Case No. 09-51063

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STACY J. HOWARD, on behalf of herself and all others similarly situated, and LINDA E. THORNBERG, on behalf of herself and all others similarly situated,

Plaintiffs-Appellants,

v.

ALBERT HAWKINS, In his official capacity as Executive Commissioner of the Texas Health and Human Services Commission,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR AMICUS CURIAE DAVID A. SUPER SUPPORTING PLAINTIFF-APPELLANTS URGING REVERSAL

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March 1, 2010

CERTIFICATE OF INTERESTED PERSONS

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LINDA E. THORNBERG, on behalf of herself and all others similarly situated,
Plaintiffs–Appellants,
v.
ALBERT HAWKINS, in his official capacity as Executive Commissioner of the Texas Health and Human Services Commission,
Defendant–Appellee.

The undersigned amicus curiae certifies that, to the best of his information and belief, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amicus curiae David Super is a professor of law at the University of Maryland Law School. He previously taught at several other law schools and a school of public policy, served as general counsel to the Center for Budget and Policy Priorities, and worked for other non-profit organizations concerned with the problems of low-income people, including Community Legal Services of Philadelphia, Pennsylvania. The interest of amicus curiae in urging reversal in this matter is that of a long-time student of the Supplemental Nutrition Assistance Program and its predecessor, the Food Stamp Program.

David A. Super
Amicus Curiae Urging Reversal

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SUMMARY OF ARGUMENT

The Supreme Court has consistently held that congressional intent governs whether federal statutes are privately enforceable. Where Congress has been silent, a line of cases culminating in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), prescribes a formula for inferring congressional intent from the structure of a statute. Here, however, Congress has not been silent: the Food and Nutrition Act specifies the amount of retroactive benefits that may be awarded households in "any judicial action arising under this Act" and makes certain records of state agencies "available for review in any action filed by a household to enforce any provision of this Act (including regulations issued under this Act)". This *express* authorization of private enforcement obviates the need to determine the availability of an *implied* private right of action under *Gonzaga*. Other provisions of the Act show that Congress has responded whenever courts called its private enforceability into question. Provisions of congressional budget process statutes, copious legislative history, the Act's authoritative administrative construction, and a vast body of caselaw all confirm the availability of a private right of action.

This Court's unanimous *en banc* holding in *Victorian v. Miller*, 813 F.2d 718 (5th Cir. 1987), that Congress expressly recognized the Act's private enforceability, controls this case.

ARGUMENT

I. Congressional Intent Controls the Availability of Private Rights of Action

Although the Court's methodology for determining when individuals have private rights of action has evolved over the years, the ultimate goal of the inquiry has remained the same: congressional intent. "The initial question before us, then, is one of statutory construction: Did Congress intend in [the statute] to create enforceable rights and obligations?" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15 (1981). "We look first, of course, to the statutory language . . . . Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981).

The Supreme Court has evolved elaborate tests, discussed in detail below, for inferring congressional about whether a federal statute is privately enforceable where Congress has been silent. "[T]he recurring question [in these cases is] whether Congress intended to create a private right of action under a federal statute without saying so explicitly." *Sea Clammers*, at 13. They seek to determine what "Congress intended to authorize by implication". *Id.*, at 17.

Even as the Court has become more skeptical of claims of implied private rights of action, it has continued its focus on "whether Congress ... intended to create a private right of action". *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)

(*quoting Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)); *see Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *Blessing v. Freestone*, 520 U.S. 329, 340-41, 345-47 (1997) ("our inquiry focuses on congressional intent"); *Suter v. Artist M.*, 503 U.S. 347, 357, 364 (1992) ("we think that Congress did not intend to create a private remedy for enforcement of" the statute); *see Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 525-26 (1990) (Rehnquist, C.J., dissenting); *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 433-34 (1987) (O'Connor, J., dissenting) ("We … have reviewed the legislative history of the statute and other traditional aids of statutory interpretation to determine congressional intent to create enforceable rights" and finding "nothing to suggest that Congress intended that [plaintiffs' claims] be included within the statutory entitlement").

Where Congress has not addressed the availability of a private right of action, the Court's fallback means of ascertaining its intent has been to examine the clarity of Congress's specification of the benefits it confers on individuals, reasoning that if "Congress … intended that the provision in question benefit the plaintiff," it was more likely to intend to allow judicial enforcement. *Gonzaga*, at 280; *Blessing*, at 340-41. This, however, is just a means to the end of "determin[ing] whether Congress *intended to create a federal right*." *Gonzaga*, at 283

(emphasis in the original). When the Court has refused to imply a private right of action under a statute, it has contrasted that statute with those in which it finds Congress did intend to subject states to suit. *Id.*, at 280-81; *Blessing*, at 342; *Suter*, at 356, 361 n. 12; *Pennhurst*, at 17-18. In doing so, the Court has searched "in the Act [and] its legislative history" for evidence "suggest[ing] that Congress intended to require" recipients of federal funds to honor the claimed right. *Pennhurst*, at 18; *see Suter*, at 362. None of these cases purports to be constitutional: they merely seek to interpret congressional silence. *Pennhurst*, at 17-27; *Suter*, at 360-61. To the extent that the Court has expressed any substantive concerns about private suits under a Spending Clause program – that states should be able to know what financial liability they may face if they participate in the program, *see Pennhurst*, at 17 – that is inapplicable here because the federal government pays all awards of SNAP benefits granted in such litigation. 7 U.S.C. §§ 2013(a), 2019, 2024(d); *Robinson v. Block*, 869 F.2d 202, 214 n. 11 (3d Cir. 1988).

