No. 20-948

IN THE

Supreme Court of the United States

KOBE,

Petitioner,

v.

BEVERLY BUSCEMI, EMMA FORKNER, KATHI LACY, THOMAS WARING, JACOB CHOREY AND JUDY JOHNSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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The Fourth Circuit's rulings should be reversed because that court applied the wrong standard of review in considering the cross motions for summary judgment. This Court should grant *certiorari* because the case presents issues of national importance and to bring about uniformity in the circuit courts which are currently split on the issues presented in the Petition.

Both *Kobe I* and *Kobe II* Are Reviewable By This Court

Respondent's argue on page 4 that the Fourth Circuit's 2020 decision is the "only decision properly before this Court for review." But the Court's denial of *certiorari* in *Kobe I* was without prejudice. *Urie v. Thompson*, 337 U.S. 163, 172-173 (1949) ("...as this Court has had occasion heretofore to observe, its power to probe issues disposed of on appeals prior to the one under review, is, in the last analysis, a "necessary correlative" of the rule which limits it to the examination of final judgments.) See also *United States v. Virginia,* 518 U.S. 515, 526 (1996). A prior denial of *certiorari* does "not establish the law of the case or amount to res judicata on the points [later] raised." *Hughes Tool Co. V. Trans World Airlines, Inc.*, 409 U.S. 363, 365, n. 1 (1973). Nor does this Court's denial of *certiorari* amount to an affirmance of the interlocutory order as to which review was denied in 2017. As this Court ruled in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916):

> ...although in this instance the interlocutory decision may have been treated as setting "the law of the case" so as to furnish the rule for the guidance of the referee, the District Court, and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.

Summary Judgment Standard

The Court should grant *certiorari* because, in both *Kobe I* and *Kobe II*, the Court of Appeals failed to apply the correct standard in reviewing the district court's grant of summary

judgment to Respondents and in denying of Kobe's motion for summary judgment. In *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986), this Court ruled that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 U.S., at 158-159.

Reply to Respondents' Objections

Respondents argue at pages 4 through 5 that this Court should not grant *certiorari* because the issues he seeks to have this Court review were "previously denied" or, if not so resolved, have not affected the Petitioner. Kobe offers the following in reply.

Kobe I - District Court. The history of this case is nothing short of Kafkaesque. Kobe filed this action in the federal court on May 11, 2011 (ECF 1) and filed an amended complaint on October 18, 2011. ECF 65. Kobe was forced to file an administrative appeal prevent the agencies from terminating his Adult Day Health Care Services. ECF 265-12. A final ruling prohibiting DDSN from terminating those services was not issued for more than a year after that appeal was filed, in conscious disregard for the violation of the reasonable promptness mandate of 42 U.S.C. 1396a(a)(8), in August, 2012. *Doe v. Kidd I,* 501 F.3d 348, 357 (2017).

The parties filed cross motions for summary judgment. On January 6, 2014, Kobe filed a Declaration, along with Declarations of professionals supporting his move to an apartment (ECF 240-23, ECF 24 and ECF 25), stating that:

> 26. I want to live in my own apartment in the community, instead of living in a home with three other people who have disabilities.
>
> 27. Just getting me the wheelchair and a speech device does not solve my problem, because there will be other things I need in the future and unless the State is required to provide services and equipment promptly, once I no longer have a

> elawyer representing me, I will be back in the same place I was, not getting the services and equipment I need when I need them.

ECF 240-22. Six weeks later, District I Director of DDSN, John King, signed an affidavit dated February 21, 2014, informing the district court that Kobe's request for placement in an apartment setting still had not been transmitted to DDSN, thus DDSN had not made a ruling on Kobe's request. ECF 264-1.

Kobe also provided a 2012 audit by the United States Department of Health and Human Services Office of Inspector General (US OIG) requiring DHHS to repay millions of dollars for unallowable costs billed to Medicaid. US OIG reported:

> The State agency claimed unallowable room-and-board costs because neither the State agency nor the Department had adequate controls to ensure that the Department followed applicable Federal law and guidance or its own guidance or to detect errors or misstatements on the local DSN boards cost reports.

