No. 01-1494

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WESTSIDE MOTHERS, et al.,
Plaintiffs-Appellants,

v.

JAMES K. HAVEMAN, JR., Director of the State of Michigan Department of Community Health; and ROBERT SMEDES, Deputy Director of the Medical Services Administration,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF OF *AMICI CURIAE* MICHIGAN MUNICIPAL LEAGUE AND GOVERNOR JOHN ENGLER SUPPORTING DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Michigan Municipal League makes the following disclosure:

1. Are said parties subsidiaries or affiliates of a publicly held corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

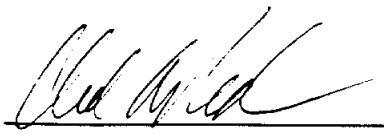

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

MISCELLANEOUS AUTHORITIES

STATEMENT OF INTEREST

The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 513 Michigan cities and villages, 416 of which are also members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. This brief *amici curiae* is authorized by the Legal Defense Fund's board of directors whose membership includes: the president and executive director of the MML and the officers and directors of the Michigan Association of Municipal Attorneys.

Among its many efforts, the MML strives to ensure that Michigan's local governments are well-equipped to provide the sound and responsible government their residents deserve. Today's case touches upon the circumstances under which private parties can assert claims against state and local governments, claims that in some cases require local governments to expend invaluable time and resources. The case likewise addresses core Spending Clause and "clear statement" principles, principles applicable to state and local governments alike. To this end, the MML works to preserve the role of municipalities in today's system of government, and to protect important aspects of local control. For these reasons, as it did in the in the court below, the MML files this *amici* brief.

Joining the MML on today's brief is Michigan Governor John Engler. As Michigan's chief executive, the Governor participates in a variety of public policy decisions that touch upon all areas of state government.

Governor Engler maintains a strong interest in protecting Michigan's children. Under his leadership, Michigan, through the State's Healthy Kids and MIChild programs, has moved to the forefront among states in providing health coverage for children. At the same time, Michigan has developed a statewide immunization registry to help ensure that children receive immunizations in a timely manner and has reduced administrative barriers to encourage enrollment of children into the State's health programs.

Equally compelling is the Governor's interest in protecting Michigan's role in our federal system of government. Governor Engler is active in helping preserve our nation's tradition of local control for States, including Michigan. His efforts include engaging the legislative and executive branches of our federal government for the purpose of encouraging federal assistance—but not interference—for Michigan and other States. And as to the judicial branch, when necessary Governor Engler involves himself in litigation that touches upon questions of great significance for the State of Michigan. Today's case presents just this type of question. For this reason, and to support the efforts of Michigan's Attorney General, the Governor files this *amici* brief.

PRELIMINARY STATEMENT

This appeal presents a question left open in *Blessing v. Freestone*, 520 U.S. 329 (1997), and answered by the court below in favor of the Michigan government defendants. *Blessing* identified but chose not to resolve the issue raised by this case — namely, whether a third-party beneficiary of Spending Clause legislation may sue to enforce that legislation under 42 U.S.C. § 1983. *See id.* at 350 (Scalia, J., concurring). After considering argument and submissions from multiple sources, the district court, in *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich. 2001), correctly concluded that plaintiffs could not assert a cause of action under § 1983 against the Michigan government defendants to enforce certain provisions of Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (the "Medicaid Act"). As the clear-statement principles that form the primary basis for that decision respect bedrock principles of Spending Clause jurisprudence, the decision should be affirmed.

It is common ground that Congress enacted the Medicaid Act in accordance with its Spending Clause powers. *See* U.S. Const. Art. I, § 8. Under settled principles of Spending Clause jurisprudence, statutes like the Medicaid Act create a contract between the Federal Government, which has offered the State federal funding in exchange for compliance with certain conditions, and the State, which has agreed to these conditions by accepting the proffered funds. In this instance, however, nothing

in the statute expressly grants these plaintiffs (or any other private citizens) a private right of action to enforce its provisions. As the United States Supreme Court has made clear, local government entities are bound only by the unambiguously expressed terms of such Spending Clause contracts, and plaintiffs have identified nothing in the Medicaid statute evidencing (let alone *clearly* evidencing) that Michigan has agreed to private enforcement actions. Instead, they filed this suit under 42 U.S.C. § 1983, which provides a generic cause of action to vindicate "rights, privileges, or immunities secured by the Constitution and laws" of the United States.