As set out below, however, Congress has been far from silent about the private enforceability of the Food and Nutrition Act. The task of discerning its intent therefore is fundamentally different from, and easier than, the one the Court undertook in *Gonzaga*, *Blessing*, and their forebears. That line of cases provides the means of analyzing a statute that "concededly does not explicitly provide any private remedies whatever." *Trans-America Mortgage Advisors v. Lewis*, 444 U.S.

11, 18 (1979). The Food and Nutrition Act, by contrast, provides an *express* private right of action; a court therefore need not reach the question of whether an *implied* private right of action might exist had Congress not spoken. *Gonzaga* is particularly adamant about the primacy of congressional intent and the illegitimacy of substituting "a multi-factor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not." *Id.*, at 286. Applying the factors the Court has identified for discerning the intent of a silent Congress in preference to respecting Congress's clearly and repeatedly expressed intention to allow households' suits would defy *Gonzaga*'s warning.

II. Federal Statutes Expressly Recognize Households' Right to Judicial Enforcement of the Food and Nutrition Act and Implementing Regulations

A. The Food and Nutrition Act Expressly Provides for Household Suits

Justice Rehnquist pointed out that, in light of the Court's decisions prior to 1979 that freely inferred private rights of action under federal statutes, Congress commonly assumed, rather than expressly creating, such rights prior that time. *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring). It therefore should not be surprising that Congress did not see the need to expressly grant a private right of action in the Food Stamp Act of 1977, especially after federal courts had entertained myriad recipients' suits to enforce the Food Stamp Act of 1964 for a decade.

"[T]he traditional rule [is] that the first step in our exposition of a statute always is to look to the statute's text and to stop there if the text fully reveals its meaning. There is no apparent reason to deviate from this sound rule when the question is whether a federal statute confers substantive rights on a § 1983 plaintiff." *Wilder*, at 526 (Rehnquist, C.J., dissenting). The single most probative evidence of Congress's intent to allow private suits to enforce the Act is 7 U.S.C. § 2023(b), enacted in 1981, under the leadership of Senate Agriculture Committee Chairman Jesse Helms, to codify authority for households' suits while limiting the relief available in those actions:

> In any judicial action arising under this Act, any allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a request with the State for the restoration of such allotments or, in either case, not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household.

Section 2023(b) serves no other purpose than to authorize suits challenging misapplication of the Program's substantive or procedural eligibility requirements as those errors directly cause "wrongfully withheld" benefits. These provisions include 7 U.S.C. § 2020(e)(3) and (9), establishing the regular and expedited deadlines for application processing: misapplication of those provisions could cause a

household to be underissued or wrongfully denied benefits.[1] Denying eligible households a private right of action would render this provision a nullity, violating the Rule Against Surplusage in statutory construction. *Dunn v. CFTC*, 519 U.S. 465, 473 (1997); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Equally clear, 7 U.S.C. § 2020(a)(3)(B)(ii) requires that state SNAP agencies' records "be available for review in any action filed by a household to enforce any provision of this Act (including regulations issued under this Act)" subject to the Act's privacy protections. As in the case of section 2023(b), Congress's having added this language to the Act's record-keeping requirements in the 2008 Farm Bill serves no purpose other than to facilitate households' suits to enforce the Act and SNAP regulations. *See* Pub. L. No. 110-246, § 4116 (June 18, 2008), 122 Stat. 1651 ("Farm Bill"). Denying households the right to bring the actions it references would render the provision, too, a nullity.

Congress has repeatedly amended the Act in response to judicial decisions limiting households' access to judicial relief. In 1988, after *Cotton v. Mansour*, 863 F.2d 1241 (6th Cir. 1988), had limited the scope of relief in households' suits, Congress enacted what is now 7 U.S.C. § 2020(b). That section cross-references the existing authorization for households' suits in section 2023(b) and requires

[1]For example, a state's failure to comply with section 2020(e)(9) could result in a household being erroneously denied benefits under 7 C.F.R. § 273.2(f)(1) because it failed to produce required documentation; had the state followed the statute, 7 C.F.R. § 273.2(i)(4)(i)(B) would have requiring providing the household with benefits once the applicant verified her or his identity.

prompt restoration of benefits and broad corrective action whether the deficiency in state "practices, rules or procedures" was discovered in such suits or otherwise.[2]