On May 7, 2015, the district court granted Respondents' summary judgment on all motions, except those of the Governor's Office, which were settled. Totally ignoring the uncontradicted evidence Kobe presented, instead relying on an email to Kobe's service coordinator, Lynn Lugo, requesting a status report (ECF 279-8 at page 31), the district court concluded that Kobe's request for placement was not ripe because he did not request placement in an apartment setting until December, 2013. 2015 U.S. Dist. LEXIS 198274*5 (May 7, 2015). The court applied the wrong standard by not believing, in fact, completely ignoring Kobe's sworn Declaration in favor of an email. The district court concluded:

> To the extent the court did not address Kobe's claim that Defendants violated his rights by not placing him in a SLP, the court determines that Kobe's claim is not ripe for

judicial review. According to Plaintiffs, Kobe made a request of the Richland/Lexington Disabilities and Special Needs Board to live in an apartment setting in or around December 2013. See ECF No. 279-8, 31. However, there is no evidence regarding if or when the request was forwarded to the Department of Disabilities and Special Needs (DDSN), or whether DDSN has rendered an unfavorable administrative decision or failed to respond to Kobe's request.

Id. The court disregarded these requests made in Kobe's Complaint, Amended Complaint in 2011. The Court also disregarded material evidence contained in the other attachments to Kobe's ECF 279, including:

1. The "DDSN Skills Assessment" Lugo conducted for placement in an SLP on May 21, 2012 at ECF 279-2;

2. Kobe's Declaration at ECF 279-5, swearing that he had requested placement in an apartment setting at every annual plan meeting since this lawsuit was filed;

3. Kobe's DDSN-approved support plan dated October 1, 2013 (ECF 279-6), signed by Lynn Lugo, which included placement in an apartment setting.

Kobe I - Fourth Circuit. The Fourth Circuit ruled in *Kobe v. Haley,* 666 Fed. Appx. 281, 297 (4th Cir. 2016) that there was a "pattern of allegedly unreasonable delays and improper denials" with respect to Kobe's wheelchair and ACD entitlement. Yet, it failed to rule that Respondents were in violation of the reasonable promptness mandate at 42 U.S.C. 1396a(a)(8). That court found that Defendants "have not met their 'heavy burden' of showing that after this litigation has concluded, Kobe will not once again find himself without the equipment he needs and without any ability to obtain it without significant delay."

That court recognized that an SLP would be less restrictive, but, like the district court, failed to view as true, or even consider Kobe's affidavits and other uncontradicted evidentiary material:

> Regarding a contention by Appellants that the court had not addressed Kobe's claim that he was entitled to be placed in a Supervised Living Program ("SLP") apartment, the district court concluded that such a claim was not ripe because "[t]here is no evidence regarding if or when [any request made by Kobe to Rich/Lex] was forwarded to [DDSN], or whether DDSN has rendered an unfavorable administrative decision or failed to respond to Kobe's request."

666 Fed. Appx. 281, 293, fn. 21(4th Cir. 2016).[1] In a footnote, the Fourth Circuit stated that it did not address Kobe's placement issue because it was not ripe:

> Appellants offer no challenge to the district court's ruling that their claim that Kobe is entitled to be provided with an SLP is unripe. Nor do they challenge the ruling that Appellants' claim demanding payment for the speech pathologist who evaluated Kobe and provided him with speech services fell outside the scope of their complaint. We therefore do not address those issues.

In so concluding, the Fourth Circuit overlooked Kobe's opening brief (Doc. 66-1) where he challenged the district court's finding that he had not requested placement in an apartment setting until December, 2013:

1. "At every annual plan meeting, Kobe has informed his service coordinator that he does not choose to live in a congregate setting and that he wants to move to an apartment." JA 4333. (Doc. 66-1 at 36).

