Case Explainer: *Medina v. Planned Parenthood of South Atlantic*—Certiorari Granted

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On December 18, 2024, the Supreme Court agreed to hear a case presenting the question: does the Medicaid free choice of provider provision, 42 U.S.C. § 1396a(a)(23)(A), unambiguously confers a right upon beneficiaries to choose a specific provider? After giving some background on enforcement of the Medicaid Act, this Case Explainer focuses on this case.[1]

Background on Private Enforcement of the Medicaid Act[2]

The Medicaid Act does not authorize individuals to bring enforcement actions in court. However, a civil rights statute, 42 U.S.C. § 1983, provides an express cause of action when a state actor is depriving an individual of rights that are "secured by the Constitution and laws." In 1980, the Supreme Court held that "the phrase 'and laws' … means what it says," and § 1983 enforcement extends not only to constitutional rights but also to federal laws. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (concerning a provision of the Social Security Act, of which Medicaid is a part).

Just a year after *Thiboutot*, the Court began to restrict use of § 1983, targeting Spending Clause enactments, such as Medicaid. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), the Court refused to allow individuals to enforce the Developmentally Disabled Assistance and Bill of Rights Act, which called for treatment in least restrictive settings. The Court announced: "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." *Id*. at 28.

[1] When certiorari was granted, the case was called *Kerr v. Planned Parenthood*. Eunice Medina has since become the Interim Director of the South Carolina Department of Health and Human Services and, under federal rules, is substituted as the petitioner.
[2] For more discussion, *see*, *e.g.*, Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 ST. LOUIS UNIV J. OF LAW & HEALTH POL. 207 (2016).

Some years later, in *Blessing v. Freestone*, 520 U.S. 329, 344 (1997), the Court applied what it labelled its "traditional three criteria for identifying statutory rights" to further limit private enforcement. The criteria ask: (1) Is the provision in question intended to benefit the plaintiff? (2) Is the provision written with enough specificity that a court knows what to enforce? (3) Does the provision create a binding obligation on the state? If these questions are answered affirmatively, there is a presumption that the provision is enforceable. The defendant can overcome the presumption only by showing that Congress has foreclosed § 1983 enforcement expressly or by including a comprehensive remedial scheme in the underlying federal law. *Id*. at 347-48.

Gonzaga University v. Doe, 536 U.S. 273 (2002) clarified the enforcement test. The wording of the statute in question must show that Congress meant to confer a clear and unambiguous right upon the individual plaintiff. The provision must contain "rights- or duty-creating language" and have an individual rather than aggregate focus. *Id*. at 279. While citing *Blessing* with favor in some parts of the opinion, the *Gonzaga* Court did not apply the three-part *Blessing* test and instead focused exclusively on whether the provision evidences congressional intent to create an individual federal right.

In 2023, the Court once again reviewed enforcement via § 1983. In *Health & Hospital Corporation of Marion County, Indiana v. Talevski*, 599 U.S. 166 (2023), the Talevskis alleged that a Health and Hospital Corporation (HHC) nursing facility violated Mr. Talevski's rights under the Medicaid Nursing Home Reform Act (NHRA) to be protected from unnecessary chemical restraints and unwanted transfers. The Supreme Court decided two questions, ruling for the Talevskis by a wide margin on both:

> *Spending Clause enforcement*: Citing *Pennhurst*, HHC argued that Spending Clause enactments are contracts between the federal government and a willing state and that individuals are third party beneficiaries of those contracts. HHC told the Court that, when § 1983 was enacted in the 1870s, third party beneficiaries were barred from enforcing contract obligations and, thus, should be barred now. All the justices, except Justice Thomas, disagreed. The Court found HHC's argument "at a minimum, contestable" and said something more than "ambiguous historical evidence" was needed to overrule prior decisions. *Id*. at 179.
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> *NHRA enforcement*: HHC next argued that the NHRA provisions could not be privately enforced because they focused on what states/nursing facilities must do, not on individual beneficiaries. All the justices, except Justice Thomas, rejected this argument. The Court confirmed that "*Gonzaga* sets forth our established method for ascertaining unambiguous conferral." *Id*. at 183. Noting this "precedent sets a demanding bar," the majority concluded that the NHRA provisions cleared that bar because of they focus on individual residents and "resident's rights." *Id*. at 180. Acknowledging HHC's argument that the provisions established who it is that must respect these rights, the Court observed, "Indeed, it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the

rights bearers, the actors that might threaten those rights (and we have never so held)." *Id*. at 185. Finally, by a 7-2 margin (Justices Alito and Thomas dissenting), the Court concluded that HHC did not rebut the presumption that beneficiaries can enforce the NHRA provisions. *Id*. at 190.

