Harris*,[10] *Chiles*,[11] *Three Rivers*,[12] *Dickson*[13]); "fleshes out" the statute (this case,[14] *D.D.*,[15] *Harris*[16]); "effectuates the mandate" of the statute (*Iverson*,[17] *Ability Center*[18]); or "applies" the statute (*Abrahams*[19]).

Moreover, courts are able to apply that standard to meaningfully differentiate between regulations that "go too far" and those that do not. The regulation at issue here merely articulates a ministerial procedural requirement inherent in the substantive fair hearing right granted by the statute to individual Medicaid applicants and recipients. That regulation, like the similar regulations in *Chiles* and *Kidd*, stands in sharp contrast to the regulations other courts have found to substantively

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[9] Pet. App 20a.
[10] 127 F.3d at 1009.
[11] 136 F.3d at 717.
[12] 382 F.3d at 424.
[13] 391 F.3d at 606-07.
[14] Pet. App. 20a.
[15] 465 F.3d at 513.
[16] 127 F.3d at 1009.
[17] 452 F.3d at 100-01.
[18] 385 F.3d at 906-07.
[19] 644 F.3d at 118.

change or expand statutory rights: *Harris*, for example, where the regulation conferred a benefit nowhere granted by the statute; *Iverson* and *Abrahams*, where the regulation required the state to engage in a *type* of conduct the statute did not command; and *Sandoval*, where it proscribed an entire class of conduct that the statute permitted.

II. PERMITTING LITIGANTS TO ENFORCE STATUTORY PROVISIONS AS CONSTRUED BY REGULATIONS WILL NOT INCREASE FEDERAL PROGRAM COSTS OR DISRUPT AGENCY ENFORCEMENT.

Petitioners also claim that the Second Circuit's decision below would lead to private litigants enforcing "hundreds of pages of the *Code of Federal Regulations*." Pet. 22. There is no basis for this assertion.

The mere volume of regulations is no reason to grant the petition, as there are well-established limitations on private enforcement that are not at issue in this case. *See, e.g.*, *Blessing v. Freestone*, 520 U.S. 329 (1997) (limiting § 1983 enforcement to statutes that confer individual rights); *Gonzaga*, 536 U.S. at 283 (same). Even where regulations are promulgated under privately enforceable statutory provisions, courts uniformly have prohibited enforcement of regulations standing alone or regulations that substantively expand statutory rights, as described above.

Petitioners' argument that the Second Circuit's decision will "spawn considerable litigation" rests on a faulty premise. Pet. 24. It assumes that the Second

Circuit's decision upsets a settled status quo with respect to private enforcement. But the opposite is true: the decision below is of a piece with the other federal courts' long-standing approach to enforcement of statutes as defined by regulations. There is thus no reason to believe the Second Circuit's decision will have any effect on the extent of private § 1983 enforcement at all.

Nor will permitting Medicaid applicants and recipients to enforce their statutory rights, as defined by federal regulations, threaten agency enforcement, as petitioners claim. Pet. 24-25. To the contrary, a threat would be posed to agency enforcement if courts were unable to look to valid regulations to define statutory rights, and instead were required to develop their own definitions, without regard to the agency's definitions. Unlike in *Heckler v. Day*, 467 U.S. 104, 113-119 (1984), where this Court reversed a decision that had imposed a judicially-crafted deadline on social security hearings where both Congress and HHS had decided not to establish a deadline, here the 90-day period was established by HHS as part of its undisputed regulatory authority to "flesh out" a specific provision of the Medicaid Act. All the court did below was use the regulation to define the statutory right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 2013