NO. 17-1492

In The

Supreme Court of the United States

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,

Petitioner,

v.

PLANNED PARENTHOOD OF GULF COAST, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF TWENTY-SEVEN FAMILY POLICY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

All twenty-seven *Amici curiae* joining in this brief are non-profit family policy councils and alliances. These organizations collectively advocate for policies and legislation supporting life, marriage, and the family. All support a state's ability to disqualify Medicaid providers that do not reflect the healthcare priorities of the individual states. The complete list follows:

Alaska Family Action, Center for Arizona Policy, California Family Council, Florida Family Policy Council, Indiana Family Action, Indiana Family Institute, The Family Leader of Iowa, Family Policy Alliance of Kansas, The Family Foundation of Kentucky, Louisiana Family Forum, Christian Civic League of Maine, Massachusetts Family Institute, Mississippi Center for Public Policy, Montana Family Foundation, Nebraska Family Alliance, Nevada Family Alliance, Cornerstone Action of New Hampshire, New Jersey Family Policy Council, North Carolina Family Policy Council, North Carolina Values Coalition, Pennsylvania Family Council, Family Action Council of Tennessee, Texas Values, The Family Foundation of Virginia, Family Policy Council West Virginia, Family Policy Institute of Washington, and Wisconsin Family Council.

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[1] No party's counsel authored any part of this brief. No person other than *Amici* contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice of the intent to file and have consented to the filing of this brief.

INTRODUCTION

Medicaid's free-choice-of-provider provision guarantees that a Medicaid beneficiary within a state is entitled to visit any qualified provider within that particular state. 42 U.S.C. § 1396a(a)(23). If a state fails to follow the requirements of § 1396a(a)(23), Congress has authorized the Secretary of the Department of Health and Human Services to withhold federal funding. When a provider is terminated from the Medicaid program, federal regulations require that the state provide an appeals process to the disqualified provider.

Rather than pursue the remedies already available under the rules and regulations of the Medicaid program, Respondents—which include a medical provider and several of its patients—and others similarly situated sought to pursue their claims in federal court, asserting a private right of action pursuant to § 1396a(a)(23). As Petitioners discuss in their Petition for Certiorari, this Court has already found that § 1396a(a)(23) does not contain an implied private right of action. *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) (involving a similar Medicaid provision).

Moreover, Congress has not evinced an "unambiguous intent" to create a private right of action under § 1396a(a)(23), and therefore such litigants must follow the system of remedies created by Congress. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002). Several Courts of Appeals have addressed the question of whether § 1396a(a)(23) provides an

implied right of action, and have reached different conclusions. *Compare Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017) (finding that § 1396a(a)(23) does *not* contain an implied private right of action), *with Planned Parenthood v. Gee*, 862 F.3d 445 (5th Cir. 2017) (finding that § 1396a(a)(23) contains an implied private right of action); *Planned Parenthood v. Betlach*, 727 F.3d 960 (9th Cir. 2013) (same); *Planned Parenthood v. Andersen*, 882 F.3d 1205 (10th Cir. 2018) (same); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (same); and *Planned Parenthood v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012) (same).

Proper administration of the cooperative federal-state Medicaid program is an issue of great national importance, and *Amici* urge this Court to resolve the divergence among the Courts of Appeals.

SUMMARY OF THE ARGUMENT

The Medicaid free-choice-of-provider provision found in 42 U.S.C. § 1396a(a)(23) does not allow individuals to maintain a private right of action challenging a state's determination that a provider is no longer qualified to provide Medicaid services. For laws enacted under the Spending Clause power, this Court has made clear that Congress must speak with an unambiguous intent to confer individual rights enforceable under 42 U.S.C. § 1983. *Gonzaga*, 536 U.S. at 280. To allow private litigants to enforce the free-choice-of-provider provision would frustrate the purposes and intent of the Medicaid statute, which explicitly creates an administrative enforcement regime. Medicaid is a federal-state cooperative

program that must be run according to uniform standards, remedies, and enforcement mechanisms to promote the intent of Congress. Permitting private litigants to sue every time a state terminates a provider's ability to administer Medicaid services undermines this uniformity–especially when the circuit conflict results in differing remedies depending on the state where the beneficiary is located.

The existence of an implied private right of action would permit Medicaid beneficiaries to pursue the vindication of federal rights in federal court, in parallel with a provider challenging its disqualification pursuant to the remedies that the state must provide, possibly producing inconsistent results. Moreover, it would open the states to immeasurable liability, siphoning funds away from state healthcare funding. Congress surely did not intend such an absurd result.