Similarly, three other provisions of the 2008 Farm Bill explicitly reiterated what Congress had already made clear in sections 2020(a)(3)(B)(ii), 2020(b) and 2023(b): that low-income households may sue to enforce any provisions of the Act or USDA's regulations. First, section 4118 overturned *Almendarez v. Palmer*, 2002 U.S. Dist. LEXIS 23258 (N.D. Ohio 2002), which found no private right of action to enforce USDA's regulations implementing the Act's provisions on service to people not fluent in English.[3] Second, the Farm Bill overturned *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007), which limited states' accountability for the actions of local governments administering the Food Stamp Program on their behalf.[4] Finally, the Farm Bill took pains to ensure that USDA's regulations implementing major civil rights laws would be judicially enforceable.[5]

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[2]The provision's sponsors identified it as expanding relief in households' suits to enforce the Act and USDA's regulations. 134 Cong. Rec. S11740, S11743 (daily ed. Aug. 11, 1988) (statement of Senate Agriculture Committee Chairman Patrick Leahy); *id.* at S11746 (statement of Senate Nutrition Subcommittee Chairman Tom Harkin).

[3]The prior statute required states to "use appropriate bilingual personnel and printed material in the administration of the program in those portions of political subdivisions in the State in which a substantial number of members of low-income households speak a language other than English". 7 U.S.C. § 2020(e)(1)(B) (2006). The Farm Bill struck "use" at the beginning of the existing provision and inserted "comply with regulations of the Secretary requiring the use of".

[4]Section 4116 amended section 7 U.S.C. § 2020(a)(2) to provide that: "The responsibility of the agency of the State government shall not be affected by whether the program is operated on a State-administered or county-administered basis, as provided under section 2012(t)(1)."

[5]*Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), held that because private rights of action must be traced to congressional intent, private individuals could only sue to enforce regulations when Congress so intended. Section 4117 amended the Food and Nutrition Act's civil rights

In overruling the only food stamp cases finding no private right of action that had not previously been overruled by the courts themselves, Congress made its intent that the Act be privately enforceable unmistakably clear. As nothing in *Gonzaga* and its forebears authorizes the courts to disregard the intent of Congress, this judgment is binding on the federal courts. No case has found the absence of a private right of action in the face of congressional action reversing cases denying private enforceability.

More broadly, the Act's clear language, including entitlement language similar to that found enforceable in other statutes, *King v. Smith*, 392 U.S. 309 (1968); *compare* 7 U.S.C. § 2014(a) *with* 42 U.S.C. § 602(a)(8) (1994) (repealed in 1996), has established SNAP benefits as "a matter of statutory entitlement for persons qualified to receive them … appropriately treated as a form of 'property'". *Victorian v. Miller*, 813 F.2d 718, 721, 723-24 (5th Cir. 1987) (en banc) (*quoting Atkins v. Parker*, 472 U.S. 115, 128 (1985)). Although the Court has entertained

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protections to make enforceable the regulations implementing the Age Discrimination Act, section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and title VI of the Civil Rights Act of 1964. By their terms, these laws already govern federal programs such as SNAP. The import of this change, then, was that it described the implementing regulations under these laws as creating "rights" for households. The new language follows the formulas from *Gonzaga* and *Sandoval*, demonstrating congressional intent and including explicit rights-creating language, here applied to regulations. Yet again, the amendment serves no other purpose than to facilitate households' suits to obtain SNAP benefits and would be rendered surplusage were courts to disallow those suits. Note also that 7 U.S.C. § 2020(a)(3)(B)(ii) specifically includes actions "to enforce any … regulations issued under this Act" among those in which state agencies' records may be accessed.

private rights of action under requirements of federal law that did not create property rights, it has never rejected judicial enforceability under a statute that did.

B. Federal Budget Process Laws Classify SNAP as a Program Giving Eligible Households the Right to Sue for Benefits

Whether eligible households may sue to enforce provisions of the Food and Nutrition Act is a matter of great importance to managing the federal budget. If households could not enforce provisions of the Act judicially, Congress could control spending simply by adding to or reducing annual appropriations. *See Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984). On the other hand, households' ability to secure the benefits the Act provides in court means that Congress must regulate spending by adjusting the substantive terms of their entitlement. This distinction between "discretionary" programs – programs whose spending is controlled by discretionary annual appropriations – and "mandatory" or "direct spending" programs – those in which designated beneficiaries may sue to obtain benefits without regard to the level of appropriations – applies across the entire federal budget.[6]

[6]"Mandatory spending includes entitlement authority (for example, the Food Stamp, Medicare, and veterans' pension programs), payment of interest on the public debt, and non-entitlements such as payments to states from Forest Service receipts. By defining eligibility and setting the benefit or payment rules, Congress controls spending for these programs indirectly rather than directly through appropriations acts." GOV'T ACCOUNTABILITY OFFICE (GAO), A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 66 (2005), available at http://www.gao.gov/new.items/d05734sp.pdf.