Interpreting section 1983 to provide a general right of action for all Spending Clause legislation would be an end run around these foundational principles and ultimately upset the State/Federal balance of power that these tenets were designed to preserve. Not only does section 1983 fail to provide such a clear statement, but the historical evidence positively undermines the notion that this civil rights statute was meant to be a catch-all mechanism for bringing actions to enforce all manner of Spending Clause legislation that does not itself provide for private rights of action. In 1871, when section 1983 became law, "rights" (the operative term in the statute) referred only to those classes of interests that were independently enforceable in court. And it was also settled law at that time that contractual rights could be enforced only by parties to the contract (not by third-party beneficiaries) and that a government's contracts could be enforced neither against the government itself nor

its officers. Thus, a private party's interest in a Spending Clause contract between a State and the Federal Government is not a right secured by law within the meaning of section 1983. Accordingly, as the district court concluded, plaintiffs have no private right of action to enforce the Medicaid Act. In view of this statutory ground for addressing plaintiffs' complaint, this Court need not reach the constitutional grounds for dismissing the complaint that the district court also reached.

ARGUMENT

I. Spending Clause Legislation Establishes a Contract between the Federal Government on the One Hand, and State or Local Governments on the Other, the Terms of Which Must Be Unambiguously Expressed.

The United States Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises to . . . provide for the . . . general Welfare of the United States." U.S. Const. Art. I, § 8. "Incident to this power," the Supreme Court has held, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation omitted). The Court, importantly, has also held that the objectives Congress may pursue through its spending power are circumscribed neither by Article I's "enumerated legislative fields," *id.* at 207 (internal quotation omitted), nor by "Tenth Amendment limitation on congressional regulation of state affairs," *id.* at 210.

Because "Congress may fix the terms on which it shall disburse federal money to the States," *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Congress may use conditional funding as a carrot to induce local governments to enact or administer federal-state cooperative programs or otherwise act in a manner that it could not require directly. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program.").

The same constitutional logic that allows Congress to exercise this sweeping power also defines its outer limits. Unlike other grants of legislative authority, the spending power does not allow Congress to enact mandatory legislation. Instead, compliance with Spending Clause legislation must be voluntary: "the States are given the choice of complying with the conditions set forth in the [legislation] or forgoing the benefits of federal funding." *Pennhurst*, 451 U.S. at 11. For this reason, the Supreme Court has recognized that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17. The Court's description of Spending Clause legislation as a contract thus captures precisely the constitutional basis upon which Congress may use its spending power to indirectly induce the States and local governments to act in a manner that it could not require directly.

Because "[t]he legitimacy of Congress' power to legislate under the spending

power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" *Pennhurst,* 451 U.S. at 17, the Supreme Court has repeatedly held that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enab[ling] the States to exercise their choice knowingly, cognizant of the consequences of their participation,'" *Dole,* 483 U.S. at 207 (*quoting Pennhurst,* 451 U.S. at 17; alteration in *Dole*); *accord Pennhurst,* 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."). The rule that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds," *id.* at 24, therefore ultimately limits the reach of Congress's power under the Spending Clause, thereby preserving the "constitutional balance between the States and the Federal Government." *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65 (1989) (*quoting Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985)).

II. Section 1983 By Itself Does Not Provide a Private Right of Action to Enforce Spending Clause Legislation.

A. Section 1983 Must Be Interpreted with Due Regard for the Federal Balance and in Light of the Textual Understanding and Legal Principles That Prevailed When It Was Enacted.