For all of these reasons, Respondents and those similarly situated cannot be permitted to enforce the free-choice-of-provider provision in the federal courts. *Amici* urge that this Court grant the petition to resolve this important question of federal law and of great national significance.

ARGUMENT

In determining whether a private right of action exists, this Court places primary emphasis on congressional intent. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine

whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative.") (internal citations omitted). When legislation is enacted pursuant to Congress' spending power—such as Medicaid—this Court has clarified that "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 State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). This Court has also "made clear that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Gonzaga*, 536 U.S. at 280 (citing *Pennhurst*, 451 U.S. at 17, 28, & n. 21). It is evident that Congress has not communicated an intent to create an implied private right of action pursuant to § 1396a(a)(23), and that Congress' intent would be substantially frustrated by such a finding.

I. Failure to follow the scheme of remedies already provided in the Medicaid statute frustrates congressional intent to create a uniform administrative process for efficiency purposes.

This Court has noted that, when a statute explicitly provides alternate remedies, or penalties, or specifically directs enforcement of its protections to parties such as government officials or agencies, the existence of such a remedy suggests that Congress' omission of a private remedy was intentional. *See*

Gonzaga, 536 U.S. at 287; *Sandoval*, 532 U.S. at 288; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568–71 (1979); *Cort v. Ash*, 422 U.S. 66, 79–80 (1975); *Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers*, 414 U.S. 453 (1974). Congressional intent not to provide a private right of action can be evident where Congress has created "a comprehensive scheme of enforcement that is incompatible with individual enforcement under § 1983". *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). Allowing a private right of action pursuant to § 1396a(a)(23) would frustrate the intent of Congress to provide the existing uniform process of remedies.

Congress expressly created a remedy for the enforcement of § 1396a(a)(23). Pursuant to 42 U.S.C. § 1396c, the Secretary of Health and Human Services is permitted to withhold the payment of federal funds where "there is failure to comply substantially with any" provision of 42 U.S.C. § 1396a, which includes the free-choice-of-provider provision. As this Court detailed in *Armstrong*, "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services." 135 S. Ct. at 1385 (holding that Medicaid beneficiaries cannot bring a private right of action to challenge the reimbursement rate standard contained in § 1396a(a)(30)).

Congress further authorized the HHS Secretary to promulgate regulations pertaining to the methods of administration of a state Medicaid plan "as are

found by the Secretary to be necessary for the proper and efficient operation of the plan." 42 U.S.C. § 1396a(a)(4). Pursuant to these regulations, states are required to give providers a right to appeal when they are terminated from the Medicaid program. *See* 42 C.F.R. § 1002.213 ("the State agency must give the individual or entity the opportunity to submit documents and written argument against the exclusion. The individual or entity must also be given any additional appeals rights that would otherwise be available under procedures established by the State.").

As the Eighth Circuit has noted, "[b]ecause other sections of the Act provide mechanisms to enforce the State's obligation under § 23(A) to reimburse qualified providers who are chosen by Medicaid patients, it is reasonable to conclude that Congress did not intend to create an enforceable right for individual patients under § 1983." *Gillespie*, 867 F.3d at 1041. To imply a private right of action would frustrate the intent of Congress, which already created a uniform administrative remedy to challenge states' disqualification of Medicaid providers.

Creating a right to an administrative appeal instead of a private right of action furthers administrative efficiency, which is lost without uniformity. Respondents' decision to bypass the process set up by Congress by filing a federal lawsuit eliminates the efficiencies created by uniform administrative procedures, and undermines congressional intent and purpose to provide an efficient scheme of remedies. Moreover, allowing

states to expertly and efficiently manage which providers qualify to administer Medicaid funds is undermined by judicial intervention in a state's decision-making processes.

The fact that Congress has provided a comprehensive scheme for the enforcement of the requirements contained in 42 U.S.C. § 1396a precludes an intent to create an implied private right of action. Indeed, "the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Armstrong*, 135 S. Ct. at 1385 (citing *Sandoval,* 532 U.S. at 290).

II. The Medicaid statute is undermined by the patchwork of remedies produced by a system of differing enforcement mechanisms.

Disagreement among the Courts of Appeals has disrupted the cooperative federal-state Medicaid program, producing parallel proceedings and affording different rights wholly dependent on the location of the Medicaid beneficiary. Medicaid patients across the country are afforded different rights based on where they live. Pursuant to the Fifth Circuit's decision in Louisiana, a Medicaid beneficiary can file a suit in federal court challenging the disqualification of their Medicaid provider pursuant to § 23(A), rather than utilizing the prescribed administrative proceedings as Congress intended.

