



Fact Sheet: Private Enforcement of the Medicaid Act Under 42 U.S.C. § 1983

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This Fact Sheet provides an overview of the history of private enforcement of the Medicaid Act pursuant to 42 U.S.C. § 1983.¹ It then describes the current state of enforcement and explains why developments must be monitored closely in 2022.²

Overview of § 1983 enforcement

During the twentieth century, Congress enacted legislation designed to improve conditions for lower-income Americans, often using its authority under the Constitution's Spending Clause. The Social Security Act, with Medicaid as title XIX, is an example of a Spending Clause enactment. Like many such enactments, the Medicaid Act makes federal funding available to states that implement Medicaid consistent with federal requirements and authorizes the federal government to withhold or terminate funding to a state that violates those requirements.³

Reflecting the rights-remedy principle under which Congress was operating at the time of Medicaid's enactment (1965), the statute does not authorize its beneficiaries to bring

¹ "Private enforcement" refers to enforcement by individuals (beneficiaries or applicants). Government enforcement refers to actions by the U.S. Department of Health and Human Services, the federal Medicaid oversight agency.

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³ See U.S. Const., art. I, § 8, cl. 1.

enforcement actions.⁴ From the beginning, however, beneficiaries have relied upon a civil rights statute, 42 U.S.C. § 1983, for the cause of action that allows them to go to court. For example, in the early case *King v. Smith*, the Supreme Court allowed welfare recipients to enforce the “reasonable promptness” provision of the Social Security Act’s welfare law pursuant to § 1983.⁵

Section 1983 provides a “procedure of redress for the deprivation of rights established elsewhere.”⁶ Specifically, § 1983 provides an express cause of action to individuals when a state actor is depriving them of their rights under the U.S. Constitution or laws. The law states:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁷

The 1980 case, *Maine v. Thiboutot*, held that “the phrase ‘and laws’ means what it says,” so enforcement applies not only to constitutional rights but also to federal laws.⁸

Just a year after it decided *Thiboutot*, the Court began to restrict private enforcement in *Pennhurst State School & Hospital v. Halderman*.⁹ Discussing the Developmentally Disabled Assistance and Bill of Rights Act (which is not part of the Social Security Act), Justice Rehnquist’s majority opinion equated legislation enacted pursuant to the Spending Clause to a

⁴ See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (noting that courts would “provide such remedies as are necessary to make effective the congressional purpose”). But cf. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (abandoning that understanding).

⁵ *King v. Smith*, 392 U.S. 309 (1968).

⁶ *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999).

⁷ 42 U.S.C. § 1983.

⁸ *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980) (enforcing a Social Security Act provision). See also, e.g., *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) (enforcing Medicaid Act provision). But cf. Brief for the United States as Amicus Curiae Supporting Petitioners, *Wilder v. Virginia Hosp. Ass’n*, 498 U.S. 496 (1990) (No. 88-2043) (Deputy Solicitor General John Roberts arguing *Pennhurst* precluded enforcement under § 1983).

⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

contract between the federal government and the states with the typical remedy for state noncompliance being an action by the federal government to terminate funding.¹⁰ Subsequently, the Court cautioned that § 1983 actions require a plaintiff to assert a violation of a federal “right,” not merely a violation of federal law.¹¹ In *Blessing v. Freestone*, the Court reiterated the “traditional” three-part test for determining whether a federal law creates such a right:

- (1) Is the federal provision in question intended to benefit the plaintiff?
- (2) Does the provision contain sufficiently specific language so that a court knows what to enforce?
- (3) Does the provision create a binding obligation on the state?¹²

If these questions are answered affirmatively, there is a presumption that the plaintiff can enforce the provision. The defendant can overcome the presumption by showing that Congress foreclosed enforcement through § 1983, expressly or by including a comprehensive remedial scheme in the underlying substantive federal law.¹³ The Medicaid Act does not expressly foreclose resort to § 1983, and the Supreme Court has recognized that the Medicaid Act does include a comprehensive remedial scheme.¹⁴

In 2002, *Gonzaga University v. Doe* further clarified and tightened the enforcement test.¹⁵ Writing for the majority, Chief Justice Rehnquist cited *Pennhurst* and noted that

¹⁰ *Id.* at 17, 28 (“[L]egislation 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.... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.... 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.”). Cf. *Barnes v. Gorman*, 536 U.S. 181, 188 n.2 (2002) (discussing *Pennhurst*, and stating that “[t]he ‘contractual nature’ of Spending Clause legislation has *implications* for our construction of the scope of available remedies. We do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.”) (citation and internal quotations omitted).

¹¹ *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 106 (1989). See also *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit*).

¹² 520 U.S. at 341-42.

¹³ *Id.* at 341.