Against this backdrop, three interpretive principles light the way for determining whether section 1983 provides private beneficiaries of Spending Clause legislation a right of action against local governments without regard to whether the

legislation expressly conditions receipt of federal funds on acquiescence to private lawsuits. *First,* the venerable clear statement rule must guide this determination. Notably, section 1983 "falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will,* 491 U.S. at 65 (internal quotation omitted). Like other reconstruction legislation, section 1983 must be interpreted with due regard for the federal balance established by the Constitution. *See Griffin v. Breckenridge,* 403 U.S. 88, 101-102 (1971) (interpreting reconstruction-era legislation to avoid "constitutional shoals"); *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 287 (1993) (Kennedy, J., concurring) (recognizing that "[t]he federal balance is a fragile one" and that care is therefore needed to avoid "a false step" in interpreting reconstruction-era legislation); *Maine v. Thiboutot,* 448 U.S. 1, 33 (1980) (Powell, J., dissenting) ("[T]he issues raised under § 1983 concern a basic problem of American federalism that has significance approximating constitutional dimension.") (internal quotation omitted). This consideration requires that, consistent with clear statement principles, section 1983 not be interpreted to upset the federal-state balance or impose sweeping liabilities on the States and other local governments not clearly intended by Congress. *See Will,* 491 U.S. at 65; *Gregory v. Ashcroft,* 501 U.S. 452, 460-61, 470 (1991).

Plaintiffs' reading of section 1983, however, shows no such restraint. In reading section 1983 to provide a private right of action to enforce Spending Clause legislation even where the legislation does not condition the receipt of federal funds on State consent to private enforcement actions, plaintiffs offer an interpretation that would eviscerate the constitutional requirement that when Congress wishes to place conditions on the receipt of federal funds it must do so explicitly. Plaintiffs' interpretation also violates another tenet of Spending Clause legislation. "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst,* 451 U.S. at 28. Reading section 1983 to create a private right of action to compel specific performance of such conditions would thus vastly expand the liability and obligations of the States. Moreover, since no similar statute exists that might routinely subject the Federal Government to private suits to enforce its obligations under Spending Clause contracts, plaintiffs' interpretation would further disrupt the federal balance by placing the parties to Spending Clause contracts on unequal footing. *Cf. Alden v. Maine,* 527 U.S. 706, 749-50 (1999) (expressing reluctance to subject the States to liabilities from which the Federal Government is exempt).

Second, by its terms, section 1983 does not provide a remedy for violations of federal law, but only, as is relevant here, for "rights" secured by that law. *Blessing,* 520 U.S. at 340; *Suter v. Artist M.,* 503 U.S. 347, 357 (1992). At the time section 1983 was enacted, a "right" was understood to be "[a]n enforceable claim or title." W. Anderson, *A Dictionary of Law* 904 (1889). That section 1983 protects only the type of interests that were legally enforceable at the time the statute was enacted is reflected not only by the contemporaneous understanding of "right," but also by the statute's text and legislative history. *See* § 1983 (providing redress for "rights . . . *secured* by the . . . laws") (emphasis added); *Blessing,* 520 U.S. at 350 (Scalia, J., concurring) ("While it is of course true that newly enacted laws are automatically embraced within § 1983, it does not follow that the question of what rights those new laws (or, for that matter, old laws) *secure* is to be determined according to modern notions rather than according to the understanding of § 1983 when it was enacted."); Cong. Globe, 42d Cong., 1st Sess. 313 (1871) (remarks of Rep. Burchard) (defining the word "rights" as "embracing whatever may be lawfully claimed") (internal quotation omitted). Thus, section 1983 provides a right of action to private beneficiaries of Spending Clause legislation only if the interest such beneficiaries have in the legislation is the type of interest that would have been legally enforceable at the time section 1983 was enacted.

Third, it is settled law that section 1983 must be read in harmony with, rather than in derogation of, "well-established immunities or defenses under the common law." *Will,* 491 U.S. at 67; *accord id.* ("One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles . . . , and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.") (internal quotation omitted); *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976). Accordingly, in determining whether private beneficiaries of Spending Clause legislation have the type of interest that would have been legally enforceable at the time section 1983 was enacted, the Court must carefully consider the immunities and defenses that a State (or other local government) could have then raised to any such suit.

B. Private Interests in Spending Clause Legislation Are Not Rights Secured by the Laws within the Meaning of Section 1983 Because Private Parties Were Not Proper Plaintiffs to Enforce Such Legislation When Section 1983 Was Enacted.