Congress's budgetary procedures control spending in discretionary programs by capping the amounts those appropriations bills may provide each year. 2 U.S.C. §§ 633(a)(3), (b), (f)(1), (2)(B), 642(a), 901. Controlling direct spending is more complicated, requiring means of forcing its various committees to change the detailed terms of entitlement programs. *Id.* §§ 632(a), 633(a)(1), (f)(1), (2)(A), 639, 641-645, 902. To prevent members or committees from gaming these procedures, the budget process statutes strictly separate discretionary programs and those in which eligible individuals have judicially enforceable rights to benefits.[7] Thus, the same focus on rights "couched in mandatory, rather than precatory, terms", *Gonzaga*, at 282; *Blessing*, at 341, that is pivotal to the Court's recognition of private rights of action is also vital to Congress in its budget procedures.

Congress has recognized unequivocally that the Food Stamp Program is a direct spending program, i.e., that eligible households have the right to judicial enforcement of the Act's terms. The Congressional Budget Act of 1974 defines "entitlement authority" to mean "(A) the authority to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriations Acts, to any person or government if, under the provisions of the law containing that authority, the United States is obligated to make such payments

[7]If it did not, appropriators could pretend to save money by cutting the appropriations to a direct spending program, confident that the courts would honor the claimants' entitlements and restore their benefits. Alternatively, if committees tasked with cutting direct spending were allowed to substitute legislation narrowing eligibility in a discretionary program, they could "cut" benefits that are authorized in statute but that have never been provided due to a lack of appropriations.

to persons or governments who meet the requirements established by the law; and (B) the food stamp program."[8] 2 U.S.C. § 622(9). Similarly, the Balanced Budget and Emergency Deficit Control Act of 1985 defines "direct spending" as "(A) budget authority provided by law other than appropriations Acts; (B) entitlement authority; and (C) the food stamp program." *Id.* § 900(c)(8). It goes on to state that "[a]s used in this part, all references to entitlement authority shall include the list of mandatory appropriations included in the joint explanatory statement of managers accompanying the conference report on the Balanced Budget Act of 1997." *Id.* § 900(c)(17). That conference report lists food stamps among the "appropriated entitlements and mandator[y]" programs. H. Conf. Rep. No. 105-217, at 1014 (1997), *reprinted at* 1997 U.S. Code Cong. & Ad. News 176, 635.

Here again, Congress has explicitly recognized that the Food and Nutrition Act is privately enforceable. Nothing in the Supreme Court's decisions even hints at a basis for disregarding such unambiguous congressional intent. If the courts denied eligible households the right to obtain the benefits that the Act provides, they would open up a huge loophole in congressional budget enforcement procedures by converting SNAP into a discretionary program while budget proce-

[8]Although annual appropriations bills do include money for food stamps and some other direct spending programs, GAO notes that "because the entitlement is created by operation of law, if Congress does not appropriate the money necessary to fund the payments, eligible recipients may have legal recourse." GAO, at 13. Designating SNAP as an "entitlement" means that Congress has determined that "under the provisions of the law containing such authority, the U.S. government is legally required to make the payments to persons or governments that meet the requirements established by law". GAO, at 47.

dures still treat it as a mandatory. This would allow committees to evade requirements to cut entitlements by manipulating SNAP. If SNAP is to be converted to a discretionary program, Congress, not the courts, should make that decision.

III. Legislative History Confirms that Congress Intended to Permit Judicial Enforcement of the Food and Nutrition Act

The statutory provisions quoted above fully resolve the question. Lest there be any doubt that Congress meant what it said, the legislative history amply confirms this result. The House Agriculture Committee's report on the Food Stamp Act of 1977 states that: "[t]he administrative remedies against the state contained in section 11(f) and elsewhere should not be construed as abrogating in any way private causes of action against states for failure to comply with federal statutory or regulatory requirements." H. Rep. No. 95-464, at 398 (1977), *reprinted at* 1977 U.S. Code Cong. & Ad. News 1978, 2327. The Senate report on the same legislation similarly declared that its granting USDA enforcement tools "does not abrogate private causes of action against States for failure to comply with Federal statutory or regulatory requirements." S. Rep. No. 95-180, at 152 (1977).

Numerous committee reports include copious commentary on households' suits to enforce the Act and its implementing regulations. *See, e.g.*, S. Rep. No. 100-397, at 29 (1988); H. Rep. No. 99-271, at 147 (1985); S. Rep. No. 97-128, at

65-66 (1981); H. Rep. No. 96-788, at 98, 105, 135, 144 (1980); H. Rep. No. 96-264, at 26 (1979); H. Rep. No. 95-464, at 26-28, 31-32, 35, 70-77, 92, 96, 120, 128, 137, 139-41, 144, 146, 247, 269, 271, 277, 278, 283-84, 343-44 (1977). Sometimes the committee agrees with the results, sometimes it criticizes them on the merits, but it never questions the propriety of the suits being brought. Congress repeatedly has resolved issues then under litigation without expressing any concern about that litigation's legitimacy. *Compare, e.g.*, H. Rep. No. 101-569, at 850, 853, 856 (1990); H. Rep. No. 99-271, at 142-43 (1985), *with Wilson v. Lyng*, 856 F.2d 630 (4th Cir. 1988); *Blinzinger v. Lyng*, 834 F.2d 618 (7th Cir. 1987); *Burkett v. USDA*, 764 F.2d 1203 (6th Cir. 1985); *Caples v. Yeutter*, 721 F. Supp. 1065 (D. Minn. 1989). Senators from both parties have explicitly identified households' suits as desirable means of resolving problems with the program. *E.g.*, 134 Cong. Rec. S9857, S9867 (daily ed. July 26, 1988).

