No. 20-1664

In the United States Court of Appeals for the Seventh Circuit

GORGI TALEVSKI, by next friend IVANKA TALEVSKI,

Plaintiff-Appellant,

v.

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana
No. 2:19-cv-00013

BRIEF OF NATIONAL HEALTH LAW PROGRAM, NATIONAL DISABILITY RIGHTS NETWORK, SHRIVER CENTER ON POVERTY LAW, JUSTICE IN AGING, NATIONAL CENTER ON LAW AND ECONOMIC JUSTICE, INDIANA DISABILITY RIGHTS, SENIOR LAW PROJECT OF INDIANA LEGAL SERVICES, DISABILITY RIGHTS WISCONSIN, WISCONSIN BOARD FOR PEOPLE WITH DISABILITIES, WISCONSIN SURVIVAL COALITION OF STATEWIDE DISABILITY ORGANIZATIONS, EQUIP FOR EQUALITY, AND LEGAL COUNCIL FOR HEALTH JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1664

Short Caption: Talevksi v. Health and Hospital Corporation

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Wisconsin Survival Coalition of Statewide Disability Organizations (con't on next page)

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Attorney's Signature: /S/ Jane Perkins Date: 08/06/2020

Attorney's Printed Name: Jane Perkins

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Indiana Disability Rights, Shriver Center on Poverty Law, Equip for Equality, Senior Law Project of Indiana Legal Services, Inc., National Center for Law and Economic Justice, and Justice in Aging, National Disability Rights Network.

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n/a

Attorney's Signature: /S/ Sarah Somers Date: 08/06/2020

Attorney's Printed Name: Sarah Somers

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /S/ Sarah Grusin Date: 08/06/2020

Attorney's Printed Name: Sarah Grusin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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TABLE OF CONTENTS

DISCLOSURE STATEMENTS……i-vi

TABLE OF AUTHORITIES viii

INTEREST OF THE *AMICI*.....1

SUMMARY OF ARGUMENT…….3

ARGUMENT 4

I. CONGRESS AND THE SUPREME COURT RECOGNIZE THE RIGHT OF INDIVIDUALS TO ENFORCE PROVISIONS OF THE SOCIAL SECURITY ACT PURSUANT TO 42 U.S.C. § 1983.....4

A. Controlling Supreme Court Precedent Establishes the Right of Individuals to Enforce Provisions of the Social Security Act Pursuant to 42 U.S.C. § 1983.....6

B. Congress Clearly Intends Private Enforcement of Social Security Act Provisions Under 42 U.S.C. § 1983.....12

C. Courts of Appeals Have Consistently Applied the Enforcement Test to Decide Whether a Provision Creates a Federal Right Under 42 U.S.C. § 1983.....17

II. THE SUPREME COURT'S ARMSTRONG DECISION DOES NOT IMPLICATE ENFORCEMENT ACTIONS BY MEDICAID BENEFICIARIES UNDER 42 U.S.C. § 1983. 19

CONCLUSION.....20

CERTIFICATE OF COMPLIANCE.....A

CERTIFICATE OF SERVICE .....B

TABLE OF AUTHORITIES

Cases

Anderson v. Ghaly, 930 F.3d 1066 (9th Cir. 2019) 17, 19

Armstrong v. Exceptional Child Center, Inc., (2015)..... 4, 19, 20

Ball v. Rodgers, 492 F.3d 1094 (9th Cir. 2007).....16

Blessing v. Freestone, 520 U.S. 329 (1997) 9

BT Bourbonnais Care v. Norwood, 866 F.3d 815 (7th Cir. 2017) 17, 20

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 11

Does v. Gillespie, 867 F.3d 1034 (8th Cir. 2017)..... 12, 16, 17

Edelman v. Jordan, 415 U.S. 651 (1974) 7

Gonzaga University v. Doe, 536 U.S. 273 (2002) ..... passim

Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel, 570 F.3d 520 (3d Cir. 2009)...18

Harris v. James, 127 F.3d 993 (11th Cir. 1997).....16

Health Sci. Funding v. N.J. Div. of Human Serv., 658 F. App'x 139 (3d Cir. July 25, 2016) 17