As explained above, Spending Clause legislation providing federal funding contingent upon state compliance with specified conditions establishes a contract between the Federal Government and the recipient local government. Potential recipients of benefits under the legislation thus are not parties to the contract but at most third-party beneficiaries. Yet, at the time section 1983 was enacted, it was doubtful whether a donee third-party beneficiary — *i.e.,* a beneficiary who was not owed money by the promisee — could sue to enforce a contract made for his or her

benefit. Accordingly, as a matter of history, custom, and common sense, it is exceedingly unlikely that the Congress that enacted section 1983 would have considered the interest of a potential beneficiary of Spending Clause legislation to be a "right . . . secured by the . . . laws" within the meaning of the statute.

Although current law allows a third-party beneficiary to bring suit to enforce a beneficial interest in a contract, "the rights of donee beneficiaries were not clearly established until *Seaver v. Ransom* (1918)." K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990); *accord Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring). By contrast, at the time section 1983 was enacted, it was widely maintained "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise." C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880). This rule followed logically from the widely accepted understanding that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise," *id.*, and was regarded by Professor Langdell as "so plain upon its face that it is difficult to make it plainer by argument," *id.* As Story also explained:

> As between the plaintiff and defendant, there must be a privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff.

W. Story, *A Treatise on the Law of Contracts Not Under Seal* 83 (1844); *accord* 1 W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) (noting "the tendency of the [American] courts" to hold that "no stranger to the consideration can take advantage of a contract, though made for his benefit"); *see also Second Nat'l Bank v. Grand Lodge,* 98 U.S. 123, 124-25 (1878) (recognizing "the general rule that privity of contract is required" to support an action to enforce a contract). On this ground alone, section 1983 does not authorize the kind of third-party action that plaintiffs have brought here. Still less does it do so unequivocally.

C. Private Interests in Spending Clause Legislation Are Not Rights Secured by the Laws within the Meaning of Section 1983 Because Private Contractual Claims Were Not Judicially Enforceable against the State or Its Officers at the Time Section 1983 Was Enacted.

Even if potential private beneficiaries of Spending Clause legislation did have the type of legal interest that could have been enforced in a contract suit against a private defendant at the time section 1983 was enacted, a private party's interest in a State's contract did not, at that time, amount to a judicially enforceable right. *See In re Ayers,* 123 U.S. 443, 505 (1887) ("contracts between individuals and a State [are] substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion"). Not only were private contract suits (whether for compensatory or injunctive relief) against the States barred by sovereign immunity but such suits also could not be maintained

against state officers because the officers were not liable on the contract and were thus not real parties in interest. Under these circumstances, a contractual claim against a State cannot be a right secured by the laws within the meaning of section 1983. *Cf. In re Ayers*, 123 U.S. at 504 ("no direct action for the denial of the right secured by a contract, other than upon the contract itself, would lie under any provisions of the statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States") (citing *Carter v. Greenhow*, 114 U.S. 317 (1884)). For like reasons, this doctrine undermines another feature of plaintiffs' claim. Because any breach of the State's contract was not legally attributable to the State's officers at the time section 1983 was enacted, *the officers* cannot be said to have "subject[ed]" the plaintiffs "to the deprivation of any rights" within the meaning of section 1983.

The rule that sovereign immunity bars contract suits (like other suits) naming the State as a defendant—regardless of the type of relief sought—was firmly established when section 1983 was enacted. *See, e.g., In re Ayers*, 123 U.S. at 502 ("For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself."); *id.* ("A bill in equity for the specific performance of the contract against the State by name, it is admitted could not be brought."); *Hagood v. Southern*, 117 U.S. 52, 67 (1886) (State "could not be brought before the court and be made to appear and defend" a bill "for the specific performance of a contract"

without its consent); *see also Briscoe v. Bank of Kentucky*, 11 Pet. 257, 321 (1837) ("No sovereign state is liable to be sued without her consent."); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1875) ("A State, without its consent, cannot be sued by an individual."); *Beers v. Arkansas*, 20 How. 527, 529 (1858) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.").

