No. 18-1446

IN THE

Supreme Court of the United States

LETTIE SEXTON, EX REL. APPALACHIAN REGIONAL HEALTHCARE, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES AND COVENTRY HEALTH AND LIFE INSURANCE COMPANY D/B/A COVENTRYCARES OF KENTUCKY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the grant of a right to an opportunity for a fair hearing found in 42 U.S.C. § 1396a(a)(3) prohibits a state court from requiring that a party meet the elements of constitutional standing in order to be entitled to judicial review of a state agency's final order.

STATEMENT OF RELATED CASES

- *Sexton v. Commonwealth, et. al.*, No. 14-CI-000542, Harlan Circuit Court. Order entered January 25, 2015.

- *Commonwealth v. Sexton, et. al.,* No. 2015-CA-000246-MR, Kentucky Court of Appeals. Opinion and Order entered September 2, 2016.

- *Commonwealth v. Sexton, et. al.,* No. 2016-SC-000529-DG, Kentucky Supreme Court. Opinion entered September 27, 2018.

- *Sexton v. Commonwealth, et. al.*, No. 2016-SC-000540-DG, Kentucky Supreme Court. Opinion entered September 27, 2018.

- *Coventry v. Sexton, et. al.*, No. 2016-SC-000534-DG, Kentucky Supreme Court. Opinion entered September 27, 2018.

- *Coventry v. Sexton, et. al.*, No. 2017-SC-000095-DG, Kentucky Supreme Court. Opinion entered September 27, 2018.

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BRIEF IN OPPOSITION

Sexton has failed to present a question of federal law worthy of review by this Court. "A petition for writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Among those reasons is that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. R. 10(b). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Here, Sexton's Petition relies on a mischaracterization of the holding by the Kentucky Supreme Court. When the holding of the Kentucky Supreme Court is properly stated, it becomes clear that the Court did not decide "an important federal question," much less "in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." In reality, Sexton merely alleges that the Kentucky Supreme Court misapplied "a properly stated rule of law" stating, "Petitioner maintains that the Court erred in applying the *Lujan* test to deny a beneficiary's right to a state fair hearing under federal law." (Petition at p. 14.) However, the Kentucky Supreme Court did not deny Sexton's right to a state fair hearing through the application of *Lujan*. In fact, the Kentucky Supreme Court explicitly deferred ruling on the application of standing to administrative hearings, stating in no uncertain terms:

> Our decision today is not that the Cabinet correctly decided that Sexton did not have the

> requisite standing to seek redress through an administrative agency hearing; rather, it is that Sexton does not have the requisite standing to seek redress for this alleged injury in a Kentucky court. Whether a party has the requisite standing to seek redress through an administrative agency is an entirely different question than whether a party has the requisite standing to seek redress through a Kentucky court.

Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by and through Appalachian Reg'l Healthcare, Inc., 566 S.W.3d 185, 199 (Ky. 2018), *reh'g denied* (Feb. 14, 2019).

Instead, the Kentucky Supreme Court properly exercised its authority by formally adopting the rule that "it is the constitutional responsibility of all Kentucky courts to consider, even upon their own motion, whether plaintiffs have the requisite standing, a constitutional predicate to a Kentucky court's adjudication of a case, to bring suit." *Id.* The Kentucky Supreme Court further adopted the test for standing articulated by this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Petitioner does not contest the propriety of this holding. (Petition at p. 14.)

Nothing in the Petition challenges the right of the Kentucky Supreme Court to require Kentucky state courts to apply principles of constitutional standing to every case brought, adopting the *Lujan* test as the law of Kentucky. Instead, Sexton argues that the Kentucky Supreme Court erred in applying that test to her. In so

arguing, she fails to state a federal question, but rather challenges the application of state law, which is reserved to Kentucky's highest court. *See West v. Am. Tel. & Tel. Co.,* 311 U.S. 223, 236 (1940) ("The highest court of the state is the final arbiter of what is state law."). Essentially, Sexton merely disagrees with the application of state law.