¹⁴ See *Wilder*, 496 U.S. at 521; see *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (citing *Wilder* and listing Medicaid as a statute whose enforcement is not foreclosed).

¹⁵ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

Gonzaga involved the Family Educational Rights and Privacy Act, a Spending Clause enactment (that is not part of the Social Security Act).¹⁶ Focusing on the first prong of the enforcement test, the Court clarified that a federal law is not privately enforceable unless Congress has unambiguously manifested its intent to confer individual rights on the plaintiff. This initial inquiry into whether a statute creates a federal right under § 1983 “is no different from the initial inquiry in an implied right of action case.”¹⁷ The provision must contain “rights- or duty-creating language” and have an individual rather than an aggregate focus.¹⁸

Thus, the *Blessing/Gonzaga* test turns on discerning congressional intent. In 1994, Congress enacted 42 U.S.C. § 1320a-2, to expressly recognize that provisions of the Social Security Act are privately enforceable.¹⁹ A Supreme Court case, *Suter v. Artist M.*, had created some confusion on this point.²⁰ As legislative history confirms,

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 the federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*.....²¹

¹⁶ *Id.* at 279-80.

¹⁷ 536 U.S. at 279.

¹⁸ *Id.* (refusing to allow enforcement of a FERPA provision that prohibited federal funding to any entity with a policy or practice of permitting the release of private records without written consent of the student/parent).

¹⁹ 42 U.S.C. §§ 1320a-2 (repeated at § 1320a-10) states:

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 471(a)(15) of the Act is not enforceable in a private right of action.

²⁰ *Suter v. Artist M.*, 503 U.S. 347 (1992). *Suter* appeared to hold plaintiffs had no enforceable rights so long as the state had a federally approved plan to implement the Child Welfare Act.

²¹ H.R. Rep. No. 103-761, at 819 (1994) (Conf. Rep.)).

Developments in the appellate courts

In the nearly 20 years since *Gonzaga* was announced, the federal courts of appeals have decided 59 cases that assess whether a particular Medicaid provision can be enforced through § 1983. These cases are highlighted here because they establish precedent for all states in the affected circuit. The geographic boundaries of the 12 federal circuits are shown on the map below.