Due to the contrary decision in the Eighth Circuit in *Gillespie,* a beneficiary in Arkansas must

rely on the provider itself challenging the decision through the administrative appeals process. In contrast, a beneficiary in Louisiana is permitted to challenge a Medicaid provider's termination in federal court under the Fifth Circuit's decision here. This can occur parallel with the provider challenging the disqualification in administrative proceedings, frustrating the purpose of efficiency underlying the creation of administrative remedies.

As the Eighth Circuit noted when it held that § 1396a(a)(23) does not contain an implied private right of action, "[t]he potential for parallel litigation and inconsistent results gives [the court] further doubt that Congress in §23(A) unambiguously created an enforceable federal right for patients." *Gillespie*, 867 F.3d at 1042. These differing remedies and mechanisms of enforcement are a nightmare in a federally supervised program, resulting in differing standards despite the intention of nationwide uniformity.

This problem is further complicated when a multi-state provider is located in both types of jurisdictions. As noted by Petitioners, in the substantially similar *Andersen v. Planned Parenthood of Kansa*s, Planned Parenthood of the St. Louis Region and Southwest Missouri ("PPSLR") "serves patients in both Missouri and Kansas. The Kansas patients, based on the Tenth Circuit's decision" finding a private right of action under § 1396a(a)(23), "have the right to challenge the termination of PPSLR as their Medicaid provider; meanwhile, PPSLR clients in Missouri, who are

subject to the Eighth Circuit's decision in *Gillespie*, have no such right." *See* Petition for Writ of Certiorari at 24–25, *Andersen v. Planned Parenthood of Kansas and Mid-Missouri* (No. 17-1340) (internal citations omitted).

The prospect of parallel proceedings as well as the provision of differing rights and remedies depending on the location of the Medicaid beneficiary undermines the purpose and intent of the Medicaid statute. If uniform federal standards are not maintained in programs such as Medicaid, it creates an administrative quagmire.

III. The finding of a private right of action would harm the intended purpose of the Medicaid statute of providing healthcare to low-income Americans.

Implying a private right of action under § 1396a(a)(23) will divert necessary funding from healthcare, adversely impacting Medicaid beneficiaries. A statute whose known purpose is harmed by a private remedy indicates that Congress intended not to create one. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that the Indian Civil Rights Act did not contain an implied private right of action, in part because such an action would frustrate the intent of Congress to allow Indian tribes to maintain their own sovereignty). The fact that a private right of action has the potential to cause harm to Medicaid beneficiaries counsels against the finding that one exists.

The purpose of the Medicaid statute is to provide health insurance coverage to low-income Americans. *See* Medicaid, "Program History," https://www.medicaid.gov/about-us/program-history/index.html. Allowing private actions pursuant to § 1983 whenever a Medicaid provider is terminated will result in enormous exposure to attorneys' fees under § 1988 and additional federal court remedies that will divert state resources and funding from healthcare, negatively impacting Medicaid beneficiaries. States will be forced to engage in costly and lengthy litigation, using limited state resources to defend their decisions terminating Medicaid providers in the federal courts.

In 2011 alone, 2,500 unique providers were terminated from the Medicaid program by state action. *See* U.S. Dep't of Health & Human Servs. Office of Inspector General, "Providers Terminated From One State Medicaid Program Continued Participating In Other States," 17, Table B-1 (Aug. 2015), https://goo.gl/PUL9iu. Louisiana took 182 actions terminating Medicaid providers in 2017, and has taken 175 actions this year through March 31. *See* Petition for Writ of Certiorari at 28, *Gee v. Planned Parenthood of Gulf Coast, Inc.* (No. 17-1492). If a private right of action were permitted under § 1396a(a)(23), each of these terminations would open the states to liability pursuant to § 1983 and attorneys' fees under § 1988, costing millions of dollars which could be used to provide healthcare to low-income individuals.

Because an implied right of action has the potential to harm Medicaid beneficiaries, it is very unlikely that Congress evinced an unambiguous intent to create one.

CONCLUSION

The finding of a private right of action pursuant to Medicaid's free-choice-of-provider provision would undermine the congressional purpose of providing efficient, uniform administrative enforcement mechanisms, and would cause undue harm to Medicaid beneficiaries. The uniform application of the Medicaid statute is an important question of federal law and an issue of great national significance. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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