Unlike the statutes under which the Supreme Court has found no enforceable private rights, Congress wrote the Food Stamp Act of 1977 expressly to replace the "open-ended" terms of prior law "with a specific scheme" identifying which household have the right to benefits, thus eliminating "discretion within the parameters of Congressional goals". H. Rep. No. 95-464, at 18-19 (1977). Where Congress sought to regulate only states' aggregate performance, rather than to

provide rights to particular individuals, it did so explicitly. *E.g.*, 7 U.S.C. §§ 2016(e), 2025(c), 2035(e); *see* 7 C.F.R. § 276.2(b)(4).

More recently, the legislative history of the 2008 Farm Bill confirms that Congress intended the amendments discussed above as responses both to *Almendarez* and *Reynolds* specifically and to the courts' increasing tendency to question the private enforceability of public benefit program rules more generally. Senator Durbin, a senior member of the Senate Judiciary Committee, made clear that the Farm Bill's provisions mean what they say, framing the issue in terms of the Court's test in *Gonzaga*:

> Mr. President, I rise to address the importance of the nutrition assistance title of the farm bill. The bill goes a long way toward ensuring that families in America will have food on their table, even when times are tough. The bill also clarifies that their rights to certain nutrition services are enforceable.
>
> Sections 4116 through 4118 of the bill specifically reinforce Congress's longstanding intention that the Food Stamp Act's provisions and its regulations are fully enforceable and should be enforced. The courts have historically and correctly understood Congress's intent that low-income households have the right to enforce these provisions.
>
> The language of the Food Stamp Act and its implementing regulations—parts 271, 272, 273, and so on—have the kind of clear language required for judicial enforcement. We made sure that they are mandatory, not aspirational, and that they set out requirements for how each individual is to be treated, not general program-wide goals. They clearly define the benefited class as low-income people receiving or seeking food assistance. Nothing in the act or regulations suggests that substantial compliance overall excuses denying any individual the benefit of these rules.
>
> Along with oversight by the Department of Agriculture, lawsuits by families participating in food stamps are one of the ways we can ensure the Food Stamp Program fulfills its purpose. Indeed, it is partly because applicants and recipients can and do bring lawsuits to enforce program rules that

> the Department has not been required to withhold funds from States to enforce service standards in the program.
>
> This legislation also makes explicit that various civil rights laws are binding in the Food Stamp Program. This is not a change—these laws and their regulations have applied since they were written, and both have been intended to be fully enforceable. This legislation just reiterates a point that we hope and believe was already clear.
>
> None of this would have been a question until two recent, unfortunate court decisions. The first case, Reynolds, comes from the Second Circuit. It applied a standard of analysis that departed from all prior Federal court precedent and held that applicants and recipients could hold a state accountable for the maladministration of the program by local food stamp agencies only in the rarest of circumstances. The act is and has been clear that States are responsible for full compliance with all applicable regulations. States' responsibility is no less because they have chosen to have counties or other local agencies operate the program for them. The option of local administration exists only as a courtesy or convenience to the States, not to reduce their accountability. The State is just as responsible for what the local agency does as if the State agency performed those acts itself. This legislation emphasizes that point.
>
> In the other case, called Almendarez, a Federal district court refused to consider a suit brought by low-income people who need assistance in a language other than English to apply for food stamps. The Department's regulations clearly provide rights for families that need language assistance. Now the act explicitly confirms that those regulations are enforceable. Future cases can be decided on the merits, as they should be.
>
> This bipartisan legislation goes a long way toward providing food for working families, and providing the security of knowing that help is enforceable by law. I thank the chairman and the committee for their tremendous work.

154 Cong. Rec. S4747-48 (daily ed. May 22, 2008).

Representative Berman, the Ranking Majority Member of the House Judiciary Committee, showed how the Act met the *Gonzaga* standard for private enforceability:

> More broadly, the legislation recognizes that lawsuits by individual households or classes of household to enforce their rights under the act and regulations are an important part of the program. There now should be no doubt, if there ever was any, that all provisions of the act and regulations that help individuals get food assistance, or that protect them from burdens in their pursuit of food aid, are intended to create enforceable rights, with corrective injunctions or back benefits, the latter subject to the limitations in the act, as appropriate.
>
> The act does not require States or the Department only to exercise reasonable efforts or to substantially comply with its requirements and those in the regulations: it gives each individual a right to be treated as the act and rules provide. The act and regulations have an unmistakable focus on the benefited class of participants and prospective participants, they are written in mandatory, not precatory terms, and they are concerned with the treatment of individuals as much as they are with aggregate or system-wide performance.
>
> I cannot imagine how Congress could be any clearer in this regard. I anticipate that we will have no further confusion concerning the enforceability of the act and regulations.

