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Congress Secures Private Right of Action for Low-Income Households Seeking Food Assistance

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Suits by applicants for and recipients of food stamps long have been integral in the administration of the Food Stamp Program, now the Supplemental Nutrition Assistance Program (SNAP). The U.S. Department of Agriculture (USDA) and the Agriculture Committee of the House and of the Senate on occasion have criticized the results of particular cases. None, however, has ever questioned the legitimacy of low-income households bringing suits to enforce the Food Stamp Act—now renamed the Food and Nutrition Act of 2008—and its implementing regulations.[1] Every regional federal court of appeals has entertained such litigation, and at least three have explicitly rejected arguments that households lack private rights of action.

In recent years, however, U.S. Supreme Court decisions have signaled a growing reluctance to imply private rights of action under federal laws where Congress did not intend to allow individuals to sue. One decision also limited the circumstances under which private individuals may sue to enforce federal regulations. In contrast to the doctrine of the 1960s and 1970s, which essentially allowed such suits whenever they would advance the purposes of the program at issue, these cases limit courts' willingness to go beyond the intent of Congress. Absent direct evidence of the desire of Congress to create a private right to sue, the Court has cautioned that only very clear contextual cues suffice to imply that Congress must have wanted prospective beneficiaries of federal statutes to be able to sue.

When two courts recently restricted low-income households' ability to seek judicial enforcement of the Act and USDA's regulations, Congress responded by both overriding these two cases specifically and clarifying more generally that private rights of action remain available under both the statute and federal regulations.[2] Here, after reviewing Supreme Court decisions establishing the primacy of congressional intent in determining the availability of private rights of action, I examine statutory provisions recognizing a private right of action in SNAP as well as their legislative history. Finally I discuss long-standing administrative interpretations and case law, both accepting private rights of action under this program.

[1]Food and Nutrition Act of 2008, 7 U.S.C. §§ 2011–2036. Congress renamed the Food Stamp Act in 2008 to reflect the elimination of paper food stamps. The citation for the two Acts is the same, and I use "the Act" throughout this article to refer to both interchangeably.

[2]Subsequent to the action of Congress, another district court held that applicants lacked a private right of action to enforce statutory deadlines for application processing (*Howard v. Hawkins*, No. A-09-CA-577-SS (W.D. Texas 2009)). Plaintiffs appealed but withdrew before oral argument. Most of the arguments in this article were neither briefed in the district court nor analyzed in the court's opinion.

I. The Primacy of Congressional Intent in Determining the Availability of Private Rights of Action

Although the Supreme 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 Court declared, "The initial question before us, then, is one of statutory construction: Did Congress intend in [the statute] to create enforceable rights and obligations?"[3] The Court stated that it "look[s] first, of course, to the statutory language .... Then [it] review[s] the legislative history and other traditional aids of statutory interpretation to determine congressional intent."[4] The Court continued, "[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."[5] The Court set its task as determining what "Congress intended to authorize by implication."[6]

Even as the Court has become more reluctant to imply private rights of action where Congress is silent, the Court has continued its focus on "whether Congress ... intended to create a private right of action."[7] 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 the specification by Congress of the benefits it confers on individuals; the Court reasoned that if "Congress ... intended that the provision in question benefit the plaintiff," it was more likely to intend to allow judicial enforcement.[8] This test, however, is just a means to the end of "determin[ing] whether Congress *intended to create a federal right*."[9] When the Court refused to imply a private right of action under a statute, the Court contrasted that statute with those in which the Court found that Congress did intend to subject states to suit.[10] In doing so, the Court 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.[11] None of its cases purports to be constitutional: the Court merely seeks to interpret congressional silence.[12] Even dissenters finding particular substantive enactments clear enough to justify implying private rights of action have never asserted that the statutes at issue directly addressed private rights of action.[13]

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[3] *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 15 (1981).

[4] *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1981).

[5] *Id.*

[6] *Id.* at 14; see also *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509–19 (1990) (focusing on inferring congressional intent); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423–29 (1987) (Clearinghouse No. 33,657) (same).