King v. Smith, 392 U.S. 309 (1968) 7

Legacy Cmty Health Servs., Inc. v. Smith, 881 F.3d 358 (5th Cir. 2018).....17

Maine v. Thiboutot, 448 U.S. 1 (1980) 7, 8, 14

McCready v. White, Judge 417 F 3d 700 (7th Cir. 2005).....10

Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190 (8th Cir. 2013).....16

Miller v. Whitburn, 10 F.3d 1315 (7th Cir. 1993) 9

New York State Citizens' Coal. for Children v. Poole, 922 F.3d 69 (2d Cir. 2019).....10

Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204 (4th Cir. 2007).....18

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).....7, 13

Planned Parenthood of Gulf Coast v. Gee, 862 F.3d 445 (5th Cir. 2017) 12, 17

Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health, 699 F.3d 962 (7th Cir. 2012)..... 6, 11, 16, 18

Planned Parenthood of Kan. v. Andersen, 882 F.3d 1205 (10th Cir. 2018) 12

Rabin v. Wilson-Coker, 362 F.3d 190 (2d Cir. 2004)..... 16, 18

Rosado v. Wyman, 397 U.S. 397 (1970).....7, 14

S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004).....16

Sabree ex rel. v. Richman, 367 F.3d 180 (3d Cir. 2004) 18

Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005) 16

Smith v. Robinson, 468 U.S. 992 (1984).....13

Suter v. Artist M., 503 U.S. 347 (1992) 13, 14

Va. Hosp. Ass'n v. Bailes, 868 F.2d 653 (4th Cir. 1989)¸ 16

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) ..... passim

Statutes

42 U.S.C. § 1320a-10 14

42 U.S.C. § 1320a-2 ..... 4, 14, 16, 20

42 U.S.C. § 1396a 4, 5

42 U.S.C. § 1396a(13)(A) 17

42 U.S.C. § 1396a(a)(23)(A) 17

42 U.S.C. § 1396a(a)(30)(A) 19

42 U.S.C. § 1983 ..... passim

42 U.S.C. § 1396r(c)(1)(A)(ii) 5, 17

42 U.S.C. §§ 1396-1396w-5 ..... 4, 11

42 U.S.C. §1320a-10 4

42 U.S.C. §1396a(a)(23) 17

42 U.S.C. §1396h 11

42 U.S.C.§ 1396a(a)(54) 17

Other Authorities

138 Cong. Rec. S17689-701 (1992) 15

139 Cong. Rec. S3173 (1993).....15

Eric Carlson, Justice in Aging, 25 Common Nursing Home Problems - & How to Resolve Them (Jan. 2019), https://www.justiceinaging.org/wp-content/uploads/2019/01/25-Common-Nursing-Home-Problems-and-How-to-Resolve-Them_Final.pdf 6

H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2901 14

H.R. Rep. No. 100–391, at 472 (1987) 6

H.R. Rep. No. 102-631(1992)..... 14, 15

Inst. of Med., *Improving the Quality of Care in Nursing Homes* (1986) 5

Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 207 (2016) 12, 17

INTEREST OF THE *AMICI*[1]

The *amici curiae* file this brief pursuant to Fed. R. App. P. 29. *Amici* collectively bring to the Court a commitment to advocate on behalf of low-income people, people with disabilities, older adults, people of color, and other vulnerable population groups. *Amici* also research and provide education on a range of legal and policy issues affecting these populations, including ensuring access to high quality long term care and to the courts.