Id. at H3819 (daily ed. May 14, 2008).

Senate Agriculture Committee Chairman Harkin made explicit what statutory language and legislative history have long demonstrated – that members of Congress have legislated on the assumption that eligible households could sue to secure benefits under the Act:

> I have been a member of the Senate Agriculture Committee or the House Agriculture Committee for over 30 years. I have always operated on the assumption that the act and regulations create enforceable rights for actual and prospective participants and that litigation may properly arise under provisions of either. When I have heard of examples where applicants or clients were not provided with the service that the act and rules provide, such as timely and fair service, assistance for those who need it by the State agency or 10 days to turn in requested paperwork, I have supported the right of an individual to file a claim against the State to enforce the rules established by Congress and the regulations stemming from the statute.

Id. at S4752-53 (daily ed. May 22, 2008). Senator Harkin also applied the *Gonzaga* standard to identify which provisions of the Act are designed to create judicially-enforceable individual rights and which speak in precatory terms or seek to benefit the program as a whole rather than any individual households:

> With very few exceptions, the old Food Stamp Act and the new Food and Nutrition Act are based on the principle of individual rights. Much of that stems from a history in the 1960s and 1970s of clients not being able to gain access to the program. To be sure, section 2 has little in it to enforce: subsections (a) through (g) of section 7 do not affect individual households, and sections 9, 10, 12, and 15 focus on retailers and wholesalers. Within section 11, paragraphs (e)(19), (e)(20), (e)(22), and (e)(23), as well as subsections (f) through (h), (k), (l), (n) through I, and (t), regulate state agencies rather than households. The same is true in section 16 of the beginning of subsection (a) as well as of subsections (c), (d), and (f) through (k). Sections 14(a), 18(e) and (f), 19, 23, 25, and 27 similarly do not convey rights to households. A few other provisions by their terms no longer apply to anyone. But by and large, the Agriculture Committees, and Congress as a whole, have consistently intended that the Food Stamp Program be administered in strict conformity with the Food Stamp Act and with regulations the Secretary has duly promulgated under this act and that prospective and actual participants be entitled to enforce these provisions legally.

Id.

Representative Baca, Chairman of the House Nutrition Subcommittee, made explicit that section 4118 of the Farm Bill sought to override *Almendarez*:

> Recently, a district court in Ohio dismissed a case brought against the State to enforce the Department's regulations for serving people whose primary language is not English. I can't speak to whether the case had any merit, but my colleagues and I were surprised and disturbed to learn about the court's dismissal. We felt that it was critical to clarify in this bill that it has always been Congress's intent that the program's regulations should be fully

> enforceable and fully complied with to the same extent as the statute. The farm bill, therefore, clarifies that the Department's rules on serving non- and limited-English speaking people have the force of law and create rights for households.

Id., at H3814 (daily ed. May 14, 2008). Representative Berman echoed this view and also noted the overruling of *Reynolds*:

> As a senior member of the Judiciary Committee, I am particularly pleased to see this title includes language to correct a couple of problems that have arisen relating to the enforceability of the act and to ensure that no further problems exist.
>
> The Food Stamp Act has long been recognized as fully enforceable on behalf of active and prospective participants. This history of enforceability is comparable to that of securities regulations, which the courts have long accepted. When, many years ago, a panel of the Fifth Circuit found no private right of action under the Food Stamp Act in a case brought by a pro se plaintiff, several other circuits, and ultimately the Fifth Circuit en banc, rejected that conclusion. Had they not done so, I have no doubt we would have intervened.
>
> Recently, a couple of Federal courts cast doubt on this long-held principle, one by finding the Department's regulations on bilingual service unenforceable and another by forcing plaintiffs to meet the high standards for supervisory liability when suing a State to enforce the act and regulations against local agencies. I am pleased that this legislation overrules both of those decisions.

Id., at H3819. Senator Harkin described the overriding of both cases that had questioned the private enforceability of the Food Stamp Act and regulations:

> Throughout the history of the Food Stamp Program, the courts have played a positive, constructive role in ensuring that congressional intent is carried out. The program has not been overrun with litigation because both Congress, in writing statutes, and USDA, in writing regulations, have taken great pains to be clear and specific. On those rare occasions when courts have misunderstood our intent on an important matter, Congress has amended that statute accordingly. Because USDA keeps the Agriculture Committees closely apprised of its regulatory actions, Congress also has been com-