At the time section 1983 was adopted, furthermore, such actions could be maintained against state officers "only in those instances where the act complained of, considered . . . as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character." *In re Ayers*, 123 U.S. at 502. In other words, relief could be obtained against a state officer only when the officer was individually liable on the plaintiff's claim as a real party in interest.

Yet that precondition has not been met here. Under settled principles of agency law that prevailed at the time section 1983 was enacted, it is true, an agent was personally liable in tort for "misfeasances and positive wrongs" committed in the service of his principal against the persons or property of third parties. J. Story, *Commentaries on the Law of Agency As a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law*, § 311 at 373 (6th ed. 1863); *accord id.* § 312 at 373 ("if the principal is a wrong-doer, the

agent, however innocent in intention, who participates in his acts, is a wrong-doer also"); F. Wharton, *A Commentary on the Law of Agency and Agents* § 542 at 357-58 (1876) ("An agent who obeys an illegal command . . . becomes liable for the consequences of his action."). But, critically, the agent was not liable on his principal's contracts. *See* Story, *Commentaries on the Law of Agency* § 261 at 291 ("when a man is known to be acting and contracting merely as the agent of another, who is known as the principal, his acts and contracts . . . will be deemed the acts and contracts of the principal only, and will involve no personal responsibility on the part of the agent"); Wharton, *supra* § 454 at 297 ("For all contracts made by the agent within the scope of his authority, the principal is ordinarily the party liable"; "on such contract the principal, and not the agent, is to be sued"); 2 J. Kent, *Commentaries on American Law* at 630 (4th ed. 1840) ("It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority the principal is responsible, and not the agent.").

In the 1870s, when section 1983 became law, these principles of agency law governed the relationship between a State and its officers. *See, e.g.*, Story, *Commentaries on the Law of Agency* § 320 at 382 ("the same rule applies to cases where the subordinate officers of the government are guilty of direct misfeasances or positive wrongs to third persons in the discharge of their official functions; for, in

such cases, they incur the same personal responsibility, and to the same extent, as private agents."). Making the point more clear, courts applied these principles to reach different results depending on whether a suit sounded in tort or contract. Government officers, for example, could be personally liable for torts committed in the service of the government and it thus was generally understood that such officers could be sued to enjoin a wrongful government invasion of personal or property rights. *See* 3 J. Story, *Commentaries on the Constitution of the United States* § 1671 at 539 (1833) ("In regard to property, the remedy for injuries lies against the immediate perpetrators, who may be sued, and cannot shelter themselves under any imagined immunity of the government from due responsibility."). In conspicuous contrast, such officers were not personally liable on government contracts, and thus could not be enjoined to perform the contractual obligations of the government. *Id.* § 1671 at 540 ("The greatest difficulty arises in regard to the contracts of the national government; for as they cannot be sued without their own consent, and as their agents are not responsible upon any such contracts, when lawfully made, the only redress, which can be obtained, must be by the instrumentality of congress").

Applying these principles, the Supreme Court, in several decisions predating 1890, repeatedly held that state officers could not be enjoined to perform States' contractual obligations because they were not parties to the contracts in their personal capacity. Thus, in *Louisiana v. Jumel,* 107 U.S. 711 (1883), the Court considered

"whether [a] contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State . . . without the State itself in its political capacity being a party to the proceedings." *Id.* at 721. The Court concluded that it could not: "The officers owe duty to the State alone, and have no contract relations with the bondholders. . . . It was never agreed that their relations with the bondholders should be any other than as officers of the State . . . . They can be moved through the State, but not the State through them." *Id.* at 723.

In *Hagood v. Southern,* 117 U.S. 52 (1886), the Supreme Court again dismissed suits that it determined were "accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it." *Id.* at 67. The Court observed that "[t]hough not nominally a party to the record," the State was "the real and only party in interest," because "the nominal defendants, being the officers and agents of the State" had "no personal interest in the subject-matter of the suit." *Id.* Consistent with traditional agency principles, the Court expressly distinguished cases "in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void." *Id.* at 70.