[7] *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002) (Clearinghouse No. 54,643) (quoting *Touche Ross and Company v. Redington*, 442 U.S. 560, 576 (1979)); see *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (Clearinghouse No. 51,706) ("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) (Clearinghouse No. 50,109) ("our inquiry focuses on congressional intent"); *Suter v. Artist M.*, 503 U.S. 347, 357, 364 (1992) (Clearinghouse No. 48,036) ("we think that Congress did not intend to create a private remedy for enforcement of" the statute); *Wilder*, 496 U.S. at 525–26 (Rehnquist, C.J., dissenting) (focusing on congressional intent); *Wright*, 479 U.S. at 433–34 (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 find "nothing to suggest that Congress intended that [plaintiffs' claims] be included within the statutory entitlement").

[8] *Gonzaga*, 536 U.S. at 280 (quoting *Blessing*, 520 U.S. at 340–41).

[9] *Id.* at 283.

[10] *Id.* at 280–81; *Blessing*, 520 U.S. at 342; *Suter*, 503 U.S. at 356, 361 n.12; *Pennhurst*, 451 U.S. at 17–18.

[11] *Pennhurst*, 451 U.S. at 18; see also *Suter*, 503 U.S. at 362 (focusing on what Congress intended for participating states).

[12] *Pennhurst*, 451 U.S. at 17–27; *Suter*, 503 U.S. at 360–61.

[13] *Gonzaga*, 536 U.S. at 293 (Stevens, J., dissenting); *Sandoval*, 532 U.S. at 293 (Stevens, J., dissenting); *Suter*, 503 U.S. at 364 (Blackmun, J., dissenting); *Pennhurst*, 451 U.S. at 33 (White, J., dissenting).

As set out in "II. Statutory Provisions" below, however, Congress has been far from silent about the private enforceability of the Act. The task of discerning its intent therefore is fundamentally different from, and easier than, the one the Court undertook in *Gonzaga University v. Doe*, *Blessing v. Freestone*, and their forebears.[14] That line of cases provides the means of analyzing a statute that "concededly does not explicitly provide any private remedies whatever."[15] The Act 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."[16] Applying the factors that the Court has identified for discerning the intent of a silent Congress in preference to respecting the clearly and repeatedly expressed intention of Congress to allow households' suits would defy *Gonzaga*'s warning.

Even where the Court has enunciated a strong constitutionally based presumption against allowing suits, it has found clear that statutes may override those presumptions.[17] Because the Court has suggested no such basis for presuming against allowing private enforcement of federal statutory rights, the statutory language and legislative history set out below are more than sufficient to establish the intent of Congress to allow eligible households to sue to enforce rights under SNAP. To the extent that the Court has expressed any substantive concern about private suits under a spending clause program, the Court's concern has been that states should be able to know what financial liability they may face if they participate in the program.[18] That concern is inapplicable in analyzing private rights of action under SNAP because the federal government pays all awards of SNAP benefits granted in such litigation.[19]

II. Statutory Provisions Recognizing a Private Right of Action to SNAP Benefits

Congressional intent that SNAP provide enforceable legal rights to claimants is evident both in the Act itself and in federal budget process laws.

A. Provisions of SNAP's Authorizing Statute

Justice Rehnquist pointed out that, in light of the Court's pre-1979 decisions that freely inferred private rights of action under federal statutes, Congress commonly assumed, rather than expressly created, such rights before 1979.[20] Thus that Congress did not see the need to grant expressly a private right of action in the Food Stamp Act of 1977 should not be surprising, especially after federal courts had entertained myriad recipients' suits to enforce the Food

[14]*Gonzaga*, 536 U.S. 273; *Blessing*, 520 U.S. 329.

[15]*Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 18 (1979).

[16]*Gonzaga*, 536 U.S. at 286.

[17]See, e.g., *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (Clearinghouse No. 54,329) (Rehnquist, C.J.) (Family Medical Leave Act may authorize suits against state agencies despite their Eleventh Amendment immunities); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998) (Scalia, J., for a unanimous Court) (Americans with Disabilities Act overcomes Tenth Amendment–based presumption against federal interference with essential functions of state government).

[18]*Pennhurst*, 451 U.S. at 17.

[19]See 7 U.S.C. §§ 2013(a), 2019, 2024(d); *Robinson v. Block*, 869 F.2d 202, 214 n.11 (3d Cir. 1989) (Clearinghouse No. 37,244); *Foggs v. Block*, 722 F.2d 933, 941 n.6 (1st Cir. 1983) (Clearinghouse No. 33,937), rev'd on other grounds sub nom. *Atkins v. Parker*, 472 U.S. 115 (1985); *Harrington v. Blum*, 483 F. Supp. 1015, 1021–22 (S.D.N.Y.), aff'd, 639 F.2d 768 (2d Cir. 1980); cf. *Gonzaga*, 536 U.S. at 286 & n.5 (identifying states' potential liability for money judgments as basis for rejecting private right of action).