Sexton's misstatement of the ruling by the Kentucky Supreme Court permeates the Petition. Sexton argues that the Kentucky Supreme Court "rendered meaningless all federal statutes and regulations that require a hearing." That statement is explicitly contrary to the ruling in Sexton, which did not address Sexton's standing to receive a state fair hearing before the Cabinet.

Despite the clear ruling of the Kentucky Supreme Court, Sexton's Petition focuses on an alleged unlimited right to a hearing that she claims is found in 42 U.S.C. § 1396a(a)(3). Even then, she fails to identify a true split of judicial authority or a compelling reason that the Petition should be granted. Further, she misconstrues the plain language of the statute, which merely requires that a state Medicaid agency's State Plan "provide for granting an *opportunity* for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3) (emphasis added). Nothing in the Medicaid Act prohibits the state agency from applying standing requirements to the review of an individual's claims after the opportunity for a fair hearing is granted.

As shown below, Petitioner has mischaracterized the ruling of the Kentucky Supreme Court. She has failed to

present a compelling reason that this Court should grant certiorari. Accordingly, her Petition should be denied.

STATEMENT OF THE CASE

The Medicaid Act established a collaborative federal-state program to assist the poor, elderly, and disabled in obtaining medical care. Under the Medicaid Act, which is Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396v, the federal government provides financial support to states that establish and administer state Medicaid programs in accordance with federal law through a state plan approved by the U.S. Department of Health and Human Services ("HHS"). 42 U.S.C. § 1396; 42 C.F.R. §§ 430.0, 430.10–.20 (2002).

In 1965, pursuant to its Spending Clause authority, Congress added Title XIX to the Social Security Act, thereby establishing Medicaid. *See* Social Security Act Amendments of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 286, 343-52 (1965). Congress invited States to accept significant federal funding in return for providing health insurance coverage for specific groups of people and for a specific set of services with additional groups services optional. Although participation in the Medicaid program is optional, once a state elects to participate, it must comply with the requirements of Title XIX. *Harris v. McRae*, 448 U.S. 297, 301 (1980).

The Cabinet for Health and Family Services, Department for Medicaid Services ("Cabinet") is the state agency designated to administer the Medicaid Act in Kentucky. KRS 194A.010(1); KRS 194A.030(2). In recent years, however, the costs of the program have soared and

the program has expanded as eligibility has expanded. Consequently, Congress and state governments have instituted comprehensive changes designed to improve efficiency and save costs.

In an effort to promote cost-effectiveness and efficiency in the allocation of federal funds under the Medicaid program, Congress enacted a waiver provision allowing states to employ Managed Care Organizations ("MCOs") to provide medical assistance to its Medicaid members. *See* 42 U.S.C. § 1396n; 42 U.S.C. § 1396u–2. Under the managed-care provision, a state may enter into contracts with MCOs to provide health care services to qualifying recipients. 42 U.S.C. § 1396u–2(a)(1). This provision and applicable regulations also permit MCOs to enter into contracts with other health care organizations to provide specialized services, such as dental care or hospital care, and to pay for these services. 42 U.S.C. § 1396u–2; 42 C.F.R. § 438.210.

Effectively, the waiver provision gives a state the discretion to manage its Medicaid population directly, or to contract with a MCO to ensure provision of medically necessary covered services, and to pay the costs of those services in return for a monthly, fixed fee, per enrollee—called a capitation payment. *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 426 (6th Cir. 2013).

Until 2011, Kentucky's Medicaid program covered the majority of its beneficiaries under a fee-for-service system. "In March 2011, the Kentucky General Assembly authorized transitioning from a fee-for-service system to a managed care system." *Ky. Spirit Health Plan, Inc. v.*

Commonwealth Fin. & Admin. Cabinet, 2013-CA-001050-MR, 2015 WL 510852, at *1–2 (Ky. App. Feb. 6, 2015), *as modified* (Aug. 7, 2015). In July 2011, the Commonwealth of Kentucky contracted with three MCOs, including Coventry Health and Life Insurance ("Coventry"), to administer Medicaid benefits to the majority of the Commonwealth's Medicaid population in seven of the eight Medicaid regions. *Appalachian Reg'l*, 714 F.3d at 426.