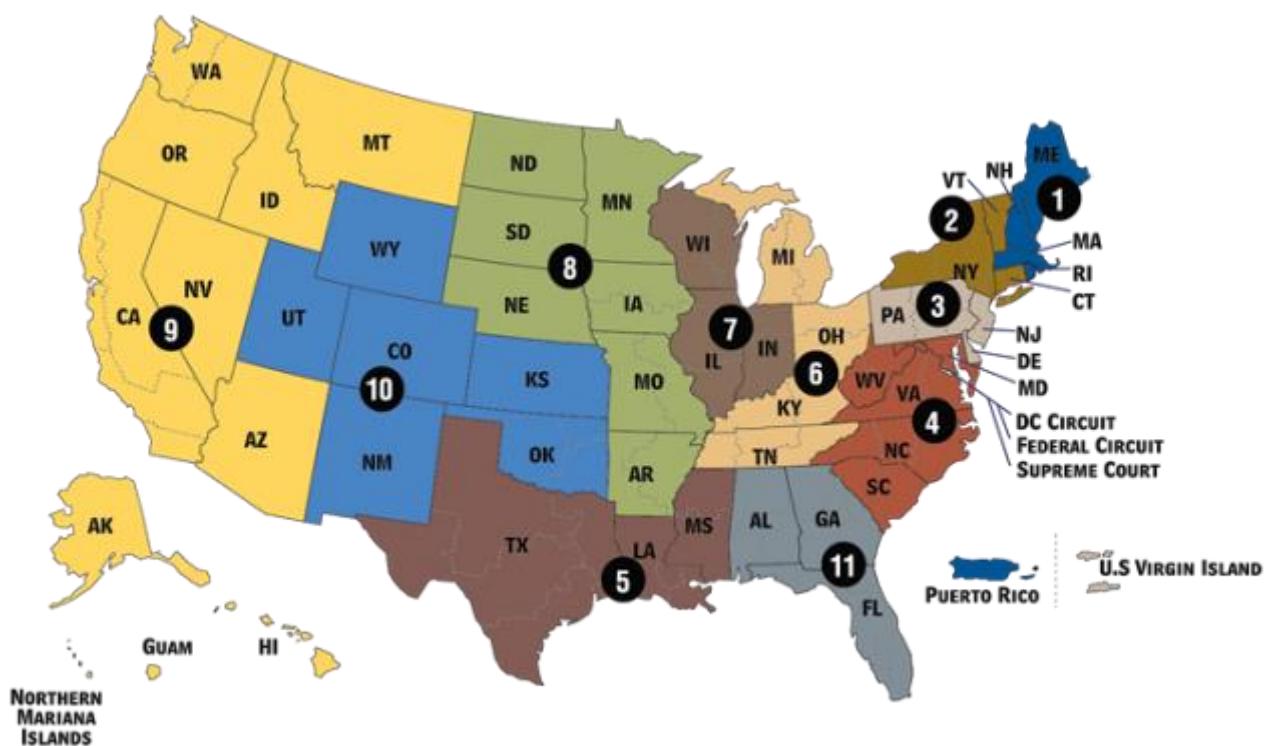


Table 1, below, shows the circuit court activity with respect to § 1983 Medicaid enforcement since June 2002, when *Gonzaga* was decided. As of January 31, 2022, 11 of the 12 circuits have decided at least one § 1983 Medicaid case. The Fifth and Ninth Circuits have been most active (9 cases from each circuit), followed by the Sixth Circuit (7 cases) and the Second and Seventh Circuits (6 cases from each circuit). The D.C. Circuit Court of Appeals is the only circuit not to have decided at least one case. In 2021, one federal circuit—the Seventh—

decided a case.²² By contrast, in 2020, four opinions were announced—two, from the Fifth Circuit and one each from the Sixth and Seventh Circuits.²³

Table 1
Medicaid § 1983 circuit court cases post *Gonzaga*
June 20, 2002-January 31, 2022

1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC
5	6	4	4	9	7	6	4	9	4	1	0

Table 2 shows that, since the *Gonzaga* ruling in 2002, federal appellate courts have reviewed the enforceability of 29 Medicaid Act provisions. The vast majority of appellate cases focus on the *first* prong of the enforcement test (whether the provision in question unambiguously manifests congressional intent to confer individual rights).²⁴ Most cases involve enforcement by Medicaid beneficiaries; however, six circuits (1st, 2d, 3d, 4th, 5th, and 9th) have allowed federally qualified health centers to enforce 42 U.S.C. § 1396a(bb), a provision that addresses payment requirements for FQHCs. By contrast, all six of the circuit courts to have reviewed the question (1st, 2d, 5th, 6th, 9th, and 10th) have concluded that the “equal access” provision, § 1396a(a)(30)(A), does not create an enforceable right allowing either providers or beneficiaries to sue states for inadequate Medicaid payment rates.

²² *Talevski v. Health & Hosp. Corp. of Marion Co.*, 6 F.4th 713 (7th Cir. 2021), *rev'd*, No. 2:19CV13, 2020 WL 1472132 (N.D. Ind. Mar. 26, 2020), *petition for cert. filed*, (U.S. Nov. 23, 2021) (No. 21-806) (concerning provisions of Nursing Home Reform Act, 42 U.S.C. § 1396r).

²³ *Waskul v. Washtenaw Co. Cnty. Mental Health*, 979 F.3d 426 (6th Cir. 2020) (allowing enforcement of §§ 1396a(a)(8), (10)(A), and (10)(B), and 1396n(c)(2)(A) & (2)(C)); *Pl. P'hood of Greater Tex. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (refusing to allow enforcement of § 1396a(a)(23)); *Thurman v. Medical Transp. Management, Inc.*, 982 F.3d 953 (5th Cir. 2020) (refusing to allow enforcement regarding non-emergency transportation); *Nasello v. Eagleson*, 977 F.3d 599 (7th Cir. 2020) (refusing to allow enforcement of § 1396a(r)(1)(A) and assuming without deciding that § 1396a(a)(8) is enforceable).

²⁴ The Third, Eighth, and Tenth Circuits reached different conclusions when applying the *third* prong of the enforcement test (whether the provision creates a binding obligation on the state). Their assessments pertain to subsections of 42 U.S.C. § 1396d(p)(4), a Medicaid provision that addresses eligibility when an applicant has a trust. *Cf. Lewis v. Alexander*, 685 F.3d 325, 333-34, 342 (3d Cir. 2012), *cert. denied*, 568 U.S. 1123 (2013) (holding d(p)(4)(C) is privately enforceable) and *Ctr. for Special Needs Trust Admin. v. Olson*, 676 F.3d 688, 700 n. 2 (8th Cir. 2012) (same) with *Hobbs v. Zenderman*, 579 F.3d 1171, 1179 (10th Cir. 2009) (relying on *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000) to hold d(p)(4)(A) is not enforceable).