Similarly, in *In re Ayers,* 123 U.S. 443 (1887), the Court dismissed a suit to enjoin state officers from taking action that would allegedly breach the State's

contract. The Court observed that the suit "does not allege any grounds of equitable relief against the individual defendants . . . . ; [i]t does not charge against them in their individual character anything done or threatened which constitutes, in contemplation of law, a violation of personal or property rights, or a breach of contract to which they are parties." *Id.* at 497. In explaining this conclusion, the Court echoed the traditional understanding of agency law:

> It may be asked what is the true ground of distinction . . . between the contract rights of the complainant in such a suit, and other rights of person and of property. In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.
>
> The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants . . . are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the acts of the State of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. There is no remedy for a breach of a contract . . . except upon the contract itself, and between those who are by law parties to it.

Id. at 503.

Not only do these principles of agency law reflect the common law background against which section 1983 must be interpreted, *see, e.g., Will*, 491 U.S. at 67; *Imbler*, 424 U.S. at 418, they also informed the doctrine of sovereign immunity as it existed at the time section 1983 was enacted. Thus, in cases where the Court determined that state officers were not liable in their personal capacity, the Court also concluded that the suit was barred by sovereign immunity because the State was the only real party

in interest. *See, e.g., Jumel,* 107 U.S. at 727-28; *Southern,* 117 U.S. at 67-68; *In re Ayer,* 123 U.S. at 505-06. The Supreme Court has repeatedly held that section 1983 must be interpreted consistently with the doctrine of sovereign immunity that prevailed at the time the statute was enacted. *See Will,* 491 U.S. at 67 (noting that "sovereign immunity was a familiar doctrine at common law" and refusing to "conclude that § 1983 was intended to disregard the well established immunity of a State from being sued without its consent"); *Quern v. Jordan,* 440 U.S. 332, 341 (1979). Because, in the 1870s, the doctrine of sovereign immunity and common law principles of agency would have barred any suit to enforce a State's contractual obligations either against the State itself or its officers, a private interest in a State's contract is not a right secured by the laws within the meaning of the statute.

III. Appellants' Contrary Arguments Are Mistaken.

A. The District Court's Decision Is Not Foreclosed by *Maine v. Thiboutot* and Its Progeny.

Plaintiffs first contend that *amici*'s interpretation of section 1983 is barred by *Maine v. Thiboutot,* 448 U.S. 1 (1980), and its progeny. (*See* Appellants' Br. at 41, 52-54.) In one respect, plaintiffs are correct that several lines of precedent provide indirect support for their position. *Thiboutot,* for example, held that section 1983 provides a right of action to enforce not only constitutional rights but rights secured by federal statute as well. And *Thiboutot*'s progeny, *see Wilder v. Virginia Hospital Association,* 496 U.S. 498 (1990), have applied a multi-prong test for determining

whether federal statutes create rights that may be enforced pursuant to section 1983. It also bears acknowledgment that *Thiboutot* itself, as well as several of its progeny, arose in the context of Spending Clause legislation. Lastly, *Wilder* and some Sixth Circuit decisions have concluded that certain provisions of the Medicaid statutes (not those at issue here) could be enforced through section 1983. Under these circumstances, it would blink at reality to assert that these cases do not provide some intuitive support for plaintiffs' attempt to invoke section 1983 here.

The Court cannot overlook, however, two other strands of Supreme Court doctrine that have grown up side by side with *Thiboutot* and its progeny. *First*, since *Thiboutot* was decided in 1980, the Supreme Court has clarified and strengthened its Spending Clause jurisprudence, making clear that legislation enacted pursuant to the spending power differs in important ways from other legislation. Notably, the Supreme Court has made clear that Spending Clause legislation is contractual in nature and, accordingly, may not be interpreted to impose duties or liabilities upon States absent a clear statement of congressional intent. *See, e.g., Dole, supra*; *Pennhurst, supra*.

Second, since *Thiboutot* was decided, the Court has held that section 1983 is governed by "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute,"

Will, 491 U.S. at 65 (internal quotations omitted), expressly identifying suits against States and suits in the Spending Clause context as "traditionally sensitive areas" where this clear statement rule applies with greatest force, *id.* In doing so, the Court breathed new vigor into its numerous previous holdings that section 1983 must be interpreted, absent contrary legislative intent, to preserve common law defenses and immunities that existed at the time it was enacted where necessary to safeguard vital structural values. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (municipal immunity from punitive damages); *Pierson v. Ray*, 386 U.S. 547 (1967) (absolute immunity for state judges and "good faith and probable cause" defense for police officers); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute immunity for state legislators).