Among many other duties, the MCOs are required to contract with healthcare providers and hospitals in order to build a network sufficient to meet the needs of their beneficiaries. Coventry and Appalachian Regional Hospital entered into a temporary Letter of Agreement sometime before November 2011. "The temporary agreement was set to expire on June 30, 2012, but allowed the parties to continue it beyond that date or terminate it on 30 days' notice." *Id.* at 427. On March 29, 2012, Coventry sent ARH a letter terminating the agreement effective May 4, 2012. *Id.* at 428. ARH then filed suit against Coventry and the Cabinet, requesting, among other things, that the U.S. District Court enjoin Coventry from terminating the agreement. On June 20, 2012, that Court issued an Order requiring extension of the agreement to November 1, 2012. *Id.* at 429.

Nearly a year and a half after the latest date on which ARH and Coventry could have been considered to have a contract, on April 7, 2014, Lettie Sexton was admitted to Harlan ARH. Sexton was a Coventry enrollee so Harlan ARH sent a request for pre-authorization of medical services to Coventry. Coventry approved a 23-hour observation stay; however, ARH provided all of the requested services, including those beyond the authorization. *Sexton*, 566 S.W.3d at 188.

On April 15, 2014, ARH requested an internal review by Coventry of the pre-authorization denial. *Id.* On May 16, 2014, Coventry upheld its original denial. *Id.* On June 12, 2014, an employee of ARH requested a State Fair Hearing, appealing the denial of payment for medical services. *Id.* at 189.

The hearing officer reviewed the uncontested facts and issued a Recommended Order dismissing the administrative appeal for lack of standing because Sexton had no stake in the outcome because she had been provided all requested services and would owe nothing to ARH for those services. *Id.* The Secretary of the Cabinet for Health and Family Services adopted the Recommended Order, issuing a Final Order dismissing the appeal for lack of standing. *Id.*

Thereafter, Sexton, "by and through her authorized representative, Appalachian Regional Healthcare, Inc.," filed a Petition for Review in the Harlan Circuit Court. The Cabinet filed a motion to dismiss the Petition alleging that 1) Sexton lacked standing, 2) ARH was not Sexton's authorized representative, 3) venue was inappropriate, and 4) the Petition for Review was barred by sovereign immunity because it did not strictly comply with the requirements of KRS 13B.140. *Id.* Coventry also filed a motion to dismiss. *Id.* The state circuit court entered an order overruling the motions, finding that 1) Sexton gave consent to ARH to file the appeal because she designated two of ARH's employees as authorized representatives; 2) the Petition for Review contained the address for ARH in its exhibits and that was sufficient to meet the requirements of KRS Chapter 13B; 3) venue was appropriate because ARH was located in Harlan County;

and 4) because the Petition for Review was sufficient to meet the requirements of KRS 13B.140, the action was not barred by sovereign immunity. *Id.*

The Cabinet then filed an interlocutory appeal with the Kentucky Court of Appeals based upon the denial of its sovereign-immunity defense, naming Coventry and Sexton as appellees. *Id.* The Court of Appeals issued a to-be-published opinion vacating and remanding. *Id.* The Court of Appeals found, in relevant part, that strict compliance with KRS 13B.140 was not required for the waiver of sovereign immunity to apply. *Id.* The Court found an additional waiver of sovereign immunity based on Kentucky statutory language, including Kentucky's Model Procurement Code and Kentucky's Medicaid Act. *Id. T*he Court then found that venue must lie in Franklin Circuit Court, rather than Harlan Circuit Court, pursuant to the Model Procurement Code, and vacated the decision of the Harlan Circuit Court. *Id.* at 190.

Upon receiving the Court of Appeals' opinion, all three parties filed Petitions for Discretionary Review. The Kentucky Supreme Court granted all three petitions, as well as a petition by Coventry to review whether Sexton possesses standing.