[1] On remand, the district court again dismissed claims against Lugo's employer, the Richland Lexington Disabilities and Special Needs Board (RichLex) and its Director, Mary Leitner, despite its findings that RichLex somehow failed to transmit Kobe's requests for placement in an SLP to DDSN for more than two years. If RichLex failed to transmit Kobe's request to DDSN, that fact would support Kobe's conspiracy claim, which may be proven by circumstantial evidence.

2. "After this lawsuit was filed, Kobe chose to move away from the Babcock Center. Because Defendants would not provide funding to allow him to move to an apartment, Kobe moved into a congregate group home operated by United Cerebral Palsy, a private provider." (Doc. 66-1 at 36).

3. "An email from Kobe's service coordinator confirms his request to live in an apartment setting in 2012. JA 4318. See also JA 4397 and affidavit and chronology at JA 4464." (Doc. 66-1 at 36).

4. "The lower court ruled that Defendants still have not ruled upon Kobe's request to receive services in a less restrictive setting, a SLP II. Kobe first requested placement in a less restrictive setting in 2011." (ECF 66-1 at 50).

5. "Treating professionals who have worked with Kobe have opined that he is capable of living in an independent apartment with appropriate supports provided. "(Doc. 66-1 at 52).

6. "Kobe's treating professionals have opined that, with appropriate supports, he could live in his own apartment in an SLP program operated by UCP. JA 3675-3682. UCP has provided a budget that is within the amounts paid for other waiver participants." (Doc. 66-1 at 57).

The Fourth Circuit vacated the district court's order, remanding all other pending claims, including claims for violation of Section 1983, the ADA and Rehabilitation Act, Section 1985 Conspiracy, and RICO, for further proceedings. Id.

Kobe challenged that court's ruling as to his request for placement in a less restrictive setting in a motion for reconsideration or *en banc* review at Doc. 96 at 8:

> On page 50 of his opening brief, Kobe argued that Respondents failed to provide services in a less restrictive setting and refuted the district court's finding that he did not request these services until 2013.
>
> Kobe first requested placement in a less restrictive setting in 2011. A reasonable jury could determine that these denials of services were retaliatory, especially in light of the sworn affidavits Plaintiffs presented documenting a culture of retaliation. JA 1851-1895, 3675. The lower court erred in totally ignoring these

allegations of retaliation and by failing to consider Plaintiffs' request for an order protecting them and their advocates from retaliation in the future.

The Fourth Circuit denied Kobe's motion in Doc. 98 on January 10, 2017 and his Petition for *certiorari* in *Kobe v. McMaster,* 137 S. Ct. 2270 (2017), was denied.

Kobe II - District Court. On remand, the Governor filed a motion to dismiss (ECF 388) and all other parties filed cross motions for summary judgment. ECF 399 (DDSN Defendants), ECF 400 (RichLex Defendants), ECF 402 (DHHS Defendants), ECF 403 (Babcock Center Defendants) and ECF 411 (Kobe). Kobe filed another declaration informing the court under oath that:

> 26. It was not true what the state's attorneys told the court that I had not asked to move to an apartment setting, because I made that request at every plan meeting since I filed this lawsuit.
>
> 27. For years, I have been requesting a bed that will keep my arms out of the railing, but all I got was a mattress and my arms still flail and get caught in the railings.[2]
>
> 28. In 2010, the State placed caps on services, limiting attendant care hours to 28 hours a week and they terminated speech, PT and OT services from the waiver.
>
> 29. I tried for years to get Medicaid to pay for speech services, but I kept being told that speech services were no longer provided.
>
> 30. For a while, I had a speech therapist to help me, but the State refused to pay him.
>
> 31. Finally, after years of asking for these services, a few months ago, I was taken to a speech clinic, but that lasted for only a few weeks, because Medicaid no longer provides these services to adults under the waiver or State Plan.
>
> 32. I recently had a swallowing study done and they recommended insertion of a G tube, because they say I am at risk of aspiration.
>
> 33. Then I was told that if I got a G tube, I would have to move to a nursing home, which really, really got me even more depressed than I already was.