> fortable with—indeed supportive of—litigation to enforce the Department's regulations. On numerous occasions when we leave a matter open in the statute, it is because USDA has told us exactly how it plans to address the matter in regulations. Congress has always operated on the assumption, and with the intent, that the program's regulations would be fully enforceable and fully complied with to the same extent as the statute.
>
> I was disturbed to learn of two recent cases in which courts disregarded the longstanding history of judicial enforcement of the act and regulations. A district court in Ohio refused to entertain a suit brought to enforce the Department's regulations for serving people whose primary language is not English, and an appellate court in New York held that States are less responsible for compliance with the act and regulations when the program is administered by local governments than when the State administers the program itself.
>
> Accordingly, this legislation clarifies that States must comply with the Department's rules on service to non-English-speaking households as well as with the statute. The regulations, no less than the statute, create rights for households to ensure that they can receive benefits.
>
> Responding to the New York case, the legislation clarifies that States' responsibility is no less in locally administered systems. Congress has granted States the option for local administration as a convenience; nothing in the law reduces States' responsibility if they take this option. If the State could not be held fully accountable for strict compliance with the act and regulations in these cases, local administration would not be permitted. These amendments correct that problem.

Id., at S4752-53 (daily ed. May 22, 2008).

Finally, as discussed above, not only did the 2008 Farm Bill overrule the only two cases limiting the availability of a private right of action to enforce the statute, it also clarified the private enforceability of SNAP regulations in light of *Sandoval*. Representative Baca declared that

> Another important achievement of the bill is to ensure that both Federal statute and regulations have the full force of law, ensuring that clients who do not receive adequate service under these rules and standards may bring suit. … Beyond the issue of bilingual access rules, this legislation makes

> clear that the Department's civil rights regulations are among those which have the full force of law and which households have the right to enforce. Discrimination is not acceptable in any form or at any point in the food stamp certification process. Households should not be assisted, or not assisted, approved or denied for any reason other than an individual assessment of their need for help or their eligibility by the state. I am pleased to be playing a role in making clear that the Committee and the Congress wish the program to be administered in compliance with the Food Stamp Act and its regulations.

Id., at H3814 (daily ed. May 14, 2008).

IV. The Authoritative Administrative Construction Recognizes a Private Right of Action

Longstanding USDA regulations, which are due some deference, recognize that the Act and its regulations are privately enforceable. They require states to report such suits to USDA and to facilitate USDA's intervention where important issues of national policy are at stake. 7 C.F.R. § 272.4(d). USDA under both Democratic and Republican administrations has participated in numerous such suits over the years as an original defendant, as a third-party defendant, or as a defendant-intervener. It does not ever appear to have questioned the availability of a private right of action.

V. The Court's En Banc Decision in *Victorian v. Miller* Controls This Case

Victorian v. Miller, 813 F.2d 718 (5th Cir. 1987) (en banc), unanimously overruled a prior panel decision, *Tyler v. Pasqua*, 748 F.2d 283 (5th Cir. 1984), to find that food stamp applicants may sue to enforce 7 U.S.C. § 2020(e)(9), one of the two statutes at issue here. *Victorian* held that 7 U.S.C. § 2023(b) explicitly

authorizes households to bring suit to enforce the Act. *Victorian* also relied on the Supreme Court's holding in *Atkins v. Parker*, 472 U.S. 115, 128 (1985), "that food-stamp benefits 'are a matter of statutory entitlement'" *Id.*, at 721. *Victorian* controls this case unless the Court reconsiders it en banc.

"Without a *clearly contrary* opinion of the Supreme Court or of this court sitting en banc, [a panel] cannot overrule a decision of a prior panel of this court." *Bd. of Supervisors v. Smack Apparel Co,*, 550 F.3d 465, 488 (5th Cir. 2008) (emphasis in the original); *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) ("a panel of this court can only overrule a prior panel decision if such overruling is unequivocally directed by controlling Supreme Court precedent."). "This principle applies *a fortiori* [where the prior case] is an en banc decision." *United States v. Abrego*, 141 F.3d 142, 151 n. 1 (5th Cir. 1998), *cert. denied* 525 U.S. 878 (1998).

Equal Access for El Paso v. Hawkins, 509 F.3d 697, 704 (5th Cir. 2007), held that *Gonzaga* implicitly overruled prior decisions finding *implied* private rights of action based on the presumption of private enforceability that the Supreme Court had rejected. By contrast, nothing in *Gonzaga* is inconsistent with *Victorian*'s finding of an *express* private right of action because "Congress … amended the Act to provide guidelines for judicial enforcement of the Act through private actions" under 7 U.S.C. § 2023(b). *Victorian*, at 723-24. Nor does it call

into question *Victorian*'s reliance on the Supreme Court's decision in *Atkins*: the interests asserted in *Gonzaga*, *Blessing*, and *Suter* had never been held to be statutory entitlements. The mere fact that the Supreme Court has begun to interpret other statutes more narrowly does not allow a panel to reopen a prior decision about a particular act. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). It is insufficient that this Court's "approach arguably conflicts with" or "may be in tension with" Supreme Court decisions. *Encore Videos, Inc. v. San Antonio*, 330 F.3d 288, 293 (5th Cir. 2003), *cert. denied* 540 U.S. 982 (2003).