The **National Health Law Program (NHeLP)** advocates, educates, and litigates at the federal and state levels to further its mission of improving access to quality health care for low-income people. For 50 years, NHeLP's work has focused on ensuring access and coverage for Medicaid beneficiaries, including people with disabilities and older people living in nursing facilities. The **National Disability Rights Network** is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies, which serve all 50 states, the District of Columbia, the U.S. Territories, and the Navajo, Hopi,

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

and San Juan Southern Paiute Reservations, were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. **Justice in Aging** is a national organization that fights senior poverty by, among other things, securing access to high-quality and affordable health care. The **Shriver Center on Poverty Law** leads the fight for economic and racial justice by litigating, shaping policy, training, and connecting people in the advocacy community and has represented thousands of Medicaid recipients in the enforcement of their rights under the Medicaid Act. The **National Center on Law and Economic Justice** advances the cause of economic justice for low-income families, individuals, and communities across the country by advocating for access to healthcare, income security, and employment. It has engaged in decades-long litigation pursuant to 42 U.S.C. § 1983 that seeks private enforcement of federal statutes, including provisions of the Medicaid Act, which provide critically important protections and benefits to low-income persons. **Indiana Disability Rights, Disability Rights Wisconsin,** and **Equip for Equality (IL)** serve as the federally-funded P & A systems in their respective states and advance the human and civil rights of children and adults with physical and mental disabilities. The **Senior Law Project of Indiana Legal Services** provides legal assistance and ombudsman services to residents of nursing facilities. **Wisconsin Board of People with Disabilities** focuses on self-determination, self-advocacy,

and keeping people free of abuse and neglect. The **Survival Coalition of Wisconsin Disability Organizations** works on statewide cross-disability policies aimed to increase the independence, self-determination and inclusion of people living with disability. **Legal Council for Health Justice (IL)** is a 30-year-old nonprofit public interest law organization that engages in individual and class action litigation to advance access to quality healthcare and protect the legal rights of people facing barriers due to illness or disability.

While each *amici* has particular interests, the ability of individuals to enforce requirements of the Medicaid Act that protect nursing home residents is essential to their mission. As such, *amici* have an interest in protecting Medicaid beneficiaries' rights to enforce provisions of the Medicaid Act.

SUMMARY OF ARGUMENT

Added to title XIX of the Social Security Act in 1987, the Nursing Home Reform Act (NHRA) sets forth requirements for residents' rights. These include the right for each resident to be free from chemical and physical restraints and from transfer or discharge from their nursing facility. When these rights are being violated, Congress intends for residents to be able to enforce them in court to obtain prospective, injunctive relief.

The Supreme Court has a well-established test for determining when provisions of a federal statute, such as the NHRA, create rights that are enforceable under 42 U.S.C. § 1983. Moreover, Congress amended the Social Security Act expressly to recognize Medicaid recipients' ability to enforce provisions of the Act. *See* 42 U.S.C. §§ 1320a-2, 1320a-10. The Supreme Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), did not alter the Court's section 1983 precedents, Congress's endorsement of private enforcement of the Social Security Act, or the federal courts' application of the enforcement test.

ARGUMENT

I. CONGRESS AND THE SUPREME COURT RECOGNIZE THE RIGHT OF INDIVIDUALS TO ENFORCE PROVISIONS OF THE SOCIAL SECURITY ACT PURSUANT TO 42 U.S.C. § 1983

Enacted as title XIX of the Social Security Act, the Medicaid Act authorizes a cooperative federal-state program to furnish medical assistance to certain low-income people. *See* 42 U.S.C. §§ 1396-1396w-5. Medicaid beneficiaries depend on states to adhere to the various Medicaid Act requirements. *See* 42 U.S.C. § 1396a (setting forth requirements for Medicaid programs).

Among other things, Medicaid-participating states must provide coverage of nursing facility services. *Id.* § 1396a(a)(10)(A), 1396d(a)(4)(A). States must ensure that any nursing facility receiving payments under the state's Medicaid plan "must

satisfy all the requirements of subsection (b) through (d) of section 1936r," the part of the Medicaid Act known as the Nursing Home Reform Act. *Id.* § 1396a(a)(28). Congress added the NHRA to the Medicaid Act in 1987 after the Institute of Medicine found that widespread deficiencies and dangerous conditions made quality of care and quality of life in nursing facilities unsatisfactory. *See* Inst. of Med., *Improving the Quality of Care in Nursing Homes* (1986).

Section 1396r(c) of the NHRA describes "[r]equirements relating to residents' rights" and lists each of the rights that nursing facilities must protect and promote for "each resident." These include:

- the "right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms," 42 U.S.C. § 1396r(c)(1)(A)(ii); and

- the right for "each resident to remain in the facility" and not be transferred or discharged absent specified circumstances. *Id*. § 1396r(c)(2)(A).