Where, as here, section 1983 is invoked to enforce Spending Clause legislation, these various doctrinal strands come into direct conflict. Section 1983 cannot be dragooned into a routine vehicle for enforcing Spending Clause legislation without eviscerating the special rules the Supreme Court has held must govern such legislation. Nor can section 1983 be so employed without disregarding the clear statement rule and the common law principles and defenses that the Supreme Court has held control section 1983's interpretation. Accordingly, the Court must attempt to resolve the doctrinal tension as it believes the Supreme Court would.

There are good reasons for resolving this tension in the manner the district court did. *First*, although *Thiboutot* and some of its progeny happened to involve Spending Clause legislation, neither the Supreme Court nor the Sixth Circuit has ever considered the doctrinal problems raised by applying section 1983 in this special context. Justices Scalia and Kennedy recognized these doctrinal problems in *Blessing v. Freestone,* 520 U.S. 329 (1997), but the majority found it unnecessary to address the argument, since the lower court opinion allowing suit under section 1983 could not be sustained even under traditional analysis. *See id.* at 350 (Scalia, J., concurring) ("in ruling against respondents under the *Wright/Wilder* test," the majority preserves the possibility that "third-party-beneficiary suits simply do not lie"). The Supreme Court also has repeatedly held that its prior decisions do not control issues that may have been present in those cases but were not squarely addressed and resolved. Accordingly, in this case *amici* raise fundamental questions regarding the scope of the section 1983 right of action that have never been resolved.

Moreover, the Supreme Court has not hesitated to reject other sweeping positions assumed but not squarely decided in *Thiboutot* when they have come into conflict with doctrines designed to preserve the federal-state balance. Thus, though *Thiboutot* upheld a suit against the State of Maine, the Court subsequently held in *Will* that, under the clear statement rule, section 1983 does not create a cause of action against States. 491 U.S. at 66. And *Alden v. Maine,* 527 U.S. 706 (1999),

"dismissed out of hand" *Thiboutot*'s cavalier assumption that constitutional principles of sovereign immunity did not shield the States from suit in their own courts. *Id.* at 737. Thus, though the Supreme Court has adhered to *Thiboutot*'s core holding — that section 1983's remedy is not limited to constitutional rights — the case is no longer good law on its facts. The suit that it sustained would today be independently barred both by *Will* and *Alden*. Just as *Thiboutot*'s other unconsidered assumptions were required to yield to vital federalism doctrines, so also should its failure to consider the special nature of Spending Clause legislation give way to the Supreme Court's Spending Clause and clear statement doctrines.

B. This Interpretation Is Not Foreclosed By *Ex Parte Young* And Its Progeny.

Plaintiffs also contend that *Ex parte Young*, 209 U.S. 123 (1908), and its progeny, bar this argument. (*See generally* Appellants' Br. at 30-39.) Not true. *First*, this argument is a statutory, not a constitutional argument. *Amici* do not dispute *Ex parte Young*'s holding that the *constitutional* immunity of the States does not bar Congress from authorizing suits for prospective relief against state officers. *Amici* argue, rather, that *as a matter of statutory interpretation* Congress did not authorize such suits to enforce private interests in Spending Clause legislation when it enacted section 1983. As did the Supreme Court in *Quern*, *supra*, and *Will* (where Congress' constitutional power to authorize suits against States pursuant to Section 5 of the Fourteenth Amendment was undisputed), *Amici* look to the understanding of

sovereign immunity that prevailed in the 1870's not in an attempt to enshrine that understanding as constitutional precept but merely to illuminate the intent of the Congress that enacted section 1983 into law. As the Supreme Court's decisions make clear, there is nothing radical or controversial in this well-settled approach to statutory interpretation.