As Table 2 shows, the circuit courts have consistently allowed beneficiaries to enforce two provisions of the utmost importance: 42 U.S.C. § 1396a(a)(8), which requires the state Medicaid agency to furnish medical assistance to “all individuals . . . with reasonable promptness,” and § 1396a(a)(10)(A), which requires the state agency to provide medical assistance to “all individuals” who are described in the section’s listing of covered populations (*e.g.*, individuals with disabilities, low-income children). However, as discussed below, the Fifth and Seventh Circuits have recently questioned whether § 1396a(a)(8) is privately enforceable.²⁵

Table 2
Post-*Gonzaga* Circuit Enforcement of Medicaid Provisions
June 20, 2002-January 31, 2022

Medicaid Provision (42 U.S.C. § 1396)	Held Enforceable	Held Unenforceable
a(a)(3)-fair hearing	2d (2016, 2012), 6th (2003)	
a(a)(8)-reasonable promptness ²⁶	1st (2002), 3d (2004) 4th (2011, 2007), 5th (2013), 6th (2020, 2006)	
a(a)(10)(A) - eligibility	3d (2004), 5th (2004), 6th (2020, 2006), 7th (2012), 9th (2006)	
a(a)(10)(B)-comparability	2d (2016), 6th (2020)	

²⁵ See *Nasello*, 977 F.3d at 602 (7th Cir. 2020) (assuming that (a)(8) is enforceable, “without suggesting that we would follow the other circuits if push came to shove”); *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953, 958 (5th Cir. 2020) (finding (a)(8) “at most” establishes a right to receive certain health care services).

²⁶ *Thurman*, 982 F.3d at 958 (finding (a)(8) does not establish an enforceable right to non-emergency medical transportation and “at most” establishes a right to receive certain health care services).

a(a)(10)(C)–medically needy		10th (2009)
a(a)(10)(D)–home health	2d (2016)	
a(a)(10)(E)–cost sharing for qualified Medicare bene's	6th (2015)	
a(a)(13)(A)–institutional payments; provider notice ²⁷	7th (2017)	2d (2006)
a(a)(17)-reasonable standards		2d (2016), 8th (2006), 9th (2006), 10th (2009)
a(a)(18)-trusts	3d (2012)	
a(a)(19)-best interests		5th (2020), 2d (2015), 7th (2003)
a(a)(23)-free choice of provider	4th (2019), 6th (2006), 7th (2012), 9th (2013), 10th (2018)	5th (2020), 8th (2017)
a(a)(25)-third party liability		11th (2012)
a(a)(30)(A)-provider payments ²⁸		1st (2004), 2d (2006), 5th (2007), 6th (2010, 2006), 9th (2007, 2005, 2005), 10th (2007, 2006)
a(a)(43)-EPSDT	6th (2010, 2006)	
a(a)(54)-outpatient drugs		3d (2016)

²⁷ *BT Bourbonnais Care v. Norwood*, 866 F.3d 815, 822 (7th Cir. 2017), distinguished *N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 47, 148 (2d Cir. 2006), noting that the Second Circuit had summarily affirmed *In re NYAHSA Litig.*, 318 F. Supp. 2d 30 (N.D. N.Y. 2004), which held that (a)(13) conferred no substantive right regarding the adequacy of institutional payment rates.

²⁸ Soon after *Gonzaga*, the Eighth Circuit allowed enforcement of (30)(A) in a law-of-the-case decision that was subsequently vacated. *Pediatric Specialty Care v. Ark. Dep't of Human Servs.*, 443 F.3d 1015 (8th Cir. 2006), vacated on other grounds, *Selig v. Pediatric Specialty Care*, 551 U.S. 1142 (2007). See *Minn. Pharm Ass'n v. Pawlenty*, 690 F. Supp. 2d 809, 820-21 & n.8 & 9 (D. Minn. 2010) (discussing *Gonzaga*, *Pediatric Specialty Care*, Eighth Circuit precedent, and holding (30)(A) does not create enforceable rights under § 1983).

a(a)(70)-transportation brokerage program		7th (2020)
a(r)(1)(A)-post eligibility treatment of income	6th (2020)	
a(bb)-FQHC payment	1st (2008, 2005), 2d (2014), 3d (2013), 4th (2007), 5th (2018), 9th (2013)	
b(m)-managed care		9th (2009)
d(a)-services	3d (2004), 6th (2006), 8th (2006)	
d(p)-cost sharing for QMBs	6th (2015)	
n(c)(2)(A)-home and community waiver safeguards	6th (2020)	
n(c)(2)(C)-home & community waiver informing	6th (2020), 9th (2007)	
n(d)(2)(D)- home & community waiver payments	9th (2007)	
p(d)(4)(A)-trust remainders		10th (2009)
p(d)(4)(C)-special needs trusts exclusion	3d (2012), 8th (2012)	
r(b), (c) (e)-nursing home reform	1st (2003), 3d (2009), 7th (2021), 9th (2019)	
r-6-transitional Medicaid	2d (2004)	