[20]*Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring).

Stamp Act of 1964 for a decade.[21] As Justice Rehnquist wrote in 1990,

> the 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.[22]

The single most probative evidence of the intent of Congress to allow private suits to enforce the Act is Section 14(b).[23] Congress added Section 14(b) 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.[24] Section 14(b) provides:

> 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.[25]

Section 14(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 requirements include the Act's Sections 11(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.[26] Denying eligible households a private right of action would render Section 14(b) a nullity, violating the Rule Against Surplusage in statutory construction.[27]

Equally clear, Section 11(a)(3)(B)(ii) of the Act 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.[28] As in the case of Section 14(b), the addition by Congress of this language to the Act's record-keeping requirements serves no purpose other than to facilitate households' suits to enforce the Act and SNAP regulations.[29] Denying households the right to bring the actions that those sections reference would render the provision a nullity.

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[21]Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964); Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913–1045 (1977).

[22]*Wilder*, 496 U.S. at 526 (Rehnquist, C.J., dissenting).

[23]7 U.S.C. § 2023(b).

[24]S. Rep. No. 97-128, at 72, 91 (1981).

[25]7 U.S.C. § 2023(b).

[26]*Id.* § 2020(e)(3) (Section 11(e)(3)); *id.* § 2020(e)(9) (Section 11(e)(9)). E.g., a state's failure to comply with Section 11(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 applied Section 11(e)(9), 7 C.F.R. § 273.2(i)(4)(i)(B) would have required providing the household with benefits once the applicant's identity is verified.

[27]On the rule against surplusage, see *Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 473 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697–98 (1995); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

[28]7 U.S.C. § 2020(a)(3)(B)(ii).

[29]Pub. L. No. 110-246, § 4116, 122 Stat. 1651, 1871 (2008); see H.R. Rep. No. 110-627, at 774 (2008) (Conf. Rep.), as reprinted in 2008 U.S.C.C.A.N. 536, 622–23; S. Rep. No. 110-220, at 135 (2008).

Congress repeatedly amended the Act in response to judicial decisions limiting households' access to judicial relief. In 1988, after a court limited the scope of relief in households' suits, Congress added what is now Section 11(b) to the Act.[30] This provision cross-references the existing authorization for households' suits in Section 14(b) and requires broad corrective action whether the deficiency in state performance was discovered in such suits (or otherwise).[31]

Similarly three other provisions of the Food, Conservation, and Energy Act of 2008 (commonly referred to as the 2008 Farm Bill) explicitly reiterated what Congress had already made clear in Sections 11(a)(3)(B)(ii), 11(b), and 14(b) of the Act: that low-income households may sue to enforce any provisions of the Act or USDA's regulations. First, Section 4118 of the Farm Bill overturned *Almendares v. Palmer*, a district court decision that found no private right of action to enforce USDA's regulations implementing the Act's provisions on service to people not fluent in English.[32] The prior statutory provision 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."[33] The Farm Bill struck "use" at the beginning of the existing provision and inserted "comply with regulations of the Secretary requiring the use of'."[34]

Second, the Farm Bill overturned *Reynolds v. Giuliani*, a Second Circuit decision limiting states' accountability for the actions of local governments administering the Food Stamp Program on their behalf.[35] The Second Circuit held that claimants were allowed to sue state officials over local food stamp agencies' violations of federal law only if the state agencies were actively involved in those violations. In the approximately one-third of the states in which counties and other local governments administer the program under state supervision, this ruling had the potential to complicate the task of obtaining statewide remedies for widespread problems in program administration or mobilizing a state's resources to address local problems. Section 4116 of the Farm Bill amended Section 11(a)(2) of the Act to provide that "[t]he 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 3(t)(1) [of the Act]."[36]

And, third, Congress took pains to ensure that USDA's regulations implementing major civil rights laws would be judicially enforceable. In *Alexander v. Sandoval* the Supreme Court recognized a private right of action to enforce "regulations, if valid and reasonable, [that] authoritatively construe the statute itself" where a private right of action exists to enforce the underlying statute.[37] The Court went on to hold,

[30]*Cotton v. Mansour*, 863 F.2d 1241 (6th Cir. 1988) (Clearinghouse No. 37,134); 7 U.S.C. § 2020(b).