Second, even as a matter of statutory interpretation, *Amici* do not dispute that section 1983 authorizes suits against state officers to enjoin compliance with the Constitution itself or statutes enacted pursuant to grants of authority other than the Spending Clause. When section 1983 was enacted, state officers were liable for torts they committed while serving the government and thus could be enjoined from violating personal or property rights even though they could not be compelled to perform state contracts on which they were not personally liable. *Amici* acknowledge, accordingly, that where Congress has authority to impose mandatory and unilateral obligations on the States, the private rights it creates, like constitutional rights, may be enforced by injunction against state officers under section 1983.

When these two distinctions are understood, it is clear that the authorities cited by the plaintiffs are not inconsistent with *Amici*'s argument. Thus, *Ex parte Young* and *Green v. Mansour,* 474 U.S. 64 (1985), addressed the scope of the States' Eleventh Amendment immunity, not the proper interpretation of section 1983. Furthermore, *Ex parte Young* explicitly approved the holding and rationale of *In re*

Ayers, distinguishing that case as involving "an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance" and recognizing that it properly denied relief because "[t]he State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." *Ex parte Young*, 209 U.S. at 151; *see also id.* (distinguishing *Hagood v. Southern*, 117 U.S. 52 (1886), on the same ground). *Ex parte Young* and its progeny are thus fully consistent with *Amici*'s interpretation of section 1983.

C. Plaintiffs' Reliance on *Will* Is Misplaced.

Although a footnote in *Will* does distinguish suits against state officers for prospective relief from suits against the State itself, the Court expressly grounds this distinction in the understanding of "the 19th-century Congress that enacted § 1983," 491 U.S. at 71 n.10, and cites *In re Ayers*, among other authorities, as evidence of this understanding. Although the passage is drafted with broad strokes, surely its context makes clear that it does not reject, but rather recognizes as authoritative, the understanding of 19th-century agency and sovereign immunity doctrine reflected in cases like *In re Ayers*. Indeed, it makes clear that this understanding controls the interpretation of section 1983.

CONCLUSION

In this case, potential private beneficiaries of Spending Clause legislation constituting a contract between the State of Michigan and the Federal Government have brought suit against officers of the State to compel specific performance of the State's alleged obligations. Nothing in the legislation at issue clearly evidences an agreement that the State's obligations may be enforced by private litigation; rather, plaintiffs bring suit under a 125-year old statute granting a generic remedy to vindicate "rights . . . secured by the . . . laws of the United States." At the time section 1983 was enacted, however, a suit brought by third-party beneficiaries of a State's contract seeking to compel its officers to perform its contractual obligations would have faced insurmountable obstacles. Under the common law of contracts and agency as it then existed, the suit could not have been maintained because neither the plaintiffs nor the defendants are parties to the contract. Furthermore, considered in its true character as a suit against the State, the suit would have been barred by the doctrine of sovereign immunity that prevailed at the time. To allow such a suit to proceed, this Court would be required to interpret section 1983 not only to abrogate a variety of well settled common law principles, immunities, and defenses that existed at the time the statute was enacted but also to eviscerate the constitutional rules governing Spending Clause legislation. Because such an interpretation of section

1983 is barred by Supreme Court precedent, the district court's decision should be affirmed.

Respectfully submitted,

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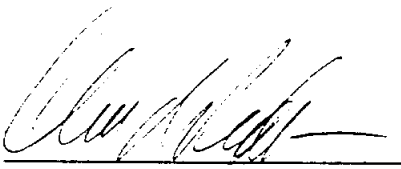
AUGUST 1, 2001

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) (7) (C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a) (7) (C) and Local Rule 32(a), that the foregoing brief contains 6,899 words, according to the count of Corel WordPerfect 7. The word count excludes the words used in the corporate disclosure statement, table of contents, table of citations, and certificates of counsel. As allowed by Rule 32(a)(5)(A) of the Federal rules of Appellate Procedure, this brief is presented in a 14-point proportionally-spaced font with serifs.



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2001, I sent an original and 10 copies of the foregoing brief to the Clerk of the United States Court of Appeals for the Sixth Circuit by overnight mail. In addition, on this same day, I served the foregoing brief by causing two copies to be sent to the following counsel by first class, regular mail:

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