Victorian is consistent with the explicit holdings of other circuits. *Gonzalez v. Pingree*, 821 F. 2d 1526, 1528, 1530 (11th Cir. 1987) (finding that the Act "speaks in imperative, not merely permissive, terms mandating that state agencies" meet its application processing deadlines and that section 7 U.S.C. § 2023(b) "plainly contemplates enforcement through individual lawsuits"); *Haskins v. Stanton*, 794 F.2d 1273, 1275 (7th Cir. 1986); *cf.*, *Robinson*, 869 F.2d at 210 n. 9 (noting that section 2023(b) sets a "one-year limitations for commencing proceedings"). District courts, too, have found that households may sue to enforce the Act and its implementing regulations. *Williston v. Eggleston*, 379 F. Supp. 2d 561 (S.D.N.Y. 2005); *Dubuque v. Yeutter*, 728 F. Supp. 303 (D. Vt. 1989), *rev'd*

on other grounds, 917 F.2d 741 (2d Cir. 1990); *Quinones v. Coler*, 651 F. Supp. 1028 (N.D. Ill. 1987); *Harley v. Lyng*, 653 F. Supp. 266 (E.D. Pa. 1986).

More broadly, *Victorian* conforms to the long-accepted understanding of the Act by Congress, USDA, and the courts. Prior to *Maine v. Thiboutot*, 448 U.S. 1 (1980), numerous federal courts entertained food stamp applicants and recipients suits to enforce the Food Stamp Acts of 1964 and 1977, explicitly or implicitly finding a private right of action directly under the statute. *E.g.*, *Knebel v. Hein*, 429 U.S. 288 (1977); *Jacquet v. Westerfield*, 569 F.2d 1339 (5th Cir. 1978); *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977); *Harrelson v. Butz*, 547 F.2d 915 (4th Cir. 1977); *Madden v. Oklahoma*, 523 F.2d 1047 (10th Cir. 1975); *Tyson v. Maher*, 523 F.2d 972 (2d Cir. 1975); *Bermudez v. U.S. Dep't of Agric.*, 490 F.2d 718 (D.C. Cir. 1973), *cert. denied* 414 U.S. 1104 (1973); *Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973), *cert denied* 414 U.S. 1094 (1973); *Stewart v. Butz*, 356 F. Supp. 1345 (W.D. Ky. 1973), *aff'd* 491 F.2d 165 (6th Cir. 1974). Since *Thiboutot*, numerous federal courts have heard and decided applicants' and recipients' assertions of both direct private rights of action and their suits under section 1983. *E.g.*, *Atkins*, at 124-27; *Stone v. Hamilton*, 308 F.3d 751 (7th Cir. 2002); *Walton v. Hammonds*, 192 F.3d 590 (6th Cir. 1999); *Estey v. Comm'r, Dep't of Human Res.*, 21 F.3d 1198 (1st Cir. 1994); *Robertson v. Jackson*, 972 F.2d 529 (4th Cir. 1992); *Hamilton v. Madigan*, 961 F.2d 838 (9th Cir. 1992); *West v. Bowen*, 879 F.2d 1122

(3d Cir. 1988); *Murray v. Lyng*, 854 F.2d 303 (8th Cir. 1988); *Foster v. Celani*, 849 F.2d 91 (2d Cir. 1988); *Gonzalez*; *Klaips v. Bergland*, 715 F.2d 477 (10th Cir. 1983); *Antone v. Block*, 661 F.2d 230 (D.C. Cir. 1981); *Roberts v. Austin*, 632 F.2d 1202 (5th Cir. 1980).

CONCLUSION

For the foregoing reasons, the district court should be reversed and the case remanded for a determination on the merits.

Respectfully submitted,

_____
David A. Super

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Plaintiffs–Appellants,

v.

ALBERT HAWKINS, in his official capacity as Executive Commissioner of the Texas Health and Human Services Commission,
Defendant–Appellee.

PROOF OF SERVICE OF BRIEF OF AMICUS CURIAE SUPER

I hereby certify that a true and correct paper copy (2 copies) of the foregoing Brief of Amicus Curiae have been forwarded by U.S. Postal Service Express Mail on this 1st day of March, 2010, to the following attorneys of record:

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I further certify that electronic copies of the foregoing Brief of Amicus Curiae in PDF text were sent this day as electronic mail attachments to counsel at the following addresses: bbower@tlsc.org; cohan@nclej.org; mannix@nclej.org; daniel.geyser@oag.state.tx.us; and jim.todd@oag.state.tx.us.

Pursuant to Local Rule 31 of the U.S. Court of Appeals for the Fifth Circuit, 7 true and correct paper copies of the Brief of Amicus Curiae and 7 electronic copies on CD (7 CDs), were also mailed by U.S. Postal Service Express Mail on March 1, 2010, to the Clerk of the United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130.

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March 1, 2010

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d) and 32(a)(7)(B) and Fifth Circuit Rules 29.2 and 32.2 because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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March 1, 2010