[2] Kobe provided emails documenting that his need for a bed he can control has never been met. ECF 457-3.

34. I am unable to control my bed and I have to wait until a staff member comes in to raise or lower the head of the bed, but if I had a bed I could control, it would make it less likely that I would aspirate.

35. I have been asking for a PT evaluation to determine what model of bed is appropriate, but they keep telling me that PT services are no longer covered by the waiver.

36. Being forced into a nursing home or a DDSN ICF/MR is my biggest fear in life and I worry about it all the time.

ECF 404-6.

As to the evidence Kobe presented in support of his conspiracy claim, he provided the district court with an affidavit signed by former DDSN Commissioner, Deborah McPherson dated January 17, 2017 informing the court that "there was no accountability for state and federal funds and that DDSN consumers were not being protected from abuse, neglect and exploitation." ECF 441-3. McPherson reported that the problems at DDSN identified in a 2008 audit had not been corrected when the Legislative Audit Council returned in 2014. Id. She reported that the Director of DHHS, Emma Forkner informed the governing board of DDSN that caps on services were unavoidable because of budget deficits, but she later learned that when these caps were imposed, the cost of the ID/RD waiver program actually increased. Id.

A second affidavit signed by Commissioner McPherson on August 9, 2017, informed the court that the governing board of DDSN had imposed caps on home-based services based on false reports by DDSN and DHHS of budget reductions and that when home-based services were capped, the per capita cost for waiver services actually increased by approximately $50 million. ECF 441-2. McPherson stated that she felt as though she had a "gun to my head and had no other alternative" because of the false information provided to Commissioners. Id. She

reported that another Commissioner had "received an anonymous call informing her that if she loved her children, she would back off." Id. A third Commissioner was removed by Governor Sanford "who was asking too many questions about the amendments to the waiver." Id. McPherson discussed the LAC which documented: "a lack of financial accountability and failure to protect DDSN consumers from abuse and neglect." Id. She described other audits of DDSN programs conducted by former DHHS Director Keck, who concluded that "it was impossible to follow the funds once they were paid to DDSN and distributed pursuant to the band funding system..." Id.

This former Commissioner described the systemic diversion of funds intended to provide services to waiver participants for unauthorized purposes. She also described medication errors in DDSN group homes, where one-third of providers were allowing untrained and unlicensed staff to administer medications. Id. She informed the district court that "It is common practice for DDSN to retaliate against families, advocates and employees who report abuse, neglect and exploitation of clients and families are legitimately fearful that services will be reduced or terminated if they complain." Id. McPherson reported that: "DDSN has systemically moved millions of dollars allocated for family support services...into other accounts..." Id.

A third affidavit signed by Commissioner McPherson on June 15, 2018 stated that DDSN was ignoring the decision in *Stogsdill v. DHHS,* 410 S.C. 278 (S.C.Ct.App. 2014) (prohibiting imposition of caps on services) and that DDSN case managers continued to inform clients that there is a 28 hour cap on home-based attendant care, in violation of the CMS "Final Rule" and *Olmstead v. L.C.,* 527 U.S. 581 (1999). ECF 500-1. McPherson reported that the

administrative appeals process is futile and that it requires participants to spend years in litigation before bringing claims to the state courts. Id. She reported that in 2017, DDSN was "systemically reducing hours without regard to medical necessity, instead of applying the rule established in Stogsdill to determine if participants need additional hours to live in their own homes." She reported that DDSN reduced hours of more than 750 participants in 2017 "without considering the medical consequences." Id. According to McPherson, there had been no budget reduction to justify these reductions and that "DDSN has received tens of millions of dollars in budget increases since Kobe's lawsuit was filed." Id. McPherson reported that CMS informed her that the payment system had never been approved by that federal agency. Id. Her affidavit states that "DDSN has millions of dollars in a reserve account and has consistently received budget increases and it is a reasonable modification to provide funding for persons like Kobe to live in their own homes." Id.