The NHRA authorizes state and federal authorities to take actions against nursing facilities that violate residents' rights—to deny Medicaid payments, assess a civil money penalty, appoint temporary management, or, in an emergency, to close the facility. *Id.* § 1396r(h). These remedies "are in addition to those otherwise available under State or Federal law." *Id.* § 1396r(h)(8). Congressional history confirms that "the specified remedies" should not be construed to limit remedies available "including private rights of action to enforce compliance with requirements

for nursing facilities." *See* H.R. Rep. No. 100–391, at 472 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-292. A separate Medicaid Act provision, 42 U.S.C. § 1396c, also allows the federal government to terminate or withhold funding to states that do not "comply substantially" with the federal law. However, that drastic provision has rarely—if ever—been enforced by the federal government, and it does not foreclose the ability of residents to enforce NHRA provisions that create federal rights under section 1983. This ability is crucial, because nursing facilities continue to violate residents' rights.[2]

A. Controlling Supreme Court Precedent Establishes the Right of Individuals to Enforce Provisions of the Social Security Act Pursuant to 42 U.S.C. § 1983.

"Section 1983 creates a federal remedy against anyone who, under color of state law, deprives 'any citizen of the United States . . . of any rights, privileges, or immunities secured by the Constitution and laws.'" *Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012) (quoting 42 U.S.C. § 1983). Section 1983 litigation has long protected the federal rights that Congress guaranteed in the Social Security Act. As Justice Harlan observed in a Social Security Act case filed by program beneficiaries pursuant to section 1983:

[2] *See, e.g.*, Eric Carlson, Justice in Aging, 25 Common Nursing Home Problems - & How to Resolve Them (Jan. 2019), https://www.justiceinaging.org/wp-content/uploads/2019/01/25-Common-Nursing-Home-Problems-and-How-to-Resolve-Them_Final.pdf.

> It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.

Rosado v. Wyman, 397 U.S. 397, 422-23 (1970); *Id.* at 420 ("We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements."). Indeed, on multiple occasions, the Supreme Court has recognized that various provisions of the Social Security Act may be enforced through section 1983. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990) (allowing enforcement of a Medicaid Act provision concerning payment for institutional services); *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (holding "the phrase 'and laws,' as used in § 1983, means what it says" and allowing enforcement of a Social Security Act provision); *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) ([S]uits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States."); *King v. Smith*, 392 U.S. 309, 333-34 (1968) (allowing enforcement of the "reasonable promptness" provision of a Social Security Act program); *cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981) (citing *King v. Smith*'s

assessment of "reasonable promptness" provision with favor, and stating that "where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly").

In *Wilder*, a hospital association filed suit under section 1983 alleging that state officials were violating the hospitals' rights under a payment provision of the Medicaid Act. 496 U.S. at 501. After acknowledging that *Maine v. Thiboutot* authorized a section 1983 action for violations of federal statutes, the Court noted two exceptions to this general rule of enforcement: when the statute does not create individual rights within the meaning of section 1983 and when Congress has foreclosed enforcement through section 1983 in the underlying statute itself. *Id.* at 508-09. The Court then stated a test for determining whether a statutory provision creates a "federal right" under section 1983:

> Such an inquiry turns on whether the provision in question was intend[ed] to benefit the putative plaintiffs. . . . If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, . . . or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Id. at 509 (citations and internal quotations omitted). Applying this test, *Wilder* held that the Medicaid payment provision at issue created a federal right enforceable by hospitals. *Id.* at 509-10; *see also, e.g.*, *Miller v. Whitburn*, 10 F.3d 1315, 1319-20

(7th Cir. 1993) (applying *Wilder* three-prong test and holding Medicaid provision created rights enforceable by individuals under age 21).