REASONS FOR DENYING WRIT OF CERTIORARI

In her attempt to convince this Court to grant certiorari, Sexton grossly misstates the Kentucky Supreme Court's Opinion. That Opinion does not decide an important federal question and does not conflict with another state court of last resort or any federal court of appeals. Instead, Sexton has asked this Court to review

Kentucky's application of state law, merely alleging that the Kentucky Supreme Court misapplied a properly stated rule of law. In fact, Sexton herself has misinterpreted federal law and misapplied the *Lujan* test in an attempt to achieve standing where there is none.

I. The Kentucky Supreme Court's Opinion Does Not Decide An Important Federal Question

The Kentucky Supreme Court's Opinion does not decide an important federal question. Instead, the Kentucky Supreme Court properly held that, as a matter of state law, every court in the Commonwealth must assess a Plaintiff's constitutional standing in order to ensure that only justiciable cases are heard. *Sexton*, 566 S.W.3d at 192. The Court formally adopted the federal test for standing set forth in *Lujan*. This holding is a statement of state law. Sexton does not attempt to contest the Kentucky Supreme Court's authority to restrict the review of all Kentucky state courts to justiciable cases.

After announcing the test for standing in Kentucky's courts, the Kentucky Supreme Court applied that test to Sexton's claims. The Kentucky Supreme Court found that "Sexton has not and will not suffer an 'injury' in this case" because 1) she did not allege that she failed to receive all of the services that she requested, 2) she did not allege that her future medical care will be impaired, and 3) she agreed that she was not financially liable for any of the services that she received. *Id.* at 197. In other words, she had no stake in the outcome of the case. Citing *Summers v. Earth Island Inst.,* 555 U.S. 488 (2009), and *Spokeo, Inc. v. Robins,* ––– U.S. –––, 136 S. Ct. 1540 (2016), the Court also rejected Sexton's argument that "federal and state Medicaid statutes and regulations themselves

create standing for Sexton to sue in court because they mandate a Medicaid State Fair Hearing be conducted to ascertain misconduct on the part of Coventry and that no such hearing was conducted." *Sexton* 566 S.W.3d at 198. The Court held that the failure to hold a hearing, *i.e.,* the alleged deprivation of a procedural right, was insufficient to create standing where the alleged deprivation did not injure her in a concrete and personal way. *Id.* The Court correctly noted that this Court has held that the grant by Congress of a statutory right and purported authorization to sue to vindicate that right does not obviate the requirement that a plaintiff have an injury-in-fact. *Id.*

Finally, and directly at odds with Sexton's description of the opinion, the Kentucky Supreme Court specifically declined to hold that Sexton did not have standing to maintain the administrative action. The Court explicitly stated:

> Our decision today is not that the Cabinet correctly decided that Sexton did not have the requisite standing to seek redress through an administrative agency hearing; rather, it is that Sexton does not have the requisite standing to seek redress for this alleged injury in a Kentucky court. Whether a party has the requisite standing to seek redress through an administrative agency is an entirely different question than whether a party has the requisite standing to seek redress through a Kentucky court.

Id. at 199.

Sexton somehow misses that point and now attempts to challenge the Kentucky Supreme Court's application of Kentucky law to her claims in this Court. Sexton attempts to create a federal question by stating that "Kentucky's highest court rendered meaningless all the federal statutes and regulations that require a hearing." (Petition at 15-16.) That characterization, however, completely ignores the Kentucky Supreme Court's plain statement that it was not reaching the issue of standing before an administrative agency.

Sexton's challenge clearly does not raise a federal question, but rather involves purely a question of state law. Questions of state law are definitively reserved to a state's highest court, as the state is "the final arbiter of what is state law." *See West,* 311 U.S. at 236. "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. Any analysis of state law, therefore, is controlled by the decisions of the state. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

The Kentucky Supreme Court acted well within its authority in applying the *Lujan* standing test to Sexton's claims brought in state court. Contrary to Sexton's assertions, the Court's Opinion did not reach a federal issue. This Court must decline Sexton's attempt to disturb Kentucky's authority as the final arbiter of state law. Sexton's disagreement with that application is certainly not a compelling reason to grant certiorari.