Based on "decades of experience, both as an employee of DDSN and later a Commissioner," as well as her experience writing a Medicaid waiver application that was approved by CMS, McPherson informed the court that "DDSN does not operate the waiver program in compliance with the ADA or the Medicaid Act." Id. The affidavit states that the funding system used by DDSN and DHHS "is directly in conflict with unambiguous legislative directives in the State Code to provide services to DDSN clients like Kobe need to remain at home." Id.

McPherson also reported that the band payment system clearly discriminates against Kobe by "providing the lowest bands to persons living at home." Id. It states that "Based on my personal knowledge of DDSN and DHHS systems, the system is designed to allow overbilling

through submission of inflated cost reports to Medicaid." Finally, McPherson opined that "Until the court system requires DDSN and DHHS to comply with the Medicaid Act and the ADA, I believe that these abuses will continue and persons like Kobe will continue to be forced to live in segregated, isolated settings." Id.

Kobe also provided the court with audits conducted by the United States Department of Health and Human Services Office of Inspector General which required South Carolina to repay millions in recoupments for unallowable costs that were claimed on DHHS cost reports. ECF 405-2. The 2015 US OIG reported that problems with cost reports identified in their 2012 audit had not been corrected. ECF 405-2.

Kobe's claims of corruption and money laundering were also supported by a letter written by former DHHS Director Anthony Keck on October 22, 2014, directing DDSN to dismantle the agency's funding system because:

> Previous reports by the Centers for Medicare and Medicaid Services (CMS) and the United States Department of Health and Human Services Office of the Inspector General (DIG) found that the appropriate match rates were not consistently applied in the past, which has led to recoupments by the federal government. This contract will provide our assurance to CMS that these audit findings have been corrected and allowable administrative costs are reimbursed appropriately.

ECF 405-1. Keck testified in his deposition he "threw down the gauntlet" to Governor Haley with this letter a month before she replaced him with her Deputy Chief of Staff, Christian Soura. ECF 404-11. But, once Soura became Director of DHHS, all movement to dismantle the illegal funding system was halted.

Kobe again provided the district court with his Support Plan that had been approved by DDSN on October 1, 2013 including the need for services to be provided in an apartment setting. ECF 457-3. He provided another sworn affidavit stating that for years he had been requesting a bed he could control to prevent aspiration. ECF 457-2. He was informed that if he required a feeding tube to prevent aspiration, he would be placed in a nursing home. Id. Kobe again informed the court that he had requested placement in an apartment setting at every meeting with his service coordinator. Id.

Respondents argue at page 5 that Kobe's remedy lies in filing yet another administrative appeal, but Kobe provided a decision of a DHHS hearing officer in the case of *Chip E.* showing the court that hearing officers do not have jurisdiction to hear the issues that Kobe has raised in the federal courts. ECF 458-1 at 12.

Without considering the evidence Kobe presented as true, or considering the motions in a light most favorable to him, the district court again granted summary judgment to the remaining Respondents. ECF 475.

Kobe II - Fourth Circuit. In his brief on appeal to the Fourth Circuit, Kobe again described ongoing patterns of years-long delays in obtaining the equipment he needs and he provided evidence of money laundering and public corruption. In his July, 2014 declaration, again provided to the Fourth Circuit, Kobe complained not only about the failure to provide services in an apartment, but also that he continued to suffer physically and emotionally from ongoing delays in obtaining the equipment he needs with reasonable promptness - or any promptness at all. J.A.3744. He informed the court that the bed he required to prevent aspiration, which the Respondents claimed to have provided on August 23, 2013, still had not

been provided in August, 2017.[3] ECF 404-6. In that declaration, Kobe reported that he had suffered from "*recurring bouts of pneumonia"* and "*felt that I was choking*" because the bed he could control to elevate his head had not been provided. J.A.4210, J.A. 4209 @ ¶9 and 4212 @ ¶¶27, 34.