[31]7 U.S.C. § 2023(b) (Section 14(b)). The provision's sponsors identified it as expanding relief in households' suits to enforce against states the Act and the U.S. Department of Agriculture (USDA) 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)).

[32]Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4118, 122 Stat. 1624 (2008) (also known as 2008 Farm Bill) (amending 7 U.S.C. § 2020(e)(1)(B)); *Almendares v. Palmer*, No. 3:00CV7524, 2002 U.S. Dist. LEXIS 23258 (N.D. Ohio Dec. 3, 2002) (unpublished decision invoking *Gonzaga* to hold 7 U.S.C. § 2020(e)(1)(B), (2)(A), insufficiently specific to be privately enforceable and *Sandoval* to hold that USDA's implementing regulations could not support a private right of action), superseded by Farm Bill § 4118.

[33]7 U.S.C. § 2020(e)(1)(B).

[34]See H.R. Rep. No. 110-627, at 773 (2008) (Conf. Rep.); S. Rep. No. 110-220, at 135 (2008).

[35]*Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007) (Clearinghouse No. 52,229). The Second Circuit disagreed with an earlier holding of the Fourth Circuit, which reached the opposite result on the same issue (*Robertson v. Jackson* 972 F.2d 529, 532–35 (4th Cir. 1992) (Clearinghouse No. 46,604)).

[36]Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4116, 122 Stat. 1624 (2008) (also known as 2008 Farm Bill) (amending 7 U.S.C. § 2020(a)(2) (Section 11(a)(2)); see H.R. Rep. No. 110-627, at 774 (2008) (Conf. Rep.); S. Rep. No. 110-220, at 135 (2008).

[37]Sandoval, 532 U.S. at 284.

however, that, because private rights of action must be traced to congressional intent, private individuals could sue to enforce regulations only when Congress so intended.[38] Specifically the Court held that individuals were not allowed to enforce regulations that were promulgated under Title VI of the Civil Rights Act of 1964 and that prohibit policies with discriminatory impact because the Court had held that Congress intended Title VI only to prohibit policies motivated by discriminatory intent.[39]

Section 4117 of the Farm Bill amended the Act's civil rights protections to make enforceable the regulations implementing several major civil rights laws.[40] 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, following the formulas from *Gonzaga* and *Sandoval*, demonstrates congressional intent and includes explicit rights-creating language applied to regulations.[41] 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.[42]

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 unmistakably clear its intent that the Act be privately enforceable. Because nothing in *Gonzaga* and its forebears authorizes the courts to disregard the intent of Congress, the judgment of Congress 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.

The Act's clear language has established SNAP benefits as "a matter of statutory entitlement" for persons qualified to receive them, entitlements that are appropriately treated as "a form of property."[43] Its entitlement language is similar to that found enforceable in other statutes.[44] Although the Court has entertained private rights of action under requirements of federal law that did not create property rights, the Court has never rejected judicial enforceability under a statute that did.

B. Provisions of Federal Budget Process Laws

Whether eligible households may sue to enforce provisions of the Food and Nutrition Act is a matter of great importance to Congress in 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.[45] However, households' ability to secure in court the benefits that the Act provides 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

[38]*Id.* at 286–87.

[39]Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d.

[40]7 U.S.C. § 2020(c).

[41]See H.R. Rep. No. 110-627, at 772 (2008) (Conf. Rep.); S. Rep. No. 110-220, at 135 (2008).

[42]With regard to *Sandoval*, note also that Section 11(a)(3)(B)(ii) of the Act specifically includes actions "to enforce any … regulations issued under this Act" among those in which state agencies' records may be accessed (7 U.S.C. § 2020(a)(3)(B)(ii)).

[43]*Victorian v. Miller*, 813 F.2d 718, 721, 723–24 (5th Cir. 1987) (en banc) (Clearinghouse No. 41,758) (quoting *Atkins*, 472 U.S. at 128).

[44]See, e.g., *Rosado v. Wyman*, 397 U.S. 397, 420–21 (1970) (former 42 U.S.C. § 602(a)(8) supported private right of action). The language of this statute is very similar to that of Section 5(a) of the Act.