The Supreme Court has not decided a Medicaid enforcement case since *Gonzaga*. In 2020, the Court (as it had done previously) refused to hear a case that allowed beneficiaries to enforce the Medicaid “freedom of choice” provision.²⁹ As discussed below, a petition for

²⁹ *Pl. P'hood of So. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019) (holding provision enforceable), *cert. denied*, 141 S. Ct. 550 (2020); *see also Pl. P'hood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018) (same), *cert. denied*, 139 S. Ct. 638 (2018); *Pl. P'hood of Gulf Coast v. Gee*, 862 F.3d 445 (2017) (same), *cert. denied* 139 S. Ct. 408 (2018). In 2020, the Fifth Circuit overruled *Gee*. *See Pl. P'hood of Greater Tex. Fam. Pl. & Prevent. Health Servs. v. Kauffman*, 981 F.3d 346 (5th Cir. 2020).

certiorari from a Seventh Circuit decision allowing private enforcement of the Nursing Home Reform Act is pending before the Supreme Court.

Conclusions and Recommendations

Medicaid beneficiaries can enforce only a few provisions of the Medicaid Act using § 1983. Caution is required. When considering a § 1983 claim, advocates should:

1. Plead the underlying statutory provision precisely. A complaint must be pled in “manageable analytic bites.”³⁰ Thus, plead claims precisely, for example: 42 U.S.C. § 1396a(a)(43)(C), not § 1396a(a)(43) and certainly not § 1396a(a) or § 1396a.
2. Only seek to enforce federal statutes that have an individual focus, specificity, and are stated as a mandate. Assess each Medicaid provision under consideration against all three prongs of the *Blessing/Gonzaga* enforcement test. When researching the enforcement history of a provision, consult and address opinions in and outside of your jurisdiction.³¹
3. Avoid provisions with a poor enforcement track record. Attempts to enforce such provisions are unlikely to be successful. To illustrate, all six of the appellate courts to have decided the question have refused to allow private enforcement of the “equal access” provision, 42 U.S.C. § 1396a(a)(30)(A). In the 2021 case, *Goldman v. Secretary of the Executive Office of Health & Human Services*, a Massachusetts Superior Court soundly rejected an attempt to enforce the provision in a case challenging Medicaid payments for neonatal circumcision.³² Similarly, all four circuits to assessed it have held the “reasonable standards” provision, 42 U.S.C. § 1396a(a)(17), is unenforceable. There is no reason to think this trend will change, as illustrated by a South Carolina district court’s recent refusal to allow enforcement.³³

When multiple courts have consistently refused to allow enforcement of a provision, avoid it. In addition to losing the claim, the litigation runs the risk of producing analysis/language that could complicate future enforcement. An example comes from the *Goldman* circumcision case noted above. The court’s opinion included broad language stating, in

³⁰ *Blessing*, 520 U.S. at 342.

³¹ The National Health Law Program maintains a Medicaid case docket that is available to Disability Rights advocates, upon request.

³² *Goldman v. Sec. Exec. Off. of Health & Human Servs.*, No. 2084CV01604, 2021 WL 956035 (Mass. Supp. Mar. 10, 2021).

³³ *Stogsdill v. S.C. Dep’t of Health & Human Services*, No. 3:12-cv-0007, 2021 WL 45511143 (D.S.C. Oct. 5, 2021).

part, that, “[t]ogether with the other state plan requirements enumerated in 42 U.S.C. § 1396a, Section (30)(A) merely describes what states must do to ensure conditioned funding, and . . . the Act only authorizes the Federal Secretary to withhold Medicaid payments from a state[.]”³⁴

Relatedly, avoid asking a judge to apply a provision with a strong enforcement track record where the facts do not line up closely with the words of the statute. This could result in an opinion that affects the court’s view of private enforcement, and it could also produce unfavorable, broad dicta.³⁵

4. Do not seek to enforce federal regulations. By now, it should be clear that courts will not allow private enforcement of regulations.³⁶ A regulation can only “define or flesh out” the content of a federal statute that is itself privately enforceable.³⁷
5. Be clear that a motion to dismiss based on enforceability does not involve Article III standing. The defendant may file a motion to dismiss the case, arguing that the plaintiffs lack standing because they cannot privately enforce the Medicaid Act provision at issue. The plaintiffs’ response needs to explain this error. The defendant’s argument has confused two distinct doctrines: constitutional standing and the availability of a cause of action.³⁸ Defendants’ arguments about whether plaintiffs can enforce a Medicaid provision pursuant to § 1983 concern whether there is a valid cause of action and thus are correctly raised under Fed. R. Civ. P. 12(b)(6). The argument does not implicate a plaintiff’s Article III

³⁴ *Goldman*, 2021 WL 956035, at *7.