The Fourth Circuit failed to consider Kobe's declarations as true, or to consider the opinions of professional caregivers who had worked with him for years, instead, relying upon an email and a letter to his provider in determining that placement in a less restrictive setting had not been provided "because of concerns that his extensive needs could not be met in that setting." *Kobe v. Buscemi,* 821 Fed. Appx. 180, 184 (4th Cir. 2020). Respondents did not contradict Kobe's assertions that he never received notice of these denials required by 42 C.F.R. 431.206(c(2) and 431.210, which are discussed in *Davis v. Shah*:

> The Medicaid Act requires that any state participating in Medicaid "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." 42 U.S.C. § 1396a(a)(3). Consistent with that requirement, HHS's regulations specify that, "[a]t the time of any action affecting [a beneficiary's] claim," the state must "inform every applicant or beneficiary in writing" of (1) his right to a hearing, (2) the method by which he may obtain a hearing, and (3) his right of representation at the proceedings. 42 C.F.R. §§ 431.206(c)(2), (b). The "notice required under § 431.206(c)(2)" must contain five pieces of information: (1) a statement of the state's intended action, (2) its reasons for that

[3] The district court believed as true DHHS' claim that "Kobe's request for a hospital bed was submitted for authorization on August 6, 2013, approved by these Defendants on August 12, 2013, and paid for by Medicaid on August 23, 2013," without considering the emails to and from his case manager and Kobe's declaration stating that this claim was totally false. *Kobe v. McMaster,* 2018 U.S. Dist. LEXIS 55500 at 76.

> action, (3) the federal or state law that supports or requires that action, (4) an explanation of whether and under what circumstances the beneficiary may obtain an evidentiary hearing, and (5) an explanation of the circumstances under which the beneficiary's coverage will be continued. Id. § 431.210.

821 F.3d 231, 253 (2d Cir. 2016). Instead, the courts have relied on emails and a letter sent to Kobe's provider summarily denying the SLP services DDSN had previously approved in his 2013 Support Plan. ECF 457-3.

As to Kobe's conspiracy claims, the Fourth Circuit also disregarded the affidavits of former Commissioner McPherson and the letter and the deposition of former DHHS Director Keck, which support Kobe's claims of money laundering and false claims being presented to the federal government by state agencies. Instead, the Fourth Circuit dismissed Kobe's conspiracy claim concluding that:

> Even if the disabled qualify as a class protected under the statute (and we express no opinion on that issue, reserving its resolution for another day), Kobe's evidence is insufficient to show that the defendants conspired to use the WAC scheme for the purpose of causing injury to the disabled. And as we have explained, Kobe never lost his ADHC services, so he has not been injured by the alleged conspiracy.

Id. at 187. The courts disregarded not only the discrimination Kobe suffered by being forced to live in a congregate setting, but also the "bouts of pneumonia" and feeling like he was choking when he aspirated and was not able to elevate his bed. 404-6.

Conclusion. The Fourth Circuit and the district court both erred as a matter of law in disregarding this Court's ruling in *Anderson*, 477 U.S. at 257 that "On a motion for summary

judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor." As described in Kobe's Petition, the circuits are split on the interpretation, and the right to enforce through an action brought under Section 1983, the reasonable promptness mandate of the Medicaid Act at 42 U.S.C. 1396a(a)(8). The circuits are also split on whether persons who have disabilities may bring an action for civil conspiracy pursuant to 42 U.S.C. 1985.

Kobe suggests that a limited class of persons with severe disabilities who live in congregate facilities should have that right. Kobe has presented evidence of pervasive corruption and the ongoing diversion of massive amounts of federal funds allocated to provide services to South Carolina's most vulnerable citizens.

Because this case presents issues of national importance and there are compelling reasons for this Court to rule on the accountability of Medicaid funds, and the failure of states to provide services with reasonable promptness, the Court should grant *certiorari.*

Respectfully submitted,

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