[45]See *Alexander v. Polk*, 750 F.2d 250, 253–54 (3d Cir. 1984) (Clearinghouse No. 26,190) (procedures for determining which eligible claimants for benefits under WIC (Special Supplemental Nutrition Program for Women, Infants, and Children) will receive benefits in case of funding shortfall).

beneficiaries may sue to obtain benefits without regard to the level of appropriations) applies across the entire federal budget.[46]

The budgetary procedures of Congress control spending in discretionary programs by simply capping the amounts that appropriations bills may provide each year.[47] Controlling direct spending requires forcing its various committees to change the detailed terms of entitlement programs. Congress has developed an elaborate procedure for doing so.[48] To prevent members or committees from gaming these procedures to evade fiscal discipline, the congressional budget process depends on strict delineation between discretionary programs and those in which eligible individuals have judicially enforceable rights to benefits. 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 by statute but that have never been provided due to a lack of appropriations. Thus the same focus on rights "couched in mandatory, rather than precatory, terms" that is pivotal to the Court's recognition of private rights of action is also vital to Congress in its budget procedures.[49]

Congress has recognized unequivocally that the Food Stamp Program is a direct spending program, that is, that eligible households have the right to judicial enforcement of its authorizing statute's terms. The Congressional Budget Act of 1974 defines "entitlement authority" to include "the food stamp program."[50] Similarly the Balanced Budget and Emergency Deficit Control Act of 1985 defines "direct spending" to include "the food stamp program."[51] That Act also cross-references a "list of mandatory appropriations" that includes food stamps.[52] Nothing in the Court's decisions even hints at a basis for disregarding such unambiguous congressional intent that the Food and Nutrition Act be privately enforceable.

III. Legislative History

Although these statutory provisions fully resolve the question, legislative history amply confirms that Congress intended to allow judicial recourse for recipients to enforce their statutory and regulatory rights.

Numerous committee reports include copious commentary on claimants' suits, sometimes agreeing with the results, sometimes criticizing them on the merits, but never questioning the propriety of them being brought.[53] On other oc-

[46]Government Accountability Office (GAO), A Glossary of Terms Used in the Federal Budget Process 66 (2005), http://bit.ly/czyDAq.

[47]2 U.S.C. §§ 633(a)(3), (b), (f)(1), (f)(2)(B), 642(a), 901.

[48]*Id.* §§ 632(a), 633(a)(1), (f)(1), (f)(2)(A), 639, 641–645, 902.

[49]*Gonzaga*, 536 U.S. at 282 (quoting *Blessing*, 520 U.S. at 341).

[50]Congressional Budget Act of 1974, 2 U.S.C. § 622(9). 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, *supra* note 46, at 13). Designating the Supplemental Nutrition Assistance Program 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" (*Id.* at 47).

[51]Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 900(c)(8).

[52]*Id.* § 900(c)(17) (referencing H.R. Rep. No. 105-217, at 1014 (1997) (Conf. Rep.), as reprinted in 1997 U.S.C.C.A.N. 176, 635).

[53]See, e.g., S. Rep. No. 100-397, at 29 (1988); H.R. Rep. No. 99-271, at 147 (1985); S. Rep. No. 97-128, at 65–66 (1981); H.R. Rep. No. 96-788, at 98, 105, 135, 144 (1980); H.R. Rep. No. 96-264, at 26 (1979); H.R. Rep. No. 95-464, at 26–28, 31–32, 35, 70–77, 92, 96, 120, 128, 137, 139–41, 144, 146, 247, 269, 271, 277–78, 283–84, 343–44 (1977).

casions Congress resolved issues then under litigation without expressing any concern about that litigation's legitimacy.[54] Senators from both parties have identified explicitly households' suits as desirable means of resolving problems with the program.[55] Most explicit, the House Agriculture Committee's report on the 1977 Act states that "[t]he administrative remedies against the state contained in section 11(f) [of the Act] 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."[56] Similarly the Senate Agriculture Committee's report on the same legislation 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."[57]

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 households have the right to benefits, thus eliminating "discretion within the parameters of Congressional goals."[58] Where Congress sought to regulate only states' aggregate performance, rather than the rights that they afford particular individuals, it did so explicitly.[59]

In 2008 Congress responded both specifically to *Almendares* and *Reynolds* and more generally to the courts' increasing tendency to question the private enforceability of public benefit program rules.[60] Were any doubt remaining, the 2008 amendments would establish definitively the commitment of Congress to the private enforceability of the Food and Nutrition Act. No court of appeals has found the lack of a private right of action to enforce a federal statute in the face of such explicit legislative history showing an intent to authorize such suits—much less statutory language seeking to facilitate them with explicit authorization of retroactive benefits and litigants' special access to program records.[61]