Thereafter, in *Blessing v. Freestone*, the Supreme Court instructed courts to use this "traditional" three-prong enforcement test for determining whether Congress intended a federal statute to create rights under section 1983. 520 U.S. 329, 340 (1997) (citing *Wilder* and stating, "We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right."). To restate: the test asks whether the statutory provision cited by the plaintiff: (1) creates a right intended to benefit the plaintiff; (2) is written with sufficient clarity for a court to enforce; and (3) is mandatory on the state. *Id*. at 340-41. *Blessing* also cautioned plaintiffs that the complaint must be broken down into "manageable analytic bites" so that the court can ascertain whether "each separate claim" satisfies the three-part enforcement test. *Id*. at 342; *see also id.* at 346 (finding district court did not apply the enforcement test's methodical inquiry and remanding for determination of "exactly what rights, considered in their most concrete, specific form, respondents are asserting").

Five years later, the Court reviewed *Wilder* and *Blessing*. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court found some of the language used in these cases had confused lower courts, leading them to find a statute enforceable solely because the plaintiff came within the general zone of interests that the statute

intended to protect. *Gonzaga* did not overrule these cases but did clarify that the first prong of the test is met *only* if the federal provision contains an unambiguously conferred right using "rights-creating terms" that have an unmistakable focus on the individuals benefitted. 536 U.S. at 284-85 (reviewing a provision of the Family Educational Rights and Privacy Act, which is *not* part of the Social Security Act).[3]

When the three-part test is met, "the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 274. The presumption can be overcome only by demonstrating that Congress foreclosed private enforcement expressly or by creating a "comprehensive enforcement scheme that is incompatible with" private enforcement. *Id*. at 284 n.4 (quoting *Blessing*, 520 U.S. at 341); *see also Blessing*, 520 U.S. at 346 (stating this is a "difficult showing").

"[T]he Supreme Court has generally found a remedial scheme sufficiently comprehensive to supplant Section 1983 only where it culminates in a right to judicial review in federal court . . . [on behalf of] aggrieved individuals." *New York State Citizens' Coal. for Children v. Poole*, 922 F.3d 69, 84 (2d Cir. 2019) (quotes

[3] In *McCready v. White*, Judge Easterbrook noted that some federal provisions create enforceable rights and others do not: "The [*Gonzaga*] Court's oxymoron—how can an 'implied' right of action be phrased in 'clear and unambiguous terms,' when statutory *silence* is what poses the question whether a right may be implied?—does not detract from the point of its message: § 1983 depends on person-specific 'rights.' What must be 'clear and unambiguous' in the Court's formulation is the right-creating language." 417 F.3d 700, 703 (7th Cir. 2005).

and alterations omitted). The Medicaid Act contains no such provision. Section 1396h authorizes government authorities to withhold funds, impose civil money penalties, or take over management of a nursing facility, and section 1396c authorizes the federal government to withhold or terminate funding to a state that is violating the Medicaid Act. However, these sections provide Medicaid recipients with no such avenue for federal judicial review. *Id.* at 98 (discussing § 1396c); *see also Wilder*, 496 U.S. at 521-22 ("The Medicaid Act contains no . . . provision for private judicial or administrative enforcement. . . . '[G]eneralized powers' . . . to audit and cut off federal funds [are] insufficient to foreclose reliance on § 1983 to vindicate federal rights."); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (Scalia, J.) (citing *Wilder* and listing Medicaid as a statute whose enforcement is not foreclosed); *Gonzaga Univ.*, 536 U.S. at 280-81 (noting *Wilder* held the Medicaid Act contains "no sufficient administrative means of enforcing the requirement against States that failed to comply"); *see Planned Parenthood of Ind.*, 699 F.3d at 974-75 ("[T]he Secretary's power to shut off all or part of a state's funding is not a 'comprehensive enforcement scheme. . . .'").

