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.; JANE DOE #1; JANE DOE #2; JANE DOE #3, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents concede a circuit split over the question presented, and they cannot deny that the last 20 circuit judges to consider that question (two panels and the Fifth Circuit en banc) have divided 10-10. Yet they suggest that the issue of private rights of action under 42 U.S.C. § 1396a(a)(23)(A) be allowed to "percolate" because the Eighth Circuit could change course, or the federal government might, at an unknown time, issue non-binding guidance. These are paltry reasons. The Eighth Circuit recently rejected en banc rehearing of the question by an overwhelming margin. And the federal government has announced no administrative intent to speak on the issue, much less speak in a way that would help this Court interpret a statute.

That the district court resolved the question presented on a motion for preliminary injunction is no barrier to a grant either. There is no indication the district court will change its mind. And this Court often grants petitions in this context.

Implicitly acknowledging the insufficiency of their objections, Respondents spend the bulk of their brief arguing the merits. But they are wrong in their analysis of the statutory language and this Court's decisions in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), *Armstrong* v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002)). No matter. The fact that litigants are receiving different results based simply on where their cases are pending is reason enough for this Court to resolve the conflict. And as Respondents concede, this case is the best vehicle to do so. The petition should be granted.

ARGUMENT

I. Respondents concede a circuit split regarding individual Medicaid beneficiaries' right to sue under 42 U.S.C. § 1396a(a)(23).

Respondents acknowledge that the circuits are divided over whether Medicaid recipients can bring a § 1983 action and invoke § 1396a(a)(23) to challenge the merits of a state's disqualification of a Medicaid provider. Br. in Opp. 11, 20. Respondents also agree that if the Court decides to address the question presented, this case is the best possible vehicle to do so. Br. in Opp. 28 (noting that the same question is presented in *Anderson* v. *Planned Parenthood of Kansas and Mid-Missouri*, No. 17-1340). Respondents nonetheless resist a grant for a variety of misguided reasons.

First, Respondents point to the split's lopsided nature (5-1 say Respondents) and suggest that the Eighth Circuit's decision in *Does* v. *Gillespie*, 867 F.3d 1034 (8th Cir. 2017), is an "outlier." Br. in Opp. 20–21. The suggestion is that, given enough time, the Eighth Circuit might change its mind. *Id.* at 27. Not so. When recently presented with the issue in an en banc petition, the Eighth Circuit declined review 9-2. So there is almost no likelihood of a change, meaning that litigants in Arkansas, Iowa, Louisiana, Minnesota, Missouri, Nebraska North Dakota, and South Dakota will receive different outcomes than litigants in other states. That is an untenable result. And it ignores that the Second Circuit has also sided with the Eighth Circuit in principle by holding that § 1396a(a)(23) provides no substantive right to support a claim for procedural due process. *Kelly Kare, Ltd.* v. *O'Rourke*, 930 F.2d 170, 178 (2d Cir. 1991).

Next, Respondents say that this Court has twice denied petitions presenting the same question presented. Br. in Opp. 12 (citing *Betlach* v. *Planned Parenthood Ariz., Ind.*, 134 S. Ct. 1283 (2014) (No. 13-621), and *Sec'y of Ind. Family & Social Servs. Admin.* v. *Planned Parenthood of Ind., Inc.*, 569 U.S. 1004 (2013) (No. 12-1159)). What Respondents do not say is that those petitions were filed and decided *before* the Eighth Circuit decision created the split.

Respondents also suggest that there is no urgency for this Court to resolve the split, because the issue presented simply doesn't arise very often. Br. in Opp. 22. That suggestion ignores the 14 recent cases raising the question of private rights of action under § 1396a(a)(23). *Id.* at 22–23 And it is a disingenuous argument for Planned Parenthood to make. Mere days before this brief was filed, Planned Parenthood and a putative class of private beneficiaries brought yet another such action against South Carolina. *Planned Parenthood South Atlantic and Julie Edwards, on her behalf and on behalf of all others similarly situated* v. *Baker*, No. 2:18-cv-2078-BHH (D.S.C.) (filed July 27, 2018). There will undoubtedly be many more of these actions as the plaintiffs' bar seeks to take advantage of § 1983 fee shifting.[1] So the question presented has national importance and is undeniably recurring.

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[1] Relatedly, Respondents assert that "it would be wrong to assume that Medicaid recipients—some of the poorest members of our society—are enthusiastic about the prospect of bringing lawsuits against States under Section 1983." Br. in Opp. 23. But Planned Parenthood subsidizes such actions by providing counsel for those recipients, as happened here.