Sen. Richard Durbin (D-Ill.), a senior member of the Senate Judiciary Committee, stated that "Sections 4116 through 4118 of the [farm] bill specifically reinforce Congress's longstanding intention that the Food Stamp Act's provisions and its regulations are fully enforceable and should be enforced" and applied the Court's test from *Gonzaga*:

> We made sure that the [statute and regulations] are mandatory, not aspirational, and that they

[54]Compare, e.g., H.R. Rep. No. 101-569, at 850, 853, 856 (1990); H.R. Rep. No. 99-271, at 142–43 (1985), with *Massachusetts v. Lyng*, 893 F.2d 424 (1st Cir. 1990) (Clearinghouse No. 44,131); *Wilson v. Lyng*, 856 F.2d 630 (4th Cir. 1988) (Clearinghouse No. 42,141); *Blinzinger v. Lyng*, 834 F.2d 618 (7th Cir. 1987) (Clearinghouse No. 39,956); *Burkett v. U.S. Department of Agriculture*, 764 F.2d 1203 (6th Cir. 1985) (Clearinghouse No. 37,500).

[55]E.g., 134 Cong. Rec. S9857 (daily ed. July 26, 1988) (statement of Sen. Tom Daschle); *id.* at S9867 (statement of Sen. Kit Bond).

[56]H.R. Rep. No. 95-464, at 398 (1977), as reprinted in 1977 U.S.C.C.A.N. 1978, 2327.

[57]S. Rep. No. 95-180, at 152 (1977).

[58]H.R. Rep. No. 95-464, at 18–19 (1977).

[59]E.g., 7 U.S.C. §§ 2016(e), 2025(c), 2035(e) (states liable only for excessive rates of mail losses and payment errors); see 7 C.F.R. § 276.2(b)(4) (2010) (thresholds for mail-loss liability).

[60]*Almendares*, No. 3:00CV7524, 2002 U.S. Dist. LEXIS 23258; *Reynolds*, 506 F.3d 183; Pub. L. No. 110-246, 122 Stat. 1651 (2008). The process by which Congress enacted the 2008 Farm Bill was somewhat unusual. Pres. George W. Bush vetoed the first bill that Congress submitted to him, and Congress apparently overrode the veto. A clerical error, however, resulted in the omission of one title of the bill from the version presented to the president. Although USDA regarded that legislation as legally effective, as a precaution Congress reenacted the bill, submitted it anew to the president, and again overrode his veto. Section 3 of the Farm Bill (7 U.S.C. § 8701 note) makes the legislative history of the original version, H.R. 2419, applicable to the final enacted legislation: "The Joint Explanatory Statement submitted by the Committee of Conference for the conference report to accompany H.R. 2419 of the 110th Congress (House Report 110-627) shall be deemed to be part of the legislative history of this Act and shall have the same effect with respect to the implementation of this Act as it would have had with respect to the implementation of H.R. 2419."

[61]7 U.S.C. § 2023(b) (Section 14(b)) (explicit authorization of retroactive benefits); *id.* § 2020(a)(3)(B)(ii) (Section 11(a)(3)(B)(ii)) (special access to program records).

> 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.[62]

Rep. Howard Berman (D-Cal.), a senior member of the House Judiciary Committee, similarly explained how the Act, particularly as Congress was amending it, met the *Gonzaga* standard for private enforceability.[63] Senate Agriculture Committee Chairman Tom Harkin (D-Iowa) went a step further and 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 and found, "[w]ith very few exceptions, the old Food Stamp Act and the new Food and Nutrition Act are based on the principle of individual rights."[64]

House Nutrition Subcommittee Chairman Joe Baca (D-Cal.), Representative Berman, and Senators Durbin and Harkin all made clear that the purpose of the 2008 amendments was to overrule *Almendares* and *Reynolds*.[65] Senator Durbin praised the role of claimants' suits in the program:

> 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.[66]

Representative Berman agreed that "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."[67] Similarly Chairman Harkin declared that,

> [t]hroughout 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.[68]

Reviewing his thirty years on the House and Senate Agriculture Committees, he reported that

> 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.[69]

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[62] 154 Cong. Rec. S4747–48 (daily ed. May 22, 2008).

[63] *Id.* at H3819 (daily ed. May 14, 2008).