II. The Opinion of the Kentucky Supreme Court Is Not Contrary to Federal Law

By perpetuating her mischaracterization of the Kentucky Supreme Court's opinion, Sexton argues that federal law requires that a state fair hearing be held under all circumstances, thus automatically granting standing to an individual who did not receive a hearing. Sexton misapplies this Court's precedent.

Sexton contends that "the decision of Kentucky's highest court conflicts with 42 U.S.C. § 1396a(a)(3), 42 U.S.C. § 1396u-2, and a host of implementing federal regulations." (Petition at p. 16.) Sexton argues that the Kentucky Supreme Court is bound by the Supremacy Clause to follow those provisions. *Id.* She further contends that the Opinion conflicts with the precedent of this Court. As shown above, the Kentucky Supreme Court did not reach a decision on whether the Cabinet was required to grant Sexton a hearing.

Nevertheless, Sexton misreads federal law and the decisions of this Court to argue that she was deprived of a right granted by Congress and for that reason alone suffered an injury. Contrary to Sexton's urging, 42 U.S.C. § 1396a(a)(3) does not confer on Medicaid beneficiaries an unconditional right to a state fair hearing in every instance. Instead, the statute provides that the state plan "provide for granting an *opportunity* for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness . . . ." 42 U.S.C. § 1396a. (emphasis added). "Medical assistance" is defined as "payment of part or all of the cost of the following care

and services or the care and services themselves." 42 U.S.C. § 1396d. 42 C.F.R. § 431.220 mimics the statute by providing that the state must provide an opportunity for a hearing. The Cabinet met that requirement. Sexton was granted the *opportunity* for a hearing through the process set forth in regulation even after Coventry paid for the cost of approved services. Sexton appealed the denial of payment for unapproved services but could not maintain that appeal because she, herself, has no claim for either payment or services as she received all requested services and cannot be required to pay for those services.

The thrust of Sexton's argument is that 42 U.S.C. § 1396a requires a state's judiciary to provide Medicaid beneficiaries with a forum in which to appeal adverse administrative decisions in all instances—regardless of whether providing such a forum would ever be inconsistent with the state's rules of justiciability. But the statute does no such thing. Instead, it simply requires the opportunity for an administrative hearing. Ms. Sexton received that, but even if she is convinced that she did not receive an adequate opportunity for a hearing, nothing in the statute requires the Kentucky courts to provide her with a forum in which to appeal. If a Medicaid beneficiary believes that his or her right to an opportunity for a fair hearing is being violated, the beneficiary can vindicate that right through some other avenue—such as an action in federal court under 42 U.S.C. § 1983. But nothing requires Kentucky courts to abandon their jurisdictional rules in order to provide beneficiaries with that avenue for relief.

Even so, the Cabinet properly applied the test for standing to Sexton. Keeping in mind that she had received all of the services that she had requested and that she could

not be required to pay for those services under federal law, the Cabinet determined that she had no standing to maintain the appeal. While administrative adjudications are not Article III proceedings to which either the "case or controversy" or prudential standing requirements apply, the application of standing to an administrative setting has been recognized by several circuits.

The Fifth Circuit has held that the "interested person standard is thus the proper test for standing for administrative actions under the APA." *Ecee, Inc. v. Fed. Energy Regulatory Comm'n*, 645 F.2d 339, 350 (5th Cir. 1981). The D.C. Circuit has agreed, holding that, in order to have standing not only before it but also before an administrative agency, the party seeking review must allege an injury within the zone of interest protected by the statute and "may not merely allege the existence of an injury, but must allege 'facts showing that he is himself adversely affected' by the challenged action." *Martin-Trigona v. Fed. Reserve Bd.*, 509 F.2d 363, 365-66 (D.C. Cir. 1974).

The D.C. Circuit reiterated that holding twenty-five years later when it held that the Nuclear Regulatory Commission had the authority to apply the principle of prudential standing to a licensee seeking to intervene in an administrative proceeding pursuant to 42 U.S.C. § 2239(a)(1)(A). That statute is much more direct than the one at issue here, providing "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 75, 78 (D.C. Cir. 1999).