³⁵ See, e.g., *Mercer Cty. Children’s Med. Daycare v. O’Dowd*, No. 13-1436, 2014 WL 546346 (D.N.J. Feb. 10, 2014) (not for publication) (refusing to allow private enforcement of the EPSDT “correct or ameliorate” provision in a dispute that arose when provider was fined for repeatedly exceeding the number of children who could be treated in a medical daycare program).

³⁶ See, e.g., *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953, 957 (5th Cir. 2020) (“[A]gency regulations cannot independently confer federal rights enforceable under § 1983 for one simple reason: ... [I]t is Congress, and not an agency of the Executive Branch, that creates federal rights.”) (citations omitted); *Price v. Stockton*, 390 F.3d 1105, 1112 n.6 (9th Cir. 2004) (noting it is “well settled that regulations alone cannot create rights ... however, regulations may be relevant in determining the scope of the right conferred by Congress” and therefore considered when applying the *Blessing* test); *Johnson v. City of Detroit*, 446 F.3d 614 (6th Cir. 2006); *So. Camden Cts. v. N.J. Dep’t of Environ. Prot.*, 274 F.3d 771 (3d Cir. 2001); *Harris v. James*, 127 F.3d 993, 465 (11th Cir. 1997); *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987).

³⁷ *Shakhnes v. Belin*, 689 F.3d 244, 254 (2d Cir. 2012). Cf. *Evangelical Luth. Good Samaritan Soc’y, Inc. v. Randol*, No. 16-cv-2665, 2017 WL 3085778 (D. Kan. Jul. 20, 2017) (refusing to allow nursing facilities and facility patients to enforce 42 C.F.R. § 435.912(c)(3)), regarding timely eligibility decisions).

³⁸ See *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (explaining difference between jurisdiction and a cause of action).

standing or the court's jurisdiction.³⁹ The distinction is significant: Whether the plaintiff has stated a valid claim for relief can be waived if not raised in a timely way.⁴⁰ By contrast, standing implicates a court's subject-matter jurisdiction and can be raised at any time, including *sua sponte* by a court.

6. Closely monitor developments regarding the following Medicaid provisions:

- The Nursing Home Reform Act:

The Supreme Court is considering a petition for certiorari in a Seventh Circuit case, *Talevski v. Health & Hospital Corporation of Marion County*. The district court recognized that beneficiaries can enforce provisions of the Nursing Home Reform Act that establish rights to be free of physical and chemical restraints and to avoid unwanted transfer/discharge from the facility.⁴¹ There is no circuit split on the enforcement of the NHRA provisions against state actors.⁴² Rather, the petition is a direct attack on private enforcement, as stated in the first of the two questions presented to the Court:

1. Whether, in light of compelling historical evidence to the contrary, the Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.

³⁹ See, e.g., *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344 (2d Cir. 2015) (finding plaintiff had standing, but that § 1396a(a)(19) was not privately enforceable).

⁴⁰ See *Scott C. ex rel. Melissa C. v. Riverview Gardens Sch. Dist.*, 19 F.4th 1078 (8th Cir. 2021) (noting that state did not challenge private enforcement of the McKinney-Vento Homeless Assistance Act in a motion to dismiss heard by the district court and refusing to consider the newly raised issue on appeal); *Ball v. Rodgers*, 492 F.3d 1094, 1102 (9th Cir. 2007).

⁴¹ *Talevski v. Health & Hosp. Corp. of Marion Co.*, 6 F.4th 713 (7th Cir. 2021), *rev'd*, No. 2:19CV13, 2020 WL 1472132 (N.D. Ind. Mar. 26, 2020), *petition for cert. filed*, (U.S. Nov. 23, 2021) (No. 21-806) (regarding 42 U.S.C. §§ 1396r(c)(1)(A)(ii), 1396r(c)(2)(A)). The 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, 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 filed an amicus brief with the Seventh Circuit. See Brief for Nat'l Health L. Prog. et al. as Amici Curiae Supporting Appellant, *Talevski v. Health & Hosp. Corp. of Marion Co.*, No. 20-1664 (No. 2:19-CV-13 (2020) (Aug. 7, 2020) (ECF No. 25).

⁴² The First and Third Circuits have also allowed beneficiaries to enforce the NRHA. See *Grammer v. John J. Kane Reg. Ctr.*, 570 F.3d 520 (3d Cir. 2009); *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003). Attorneys representing estates of deceased individuals injured in a nursing facility have sought to enforce provisions of the NHRA against private nursing homes, without success. See, e.g., *Prince v. Dicker*, 29 F. App'x 52, 54 (2d Cir. 2002); *Roberts v. Woodcrest Manor Care Ctr.*, No. 12-200-DLB, 2012 WL 6652502 (E.D. Ky. Dec. 20, 2012).