Respondents alternatively urge the Court to wait to resolve the circuit conflict because this case is at an interlocutory stage. Br. in Opp. 11–12, 24–25. But this Court frequently grants petitions in the preliminary-injunction context. *E.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018); *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018); *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018); *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876 (2018); *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018). And it is particularly appropriate for the Court to exercise its power of review here, where the legal issue presented has national jurisprudential significance and has been fully and completely developed. Moreover, if Respondents lack a private right of action and any substantive rights under § 1396a(a)(23), as Louisiana contends, then there is no right for which Respondents have been denied Equal Protection, which is their only other claim in this case. In other words, this Court's ruling will end the litigation, despite its interlocutory status.

Finally, Respondents ask the Court to wait for the federal government to provide guidance on the question presented. Br. in Opp. 26–27. But there is no need for the administrative state to assist this Court in the inherently judicial function of interpreting the meaning of § 1396a(a)(23). The contrasting positions of the current and previous administrations only underscore the need for clarity regarding the question presented. And there has been no indication the government is preparing to issue such guidance in any event. Granting Respondents' request for delay will only perpetuate the acknowledged conflict and confusion, which is a reason to grant review, not to deny it.

II. The Fifth Circuit's decision is wrong.

Lacking a persuasive procedural reason for denying the grant, Respondents spend most of their opposition brief arguing why the Fifth Circuit panel majority got it right. That issue is largely irrelevant to the propriety of granting the petition, particularly where there is a mature circuit split on an issue of such great importance.

Respondents are also wrong about the merits. They ignore that the remedy for a state's non-compliance with a spending-power act, like the Medicaid Act, is not a private right of action, but rather a federal-government action to terminate state funding. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981). They misapprehend the significance of *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2002), which required "an unambiguously conferred *right* to support a cause of action," not merely a statutorily-conferred individual benefit. *Id.* at 283 (emphasis added). Section 1396a(a)(23)(A) has no express right- or duty-creating language. Respondents fail to rebut Louisiana's argument that *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), defeats their claims about §1396a(a)(23). And they overlook that, contrary to suggesting a private right of action, the Medicaid Act's inclusion of a defunding provision strongly indicates that Congress intended a defunding rather than a litigation remedy. This is particularly so given that Congress also granted the Secretary the ability to waive § 1396a's requirements entirely. 42 U.S.C. § 1396n(b).

These are only some of the many unforced errors in Respondents' petition. For example, Louisiana has never admitted or conceded that Planned Parenthood Gulf Coast is qualified. Contra Br. in Opp. 5, 10, 19–20. The initial decision to terminate was pursuant to the parties' at-will agreement. See La. Rev. Stat. Ann. § 46:437.11(C) ("The provider agreement shall be a *voluntary* contract between the department and the health care provider" (emphasis added)). But that termination was entirely superseded by the subsequent "for cause" notice.

Respondents are wrong that no stay was available had Planned Parenthood chosen to pursue its right to administrative review. Br. in Opp. 5 n.4. Louisiana law provides multiple avenues to ensure continuity of care after a termination. For example, Planned Parenthood could have requested a stay in pursuing its administrative appeal rights under La. Rev. Stat. Ann. § 46:107(A)(3). Indeed, review proceedings under § 46:107 are governed by the Louisiana Administrative Procedures Act, which provides that an agency or a reviewing court may grant a stay. La. Rev. Stat. Ann. § 49:964(B). Louisiana's second termination invoked these regulations and indicated that the agency action would be suspended. Perhaps that is why Respondents agree that the "second termination decision would have been stayed if PPGC had pursued administrative review." Br. in Opp. 5 n.4.

Respondents misapprehend what this case is about when they assert, without citation, that there "is no question *who* Congress intended to benefit in [§ 1396a(a)(23)(A)], or *what* benefit Congress intended to give them. Br. in Opp. 14. Those are

precisely the questions that have given rise to the split among the circuits and this petition. As explained at length in the petition, the better reading of the statute is that Congress did *not* intend to give Medicaid beneficiaries a private right of action every time a beneficiary feels aggrieved about a termination decision.

Respondents make a similar misstep when they criticize Louisiana for making a merits argument in contending that states have "considerable latitude" to determine provider qualifications. Br. in Opp. 19. That latitude actually goes to the core of the private-right-of-action standard under *Gonzaga* and *Armstrong*.

Finally, Respondents err by reframing the question presented. Respondents' proffered question is whether § 1396a(a)(23) "confers *a right* enforceable under 42 U.S.C. § 1983." Br. in Opp. i (emphasis added). The actual question presented is whether "*individual Medicaid recipients* have a private right of action under 42 U.S.C. § 1396a(a)(23) *to challenge the merits of a state's disqualification of a Medicaid provider*." Pet. i (emphasis added). It is only by decoupling the question presented from both the individual Medicaid recipients and what those recipients can challenge that Respondents can even frame an argument that a private right of action exists. This Court's review is warranted.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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