The section 1983 enforcement test is the law of the land. Most recently, the Supreme Court denied certiorari in two cases that had applied the test to find the Medicaid free choice of provider provision, section 1396a(a)(23)(A), enforceable pursuant to section 1983. *See Planned Parenthood of Kan. v. Andersen*, 882 F.3d

1205 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 638 (2018); *Planned Parenthood of Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018). Three justices dissented, *see* 139 S. Ct. 408, but their opinion misrepresents the current state of the law. Writing for the dissent, Justice Thomas cited an Eighth Circuit case that broke with six other circuit courts (including the Seventh) and refused to enforce the freedom of choice provision. Justice Thomas said the Eighth Circuit was tactfully saying the Supreme Court had "made a mess of the issue." *Id.* at 409 (citing *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017)). However, the enforcement track record in the lower courts does not reflect this. From 2002, when *Gonzaga* was decided, until 2017, when the split-panel *Does* decision issued from the Eighth Circuit, the appellate courts' decisions on whether a particular Medicaid provision could be privately enforced were remarkably consistent. *See* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 207, 226 tbl. 2 (2016). To the extent there is any confusion now, it stems not from the *Blessing/Gonzaga* test but from the Eighth Circuit's failure in *Does* to apply the test.

B. Congress Clearly Intends Private Enforcement of Social Security Act Provisions Under 42 U.S.C. § 1983

Congress is well aware of the basic ground rules established by the Supreme Court: When a provision of a Spending Clause enactment is couched in terms that

are "precatory," *Pennhurst*, 451 U.S. at 18, or that have an "'aggregate' focus," *Gonzaga Univ.*, 536 U.S. at 288, or is included in a statute that provides alternative, comprehensive private enforcement mechanisms, *see Smith v. Robinson*, 468 U.S. 992, 1011-12 (1984), it will not give rise to claim under section 1983. However, when the provision at hand binds states and confers entitlements on individuals, those will be regarded as "rights secured by the . . . laws of the United States" under section 1983. 42 U.S.C. § 1983

Congress has expressly evinced its understanding of this design. Following the Supreme Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), Congress amended the Social Security Act to make clear that beneficiaries can enforce provisions of the Act that meet the traditional enforcement test. *Suter* held that plaintiffs could not use section 1983 to enforce a provision of the Adoption Assistance and Child Welfare title of the Social Security Act. *Id.* at 363. *Suter* further stated that a Social Security Act provision did not create enforceable rights if it was placed in a statute that listed mandatory elements of state plans submitted to receive federal funds. *Id.* at 358. This part of the decision had potentially far-reaching ramifications because most Social Security Act titles, including Medicaid, are written in terms of what a state plan must include for a state to receive federal funds to operate the plan.

Congress reacted to correct the *Suter* error and reestablish the private right of action as it existed in previous cases such as *Wilder*, *Thiboutot*, and *Rosado*. Specifically, Congress amended the Social Security Act to provide:

> In an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of [the Act] is not enforceable in a private right of action.

42 U.S.C. §§ 1320a-2, 1320a-10 (provision repeated). The Conferees explained:

> The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in federal courts to the extent they were able to prior to the decision in *Suter v. Artist M*.

H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257. According to the House Ways and Means Committee:

> Prior to this decision, the Supreme Court has recognized, in a substantial number of decisions, that beneficiaries of Federal-State programs could seek to enjoin State violations of Federal statutes by suing under 42 U.S.C. § 1983. *See Rosado v. Wyman*, 397 U.S. 397 (1970); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

H.R. Rep. No. 102-631, at 364 (1992).

The Committee also noted that:

> Social Security beneficiaries, parents, and advocacy groups have brought hundreds of successful lawsuits alleging failure of the State and/or locality to comply with State plan requirements of the Social Security Act. . . . Much of this litigation has resulted in comprehensive reforms of Federal-State programs operated under the Social Security Act, and increased compliance with the mandates of the Federal statutes[.]

Id. at 364-65.

Congress provided yet further evidence of its intent when it stated:

> [When] Congress places requirements in a statute, we intend for the States to follow them. If they fail in this, the Federal courts can order them to comply with the congressional mandate. For 25 years, this was the reading that the Supreme Court had given to our actions in Social Security Act State plan programs. The *Suter* decision represented a departure from this line of reasoning.