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2. Whether, assuming Spending Clause statutes ever give rise to private rights enforceable via Section 1983, FNHRA's transfer and medication rules do so.⁴³

National and state trade association and 17 states (IN, AK, AR, ID, KS, KY, LA, MT, NE, NH, OH, OK, SC, SD, TX, UT, WV) have filed amicus briefs supporting the petition. Mr. Talevski waived his right to file a response brief; however, the Court has requested a response (due March 11, 2022).

- The reasonable promptness provision:

Since the inception of the Medicaid program, beneficiaries have enforced 42 U.S.C. § 1396a(a)(8) to ensure states furnish medical assistance with reasonable promptness. All seven of the circuit courts to have reviewed the provision (the 1st, 3d, 4th, 5th, 6th, 10th, and 11th) have held it creates an enforceable right (with the 10th and 11th circuit decisions pre-dating *Gonzaga*). At least 54 district courts have recognized an enforceable right (40 of them in decisions post-dating *Gonzaga*), with only handful of them concluding otherwise.

Nevertheless, the reasonable promptness provision under intense scrutiny.⁴⁴ The Fifth Circuit expressed some skepticism in *Thurman v. Medical Transportation Management, Inc.*⁴⁵ The court had initially dismissed the case but reopened it so that it could decide "whether *any* agency regulation can ever independently create individual rights enforceable through § 1983."⁴⁶ Not surprisingly, it held regulations cannot establish enforceable federal rights; only statutes can do that.⁴⁷ The court rejected reliance on section (a)(8) as a statute, finding that it does not "even come close" to establishing an enforceable right to transportation because it "do[es] not mention transportation at all" and "at most, establish[es] only a right to receive certain health care services."⁴⁸

Seventh Circuit courts have also been active. The decision causing the most concern occurred in 2020, *Nasello v. Eagleson*.⁴⁹ In this case, nursing home residents complained that Illinois was improperly calculating the amount of medical expenses that individuals need to incur before Medicaid would begin paying for their care. They

⁴³ Petition for Writ of Certiorari, *Talevski*, No 21-806 (U.S. Nov. 23, 2021).

⁴⁴ For discussion of additional considerations when seeking to enforce (a)(8), see Jane Perkins, Nat'l Health Law Prog., *Q&A Medicaid's Reasonable Promptness Provision Gets Tested* (Nov. 28. 2019) (available from NHeLP or NDRN).

⁴⁵ *Thurman v. Medical Transportation Management, Inc.*, 982 F.3d 953 (5th Cir. 2020).

⁴⁶ *Id.* at 956 (regarding 42 C.F.R. § 431.53, requiring states to "ensure necessary transportation for beneficiaries to and from providers").

⁴⁷ *Id.* at 957.

⁴⁸ *Id.* at 958.

⁴⁹ *Nasello v. Eagleson*, 977 F.3d 599 (7th Cir. 2020).

included a claim based on the reasonable promptness provision. The district court dismissed the case.⁵⁰ The Seventh Circuit affirmed. Without acknowledging the traditional *Gonzaga/Blessing* enforcement test, Judge Easterbrook said the Medicaid Act

does not establish anyone's entitlement to receive medical care (or particular payments); it requires only compliance with the terms of the bargain between the state and federal governments. Congress could make those terms enforceable in suits by potential beneficiaries such as plaintiffs, but it has not done so. Instead it has created a system of administrative remedies.⁵¹

The court, however, skirted a direct hit on (a)(8). Though expressing "skepticism" about the reasoning of the other circuits, the court assumed that (a)(8) is enforceable, "without suggesting that we would follow the other circuits if push came to shove."⁵² It then upheld the lower court dismissal based on the merits.⁵³

Now, push is coming to shove, and two district courts have held (a)(8) unenforceable. In *St. Anthony Hospital v. Eagleton*, an Illinois court rejected an (a)(8) claim by a health care provider, noting that the provision refers only to individuals.⁵⁴ But citing *Nasello*, Judge Seeger also concluded that the provision is not enforceable because it is merely a condition for a state's participation in the Medicaid program.⁵⁵ And despite more than 60 court cases enforcing (a)(8), he also concluded that (a)(8) is "too murky and amorphous to create enforceable rights."⁵⁶ Soon thereafter, *Daly v. Eagleton*, No. 1:19-cv-06020, 2021 WL 4439428 (N.D. Ill. Sept. 27, 2021), relied on *Nasello* and *Saint Anthony Hospital*, without analysis, to dismiss nursing home residents' (a)(8) claim with prejudice.⁵⁷

Saint Anthony Hospital is now before the Seventh Circuit (No. 21-2325). As of the date of this Fact Sheet, the Hospital's reply brief had been filed but oral argument was not yet scheduled.