The Federal Circuit has likewise recognized the requirement that a party have a "real interest" in the proceedings and must have a "reasonable" basis for his claim of injury. *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999) (analyzing opposer standing under the Lanham Act.) While it is true that an administrative agency may choose to grant a hearing to one who does not show Article III standing, it is likewise true that the agency may choose to require that an individual show that he or she has standing in order to maintain the administrative action. Accordingly, the Cabinet acted within the boundaries of federal law when it applied the *Lujan* test to Sexton's claims and dismissed her action for want of standing.

In analyzing whether Sexton had standing to seek judicial review of the Cabinet's administrative decision, the Kentucky Supreme Court discussed the interplay between statutory and constitutional standing. The Court explained:

> Constitutional and prudential standing are about, respectively, the constitutional power of a . . . court to resolve a dispute and the wisdom of so doing. Statutory standing is simply statutory interpretation: the question it asks is whether [the legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.

Sexton, 566 S.W.3d at 191 (quoting *Graden v. Conexant Sys., Inc.,* 496 F.3d 291, 295 (3d Cir. 2007)). The Court found that only constitutional standing was at issue because no one alleged that Sexton did not have the

statutory right to bring suit. Instead, the Cabinet and Coventry both argued that Sexton did not have an injury-in-fact that would give rise to standing necessary for a justiciable cause. *Sexton*, 566 S.W.3d at 191-92. The Court found that Medicaid beneficiaries "purported interest in maintaining the integrity of the system" could not satisfy the standing requirement because as this Court held in *Summers*, "[t]he party bringing suit must show that the action injures him in a concrete and personal way." *Id.* at 197 (citing *Summers*, 555 U.S. at 497). The Kentucky Supreme Court further considered and rejected Sexton's argument "that federal and state Medicaid statutes and regulations themselves create standing for Sexton to sue in court because they mandate a Medicaid State Fair Hearing be conducted to ascertain misconduct on the part of Coventry and that no such hearing was conducted." *Id.* at 198.

In rejecting Sexton's argument, the Kentucky Supreme Court relied on this Court's decisions in *Summers* and *Spokeo*. The Court quoted *Summers*, stating that the "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create . . . standing. Only a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 198 (citing *Summers*, 555 U.S at 196). The Court then quoted *Spokeo*, stating that "[i]t is settled that [the legislature] cannot erase [constitutional] standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* (citing *Spokeo*, 136 S. Ct. at 1547-48). The Court adopted the instructions contained in *Spokeo*:

> [The legislature's] role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. [Constitutional] standing requires a concrete injury even in the context of a statutory violation. For that reason, [a plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id. (citing *Spokeo*, 136 S. Ct. at 1549). The Court then properly found that Sexton did not allege the sort of concrete injury to be cloaked with constitutional standing even if she had statutory standing.

The Kentucky Supreme Court's analysis of this Court's jurisprudence is correct. The most important point, however, is that the Kentucky Supreme Court adopted that jurisprudence *as a matter of Kentucky law*. Thus, the Kentucky Supreme Court's decision was rendered purely on the basis of state law. And that plainly makes this case one in which certiorari is inappropriate.

III. Sexton Failed To Identify A Split Of Judicial Authority

Sexton contends that the Kentucky Supreme Court's Opinion conflicts with opinions of the Sixth and Seventh Circuits as well as multiple district courts in the Eastern District of Kentucky. Again, this contention is based on

her mischaracterization of the case. In reality, there is no split of judicial authority.

Sexton cites *Banks v. Secretary of Indiana Family & Social Services Admin.*, 997 F.2d 231 (7th Cir. 1993), as recognizing a Medicaid beneficiary's right to request a hearing under 42 U.S.C. §1396a(a)(3). As stated above, the Kentucky Supreme Court did not deny that Sexton had the right to request a hearing. Instead, it held that she did not have standing to maintain judicial review of the administrative agency's action in dismissing her claims. This holding comports with the holding in *Banks*.