139 Cong. Rec. S3173, S3189 (1993). As is evident from the face of the statute itself, the purpose of the law is to "restore[ ] the right of individuals to turn to Federal courts when States fail to implement Federal standards under the Social Security Act." 138 Cong. Rec. S17689-701 (1992) (statement of Sen. Riegle).[4]

[4] In 1981, 1985, 1987, and 1996, Congress rejected bills that would have limited private enforcement under section 1983. *See* S. 584, 97th Cong. § 1 (1981); S. 436, 99th Cong. § 1 (1985); S. 325, 100th Cong. § 1 (1987); H.R. 4314, 104th Cong. § 309(a) (1996). In *Thiboutot*, the Court invited Congress to change the law if it thought the Court's interpretation of congressional intent was in error. 448 U.S. at 8. That Congress has not done so further evidences enforcement rights under section 1983.

Circuit courts, including the Seventh, have relied on this statute. *See*, *e.g.*, *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1200 (8th Cir. 2013); *Planned Parenthood of Ind.*, 699 F.3d at 977 n.9 (7th Cir. 2012) (noting that § 1320a-2 forecloses the argument that federal statutes specifying the requirements of state Medicaid plans cannot impose legal obligations on state officials); *Ball v. Rodgers*, 492 F.3d 1094, 1112 n.26 (9th Cir. 2007) (noting courts "around the country have relied on it [§ 1320a-2] in holding some Medicaid Act rights enforceable under § 1983 even where the statute's "rights-creating" language is embedded within a requirement that a state file a plan or that that plan contain specific features"); *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004); *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004); *Harris v. James*, 127 F.3d 993, 1003 (11th Cir. 1997). *But see Does*, 867 F.3d at 1044 (8th Cir. 2017) (discounting § 1320a-2 as "hardly a model of clarity," quoting *Sanchez v. Johnson*, 416 F.3d 1051, 1057, n.5 (9th Cir. 2005)

In sum, "the touchstone of the [private enforcement] determination is congressional intent, as manifest in the language and legislative history of the statute," *Va. Hosp. Ass'n v. Bailes*, 868 F.2d 653, 657 (4th Cir. 1989), *aff'd sub nom. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990). The language of the Social Security Act and its legislative history establish that Congress intends certain Social Security Act provisions to be privately enforceable under section 1983.

C. Courts of Appeals Have Consistently Applied the Enforcement Test to Decide Whether a Provision Creates a Federal Right Under 42 U.S.C. § 1983

In *Gonzaga*, as discussed above, the Supreme Court addressed confusion surrounding application of the first (intent-to-benefit) prong of the enforcement test by clarifying that a general intent to benefit individuals will not do; rather, the federal law at issue must contain unambiguous rights-creating language. 536 U.S. at 282-84. Since 2002 when *Gonzaga* was decided, the federal courts of appeals have reviewed the enforceability of twenty-eight Medicaid Act provisions, finding just over half of these provisions privately enforceable.[5]

The cases in which an appellate court has found a Medicaid Act provision confers enforceable rights refer to protections or benefits that run to individual Medicaid beneficiaries. The Second Circuit has explained that the crux of the *Gonzaga* holding was that provisions containing individual rights-granting language

[5] *See* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 207 (tbl. 2) (2016), as updated by *Anderson v. Ghaly*, 930 F.3d 1066 (9th Cir. 2019) (holding § 1396r(e)(3) enforceable); *Legacy Cmty Health Servs., Inc. v. Smith*, 881 F.3d 358 (5th Cir. 2018) (holding § 1396a(bb) enforceable); *Andersen*, 882 F.3d 1205 (10th Cir. 2018) (holding § 1396a(a)(23)(A) enforceable); *BT Bourbonnais Care v. Norwood*, 866 F.3d 815 (7th Cir. 2017) (holding § 1396a(13)(A) enforceable); *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017) (holding §1396a(a)(23) unenforceable); *Pl. P'hood of Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir. 2016), (holding § 1396a(a)(23)(A) enforceable); *Health Sci. Funding v. N.J. Div. of Human Serv.*, 658 F. App'x 139 (3d Cir. July 25, 2016) (holding § 1396a(a)(54) unenforceable).