[64] *Id.*

[65] *Id.* at H3814 (statement of Rep. Joe Baca); *id.* at H3819 (statement of Rep. Howard Berman); *id.* at S4747–48 (daily ed. May 22, 2008) (statement of Sen. Richard Durbin); *id.* at S4752–53 (statement of Sen. Tom Harkin).

[66] *Id.* at S4747–48.

[67] *Id.* at H3819.

[68] *Id.* at S4752–53.

[69] *Id.*

Representative Baca also pointed out that the legislation clarified the private enforceability of SNAP regulations in light of *Sandoval*:

> 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.[70]

IV. Authoritative Administrative Construction

Long-standing USDA regulations recognize that the Act and its regulations are privately enforceable. This construction is due broad deference by the courts.[71] These regulations require states to report such suits to USDA and to facilitate USDA's intervention where important issues of national policy are at stake.[72] 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.[73] It does not ever appear to have questioned the availability of a private right of action.

V. Established Case Law

Private litigation to enforce federal statutory requirements goes back many decades. Important bodies of law, such as antitrust and securities regulation, depend on suits brought through private rights of action implied under federal statutes. Although one or more federal agencies had jurisdiction to enforce these laws, scarce resources and political considerations prevented them from addressing more than a small fraction of the statutory violations. A series of Supreme Court decisions in the 1960s and 1970s recognized that private suits were a valuable complement to agency enforcement and established relatively lenient standards for implying the availability of such suits.

Beginning with *Maine v. Thiboutot* in 1980, the Supreme Court interpreted 42 U.S.C. § 1983 as authorizing suits to redress violations of federal statutory as well as constitutional rights.[74] This holding required courts to determine which provisions of statutes created enforceable rights.

Somewhat similar inquiries are required to determine whether individuals have a private right of action under a federal statute and whether they may sue under Section 1983 for violations of that statute. In both inquiries the court must determine whether the statutory provision in question creates individual rights.[75] When a plaintiff alleges a private right of action directly under a statute, the court also must determine whether Congress intended to grant the remedy sought.[76] By contrast, where an individual alleges a violation of a federal right under color of state law, Section 1983 provides the requisite remedy.[77] Before *Thiboutot* was decided in 1980, numerous federal courts (including the Supreme Court) enter-

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[70] *Id.* at H3814.

[71] *Chevron U.S.A. Incorporated v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[72] 7 C.F.R. § 272.4(d) (2010).

[73] See, e.g., *Atkins*, 472 U.S. 115 (secretary of agriculture as original defendant); *Dion v. Commissioner, Maine Department of Human Services*, 933 F.2d 13 (1st Cir. 1991) (secretary as third-party defendant); *Thomas v. North Carolina Department of Human Resources*, 898 F. Supp. 315 (M.D.N.C. 1995) (secretary as defendant-intervenor).

[74] *Maine v. Thiboutot*, 448 U.S. 1 (1980); see also Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, 398 Clearinghouse Review 720 (March–April 2005).

[75] *Gonzaga*, 536 U.S. at 283–84.

[76] *Id.*

[77] *Id.*

tained food stamp applicants' and recipients' suits to enforce the Food Stamp Acts of 1964 and 1977 and explicitly or implicitly found a private right of action directly under the statute.[78] Since *Maine v. Thiboutot*, numerous federal courts (again including the Supreme Court) have heard and decided applicants' and recipients' assertions of both direct private rights of action and rights of action under Section 1983.[79]

This explicit statutory authorization persuaded almost all courts that food stamp claimants have enforceable rights under the Food Stamp Act. The Seventh Circuit found dispositive the 1977 committee report expressly reaffirming a private right of action.[80] Similarly the Eleventh Circuit found that the Act "speaks in imperative, not merely permissive, terms mandating that state agencies" meet their application processing deadlines, and thus the Eleventh Circuit recognized that applicants had a right of action to enforce those deadlines.[81] It found that Section 14(b) of the Act "plainly contemplates enforcement through individual lawsuits" and extensively cited the legislative history accepting households' lawsuits.[82] At about this time the Third Circuit, entertaining a household suit under the Act, noted that Section 14(b) set "one-year limitations for commencing proceedings."[83] The Fifth Circuit did initially find the Food Stamp Act unenforceable in a case brought by a *pro se* food stamp applicant and briefed by appointed counsel inexperienced with the Food Stamp Program.[84] Three years later, after proper briefing, a unanimous en banc Fifth Circuit—relying on Section 14(b) and the Supreme Court's recognition of food stamps as a statutory entitlement—reversed the prior panel's opinion.[85] The federal district courts generally have reached the same conclusion.[86] With the courts united in recognizing households' right to sue to enforce provisions of the Food Stamp Act, Congress had no occasion to return to the question until 2008.