In *Banks*, the Seventh Circuit considered a suit brought by the widow of a Medicaid recipient and a Medicaid recipient "alleging violations of rights secured by the federal Medicaid regulations and constitutional due process. Specifically, the complaint charged that Indiana's Medicaid agency had failed to give notice and an administrative hearing to Medicaid recipients whose health care providers' claims for reimbursement were denied by the state." *Id.* at 234. Both of these individuals brought suit after they were sued for payment of medical bills denied by the Indiana Medicaid agency.

The Seventh Circuit found that these individuals had standing not because of a bare procedural violation, but because they were at risk of economic injury. "Being billed for services rendered under Medicaid, and being sued on the bill, threatened to deprive each plaintiff of her interest." *Id.* at 240. The Seventh Circuit noted that Banks, the widow of the Medicaid recipient for whose claims she was being billed, did not have standing to pursue a claim of violation of her own rights to Medicaid

benefits because she "has been neither billed nor sued by a provider for Medicaid services rendered to her, [and] she can show no injury in fact to her interests." *Id.* at 238 n.6. Sexton's situation is like the personal situation of Banks but directly contrary to that of the Medicaid recipients who were granted standing in *Banks* because Sexton has not been and will not be billed for the services rendered to her.

Sexton also cites *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003), for the proposition that Medicaid beneficiaries have a right to request a hearing. Again, the Kentucky Supreme Court opinion does nothing to contradict that. *Gean* involved three young men formerly in the custody of the state of Tennessee in live-in treatment facilities. Tennessee used the children's Social Security benefits to reimburse the state for their maintenance. One of their claims was denial of due process under the Medicaid Act. *Id.* at 765. Rather than holding that 42 U.S.C. § 1396a(a)(3) creates an unrestricted right to a state fair hearing, *Gean* held that "it is proper for plaintiffs to bring their claim for enforcement of their Medicaid rights under § 1983." *Id.* at 773. *Gean* does not assess standing. Instead, the Sixth Circuit held that the juveniles could not show a violation of clearly established law where they "do not allege that Tennessee failed to provide them with complete and adequate medical benefits while in state care" but rather allege that their Medicaid benefits "were 'suspended, terminated, or reduced' when their Social Security benefits were used to contribute towards the cost of their medical care, and they never received notice of that event." *Id.* *Gean* does not relieve Sexton of her duty *under Kentucky law* to show a concrete injury-in-fact in order to have access to Kentucky courts.

Sexton then points to a case from the Eastern District of Kentucky in support of her theory that 42 U.S.C. § 1396a(a)(3) mandates a hearing without consideration of standing. In that case, however, the Plaintiffs were terminated from eligibility for nursing facility care without a hearing. *Kerr v. Holsinger*, CIV.A.03-68-H, 2004 WL 882203, at *5 (E.D. Ky. Mar. 25, 2004). Despite the allegations of procedural deprivations, the Court still analyzed their standing and found as follows:

> [E]ach Plaintiff has a personal stake in the outcome of this controversy and can claim an injury due to Defendants' decision to terminate certain Medicaid benefits through their application of the 2003 regulations and their alleged failure to provide Plaintiffs with adequate procedural due process. Specifically, they have lost NF and HCBS services under the Medicaid program, a concrete and particularized injury, and they seek to vindicate interests falling within the "zone of interests" protected and regulated by the Medicaid Act, as described above.

Id. at 5. Clearly then, the Kentucky Supreme Court's application of the *Lujan* standing test to Sexton comports with this decision.

Sexton has failed to point to any case that contradicts the Kentucky Supreme Court's decision to require all of its courts to apply the *Lujan* test to determine constitutional standing. In fact, the cases discussed above support the Kentucky Supreme Court's requirement of a concrete injury-in-fact, even where statutory standing has been granted.

CONCLUSION

Petitioner has failed to present a compelling reason why certiorari should be granted. She has failed to show that the Kentucky Supreme Court decided an important federal question, much less one that conflicts with either Supreme Court precedent or a decision of another state court of last resort or a federal court of appeals. She has failed to allege anything other than a misapplication of a properly stated rule of law. Her complaints sound in state law, not federal law. Consequently, Sexton's Petition should be denied.

Respectfully Submitted,

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