support a private action while those focusing on state "policy or practice" in the aggregate do not. *Rabin*, 362 F.3d at 201. The Second Circuit enforced a provision regarding transitional Medicaid coverage, 42 U.S.C. § 1396r-6, which "contains no qualifying language akin to [*Gonzaga's*] 'policy or practice.'" *Id*. *See also, e.g.*, *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) (noting that "as required by *Gonzaga* [the Medicaid provision, § 1396a(bb)] contains rights-creating language because it specifically designates the beneficiaries—the [health clinics]—and . . . has an individual focus rather than an aggregate focus on institutional policy or practice"); *Sabree ex rel. v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004) (finding Medicaid provision's reference to "individual" recipients was indistinguishable from Title VI's reference to "no person" as discussed with favor in *Gonzaga*). This Circuit has also observed that "Medicaid patients are the obvious intended beneficiaries" of a provision that "does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled." *Planned Parenthood of Ind.*, 699 F.3d at 9746. The resident rights provisions of the NHRA at issue in the instant dispute focus on the rights of "each resident," not on the state's policies or practices in the aggregate and thus pass muster under the enforcement test. *See* 42 U.S.C. §§ 1396r(c)(1)(A)(ii), 1396r(c)(2)(A). *See Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 524-32 (3d Cir. 2009) (listing specific NHRA provisions at issue in the case, including § 1396r(c)(1)(A)(ii), and

after applying enforcement test, finding that residents living in state-operated nursing home could enforce them pursuant to § 1983); *see also Anderson v. Ghaly*, 930 F.3d 1066 (9th Cir. 2019) (holding § 1396r(e)(3) requirement for hearing appeals upon transfer or discharge of residents enforceable under § 1983).

II. THE SUPREME COURT'S ARMSTRONG DECISION DOES NOT IMPLICATE ENFORCEMENT ACTIONS BY MEDICAID BENEFICIARIES UNDER 42 U.S.C. § 1983.

Armstrong v. Exceptional Child Care Center, 135 S. Ct. 1378 (2015), does not alter the analysis for determining whether Medicaid beneficiaries can enforce a provision of the Medicaid Act pursuant to section 1983. *Armstrong* isn't a § 1983 case." *Andersen*, 862 F.3d at 1229 Further, *Armstrong* addressed an entirely different provision of the Medicaid Act: 42 U.S.C. § 1396a(a)(30)(A), a provision that does not meet the three-prong test of *Blessing* and *Gonzaga*. *Id*. at 1385 (It is difficult to imagine a requirement broader and less specific than §30(A)'s mandate"); *see id*. at 1388 (Breyer, J., concurring) (emphasizing the unique difficulty of § 30(A)'s application to ratemaking and concluding that "Congress intended to foreclose respondents from bringing *this particular action* for injunctive relief") (emphasis added).

Armstrong did not concern and certainly did not overrule the section 1983 test established in *Wilder* and refined in *Blessing* and *Gonzaga*, and it did not address 42

U.S.C. § 1320a-2. For these reasons, in the wake of *Armstrong* all courts of appeals, save one, have continued to apply the *Blessing/Gonzaga* factors to determine whether a specific provision of the Medicaid Act creates a private right of action. In sum, while the Supreme Court has clarified and tightened the section 1983 enforcement test over the years, it has not removed Medicaid beneficiaries' ability to obtain relief from federal courts when states violate unambiguously conferred rights within the Medicaid Act. As the Seventh Circuit Court of Appeals has noted:

> [N]othing in *Armstrong*, *Gonzaga*, or any other case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers. There would have been no need, had that been the Court's intent, to send lower courts off on a search for "unambiguously conferred rights." A simple 'no' would have sufficed.

BT Bourbonnais Care, 866 F.3d at 820-21.

CONCLUSION

For the foregoing reasons, *amici curiae* ask that this Court reverse the District Court's decision.

Dated: August 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I certify that the foregoing brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5), and that the total number of words in this brief is 4,599 according to the count of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)

Date: August 7, 2020

/s/Martha Jane Perkins
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CERTIFICATE OF SERVICE

I certify that on this day, August 7, 2020, I electronically filed the forgoing brief with the Clerk of the Court by using the CM/ECF system.

/s/Martha Jane Perkins
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