The current state of Medicaid enforcement

Since *Gonzaga* was announced in 2002, federal circuit courts have decided 63 cases that assess whether a Medicaid provision can be privately enforced.[3] These courts have considered 31 different Medicaid provisions. Their decisions focus overwhelmingly on whether the provision in question unambiguously manifests congressional intent to confer an individual right.

The courts' track record shows a common understanding of the enforcement test, as disagreements among them are quite rare. The only significant disagreement involves the free choice of provider provision. Until 2017, all six federal circuits to have reviewed the provision (the 4th, 5th, 6th, 7th, 9th, and 10th) had concluded it can be enforced via § 1983. A conflict arose when the Eighth Circuit ruled, 2-1, otherwise. *See Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017) (regarding exclusion of Arkansas Planned Parenthood clinics from participating in the Arkansas Medicaid program because they provided abortion services). This Eighth Circuit case was one of a handful that arose after edited videos were circulated purportedly depicting Planned Parenthood Federation of America executives negotiating with undercover journalists for the sale of fetal body parts.[4] The Fifth Circuit subsequently joined the Eighth in rejecting private enforcement in a Planned Parenthood case. *See Pl. P'hood of Greater Tex. Fam. Pl. & Prevent. Health Servs. v. Kauffman*, 981 F.3d 347, 357 (5th Cir. 2020), *vacating*, 913 F.3d 551 (2019), *and overruling*, *Pl. P'hood of Gulf Coast v. Gee*, 862 F.3d 445 (2017).[5]

[3] A Seventh Circuit case recognizing providers' ability to enforce 42 U.S.C. § 1396u-2(f), regarding timely claims payment in managed care networks, has been vacated and is being reheard. It is not included in this total. *See St. Anthony Hosp. v. Whitehorn*, 40 F.4th 492 (7th Cir. 2022), *cert. granted, vacated, & remanded in light of Talevski*, 143 S. Ct. 2634 (June 20, 2023), *on remand*, 100 F.4th 767 (7th Cir. Apr. 25, 2024), *vacated & reh'g granted*, No. 21-2325, 2024 WL 3451942 (7th Cir. July 24, 2024).

[4] Not only were the videos edited, the underlying allegations against PPFA were not proven. *See*, *e.g.*, *Planned P'hood of Kan. v. Andersen*, 882 F.3d 1205, 1212 (10th Cir. 2018).

[5] *See also Akula v. Russo*, No. 23-30046, 2023 WL 6892182 (5th Cir. Oct. 19, 2023) (rejecting provider's argument that he had a right under § 1983 to participate in Medicaid until he is convicted of a crime, finding nothing in the text and structure of the free choice provision indicates Congress intended to create new individual rights).

The case before the Supreme Court

The Supreme Court has agreed to decide whether the Medicaid free choice of provider provision unambiguously confers a right upon Medicaid beneficiaries to choose a specific provider. *See Planned P'hood of S. Atl. v. Kerr,* 95 F.4th 152 (4th Cir. 2024) (*Kerr II*), *cert. granted in part*, No. 23-1275, 2024 WL 5148085 (Dec. 18, 2024).

Kerr II reaffirmed the Fourth Circuit's previous holding that allowed Medicaid beneficiaries to enforce the free choice provision via § 1983. *Kerr*, 27 F.4th 945 (4th Cir. 2022) (*Kerr I*). The Supreme Court granted certiorari in that case and vacated and remanded it to the Fourth Circuit in light of *Talevski*, 143 S. Ct. 2633 (2023). Nevertheless, it is worth noting the court's opening reminder in *Kerr I*:

> This case arises out of South Carolina's termination of Planned Parenthood South Atlantic's Medicaid provider agreement, an action that South Carolina took because Planned Parenthood offers abortion services. But this case is not about abortion. It is about Congress's desire that Medicaid recipients have their choice of qualified Medicaid providers.