Although these circuit court cases were decided before *Blessing* and *Gonzaga*, they remain good law because they found express private rights of action under the terms of the Act, particularly Section 14(b). The Court's further elucidation of its standard for implying causes of action where Congress has been silent thus does not undermine those cases' determination that Congress has spoken clearly to create a private right of action. The circuit court cases finding enforceable rights in the Food Stamp Act therefore remain good law. Not surprisingly

[78]E.g., *Knebel v. Hein*, 429 U.S. 288 (1977); *Roberts v. Austin*, 632 F.2d 1202 (5th Cir. Unit B 1980) (Clearinghouse No. 29,940); *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. Department of Agriculture*, 490 F.2d 718 (D.C. Cir. 1973); *Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973); *Stewart v. Butz*, 356 F. Supp. 1345 (W.D. Ky. 1973), aff'd, 491 F.2d 165 (6th Cir. 1974).

[79]E.g., *Atkins*, 472 U.S. at 124–27; *Estey v. Commissioner, Maine Department of Human Services*, 21 F.3d 1198 (1st Cir. 1994) (Clearinghouse No. 49,508); *Robertson*, 972 F.2d 529; *Hamilton v. Madigan*, 961 F.2d 838 (9th Cir. 1992); *Lynch v. Lyng*, 872 F.2d 718 (6th Cir. 1989) (Clearinghouse No. 43,756); *Foster v. Celani*, 849 F.2d 91 (2d Cir. 1988) (Clearinghouse No. 37,205); *Robinson*, 869 F.2d 202; *Murray v. Lyng*, 854 F.2d 303 (8th Cir. 1988) (Clearinghouse No. 38,984); *Victorian*, 813 F.2d 718; *Gonzalez v. Pingree*, 821 F.2d 1526 (11th Cir. 1987); *Haskins v. Stanton*, 794 F.2d 1273 (7th Cir. 1986) (Clearinghouse No. 39,781); *Klaips v. Bergland*, 715 F.2d 477 (10th Cir. 1983); *Antone v. Block*, 661 F.2d 230 (D.C. Cir. 1981).

[80]*Haskins*, 794 F.2d at 1275.

[81]*Gonzalez*, 821 F.2d at 1528.

[82]*Id.* at 1530.

[83]*Robinson*, 869 F.2d at 210 n.9.

[84]*Tyler v. Pasqua*, 748 F.2d 283 (5th Cir. 1984).

[85]*Victorian*, 813 F.2d at 721, 723–24 (quoting *Atkins*, 472 U.S. at 128).

[86]See, e.g., *Williston v. Eggleston*, 379 F. Supp. 2d 561 (S.D.N.Y. 2005) (Clearinghouse No. 55,975); *Dubuque v. Yeutter*, 728 F. Supp. 303 (D. Vt. 1989), rev'd on other grounds sub nom. *Lepage v. Yeutter*, 917 F.2d 741 (2d Cir. 1990) (Clearinghouse No. 44,773); *Quinones v. Coler*, 651 F. Supp. 1028 (N.D. Ill. 1987) (Clearinghouse No. 42,552); *Harley v. Lyng*, 653 F. Supp. 266 (E.D. Pa. 1986). But see *supra* note 2.

then, the flurry of recent litigation about whether claimants of public benefits may enforce programs' statutes have focused on programs lacking clear congressional authorization of private enforcement, not SNAP.

■ ■ ■

Because Congress long ago created, and the courts long have recognized, an explicit private right of action to enforce the Food Stamp Act, developments in the law concerning private rights of action that are only implied have no direct relevance to the enforceability of federal SNAP law. The quick and decisive response of Congress to two lower-court decisions calling into question eligible households' right to sue should establish once and for all that both the Food and Nutrition Act and SNAP regulations remain judicially enforceable. The language of the Act, its legislative history and administrative construction, and the intentions of Congress expressed in its budget process statutes all unmistakably establish eligible households' right to seek judicial redress when federal, state, or local agencies violate the Act or federal SNAP regulations.

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