⁵⁰ No. 18 C 7597, 2019 WL 4958239 (N.D. Ill. Oct. 8, 2019).

⁵¹ 977 F.3d at 601.

⁵² *Id.* at 602.

⁵³ The court read section (a)(8) as concerning only the timing of benefits, while the plaintiffs' "grievance concerns not the *time* at which ongoing benefits are paid but the *amount* of those benefits." *Id.* at 602.

⁵⁴ *St. Anthony Hospital v. Eagleton*, No. 20-cv-2561, 2021 WL 2894169, at *13-14 (N.D. Ill. July 9, 2021), appeal docketed, No. 21-2325 (July 7, 2021).

⁵⁵ *Id.* at *13.

⁵⁶ *Id.* at *14.

⁵⁷ *Daly v. Eagleton*, No. 1:19-cv-06020, 2021 WL 4439428, at *7 (N.D. Ill. Sept. 27, 2021).

- The freedom of choice provision:

The freedom of choice provision requires the state to ensure that “any individual

eligible for medical assistance . . . may obtain such assistance from any . . . person, qualified to perform the service. . . .” 42 U.S.C. § 1396a(a)(23).

Until 2017, all six federal circuits to have reviewed the provision (the 4th, 5th, 6th, 7th, 9th, and 10th) allowed beneficiaries to enforce it.⁵⁸ A split was created when the Eighth Circuit ruled, 2-1, otherwise.⁵⁹ The Supreme Court refused to address the split in 2018, over the dissent of Justices Thomas, Alito, and Gorsuch.⁶⁰

Then, in 2020, the Fifth Circuit reversed course and concluded that, while (a)(23) “does give a Medicaid beneficiary the right to receive care or services from a provider that a State has determined is ‘qualified,’” it does not give beneficiaries a right to contest a state’s decision that a provider is not qualified.⁶¹ NHeLP has discussed this decision in a previous Q&A.⁶²

So, where does this leave private enforcement of (a)(23)? Five circuits hold that it is privately enforceable (the 4th, 6th, 7th, 9th, and 10th); one (the 8th) holds it is not; and one (the 5th) holds the provision, at best, only creates a right to receive care from a state-designated qualified provider.

The case to watch comes from the Fourth Circuit. As noted, that circuit previously allowed private enforcement, on appeal from entry of a preliminary injunction.⁶³ Thereafter, the district court entered a permanent injunction.⁶⁴ The State has appealed that ruling to the Fourth Circuit, asking it to reverse based on the Fifth Circuit’s decision. Oral argument in the case occurred on January 26, 2022. The panel (Wynn, Wilkinson, Richardson) focused on law of the case/law of the circuit, with Judge Richardson raising some questions on mootness. Justices Wynn and Wilkinson vigorously questioned the State’s counsel and, at times, spoke forcefully about the

⁵⁸ *Pl. P’hood of So. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019), cert. denied, 141 S. Ct. 550 (2020); *Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Gee*, 862 F.3d 445 (5th Cir. 2016), rehearing denied, 876 F.3d 699 (2017), cert. denied, 139 S. Ct. 408 (2018); *Pl. P’hood of Ariz. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), cert. denied, 571 U.S. 1198 (2014); *Pl. P’hood v. Ind. v. Comm’r*, 699 F.3d 962 (7th Cir. 2012), cert. denied, 133 S. Ct. 2736 (2013); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

⁵⁹ *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017).

⁶⁰ *Gee v. Pl. P’hood of Gulf Coast*, 139 S. Ct. 408 (2018) (Thomas, Alito, Gorsuch, JJ, dissenting).

⁶¹ *Pl. P’hood of Greater Tex.*, 981 F.3d 347 (2020), vacating, 913 F.3d 551 (5th Cir. 2019), and overruling *Pl. P’hood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017).

⁶² Jane Perkins, Nat’l Health Law Prog., *Q&A 2020 Circuit Decisions on Private Enforcement of the Medicaid Act* (Dec. 29, 2020) (available from NHeLP or NDRN).

⁶³ *Pl. P’hood of So. Atl.*, 941 F.3d 687 (4th Cir. 2019), cert. denied, 141 S. Ct. 550 (2020).

⁶⁴ *Pl. P’hood of So. Atl v. Phillip.*, 87 F. Supp. 3d 443 (D.S.C. 2020), on appeal, No. 21-2325.

importance of (a)(23) in ensuring that low-income people have a choice of health care providers. The audio is available at [**this link**](#), and it is highly recommended that advocates, if able, listen to it—particularly the judges' questions to State's counsel on rebuttal.