27 F.4th at 948.

As with *Kerr I*, the *Kerr II* opinion was written by Judge J. Harvie Wilkinson III who, over the years, has authored a number of Medicaid opinions for that court. By any standards, his decision is thorough and well-considered. At the outset, the court verifies the high bar for private enforcement:

> Although federal statutes have the potential to create § 1983-enforceable rights, they do not do so as a matter of course.... And for Spending Clause legislation in particular, like the Medicaid Act, the typical remedy for state noncompliance with federally imposed conditions is ... action by the Federal Government to terminate funds to the State.

95 F.4th at 160 (quoting *Talevski,* 599 U.S. at 183) (cleaned up). The court then turned to the State's primary argument—that *Talevski* did not apply the three-factor *Blessing* test and instead confirmed that *Gonzaga*, not *Blessing*, set forth the correct test. The State said this marked a doctrinal transformation that resulted in the unenforceability of the free choice provision. The Fourth Circuit disagreed, tracing Supreme Court decisions on private enforcement, and concluding that *Talevski* "was not such a dramatic departure from precedents past," *id*. at 160-63:

> There are somewhat varying formulations and somewhat different emphases on the matter of statutory creation of privately enforceable rights under § 1983. But any inconsistency should not be exaggerated, because one central inquiry eclipses all the rest. Throughout, the Court's decisions have asked whether

> Congress conferred a clear and unambiguous right upon a discrete class of beneficiaries. Absent that crucial grant, the federal statute has not made available a private right actionable under § 1983.

Id. at 163. However, the court rejected the argument that *Talevski* superseded *Blessing*.

> We … remain bound by *Blessing* until given explicit instructions to the contrary…. It is thus not up to us to assess the degree to which *Blessing* has or has not fallen into disfavor with the Court…. [W]ith or without *Blessing*, the central analysis remains the same. *Talevski* recognized that courts are to look primarily to *Gonzaga* to ascertain whether Congress has unambiguously conferred individual rights upon a class of beneficiaries to which the plaintiff belongs.

Id. at 164 (citing *Talevski*, 599 U.S. at 183) (cleaned up).

Assessing the free choice provision according to the inquiry set forth in *Talevski*, the court concluded the provision speaks "in terms that could not be clearer in unambiguously conferring rights." *Id*. at 168; *Id*. at 165 (noting (23)(A) focuses on "discrete beneficiaries" and guarantees them a choice of provider free from state interference). The court made three final points:

- A provision need not use the word "right" to be found enforceable: "We reject the invitation to strip Congress of its prerogative to use synonyms. To hold otherwise would be to limit Congress to a thin thesaurus of our own design." *Id*. at 166.

- A provision does not lose individual focus because it speaks to the government officials overseeing the funding: "[I]t would be strange to hold that a statutory provision fails to secure rights imply because it considers, alongside the rights bearers, the actors that might threaten those rights." Id. at 167 (quoting *Talevski*, 599 U.S. at 185). The court also pointed out that Congress rejected this viewpoint. *Id*. (citing 42 U.S.C. § 1320a-2, which expressly recognizes that provisions of the Social Security Act can be enforced through § 1983 even though they are a section of the Act that specifies the contents of a state plan).

- The Medicaid Act's promise to maintain federal funding so long as the state is in "substantial compliance" with the funding conditions, 42 U.S.C. § 1396c, does not introduce an aggregate, rather than individual, focus: "[T]his cannot be right after *Talevski*, which considered two provisions of the FNHRA . . . [which] operates via a substantial compliance regime." *Id*. at 168.

Conclusion

In *Kerr II*, the Fourth Circuit provided a thoughtful decision concluding that the free choice provision can be enforced through § 1983. Nevertheless, given the split among

the circuits, it was perhaps inevitable that the case would make its way to the Supreme Court again. At this point, there are questions without answers, for example: Will the subject matter of the case—abortion services—affect the Court's approach to the question of private enforcement? Will the Court reaffirm or modify the enforcement test it recently reaffirmed in *Talevski*? Will the Court narrowly focus its review on the free choice provision or write more expansively with respect to enforcement of the Medicaid Act, Spending Clause enactments, or federal laws generally?

The Court's decision is expected by the Summer of 2025. The National Health Law Program will continue to monitor and report on the case as it moves forward.