Case 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

Petition for Reconsideration

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Introduction

Kobe brought this lawsuit in his important role as a private attorney general pursuant to 42 U.S.C. 1983 and 42 U.S.C. 1985, alleging in 2011 that Defendants were illegally diverting hundreds of millions of dollars paid by the federal government that were intended to provide Medicaid services to to severely disabled participants who would otherwise require institutional care.[1] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 *(1968) and Kobe v. Haley*, 2014 U.S. Dist. LEXIS 139172 (D.S.C. 2014). ECF 1, J.A. 82-87.

As a result of this illegal spending, Kobe and others have been, and continue to be denied needed Medicaid-funded services and equipment. Medicaid waiver participants are required to wait years for services that Congress intended to be provided with reasonable promptness. 42 U.S.C. 1396a(a)(8). *Doe v. Kidd I*, 501 F.3d 348 (4th Cir. 2007), *Doe v. Kidd II,* 419 Fed. Appx. 411 (4th Cir. 2011) and *Doe v. Kidd III,* 656 Fed. Appx. 643 (4th Cir. 2016).

Kobe spent weeks in bed after he was dropped in his wheelchair that was not promptly repaired and replaced. J.A. 3101 at paragraph 3 and 31. He waited years to receive a speech device that had been repeatedly ordered by his physicians and was even recommended by the South Carolina Lieutenant Governor's Office Ombudsman after he was left lying in feces for hours in his group home. J.A. 2017

[1] Kobe's allegations of illegal spending have been supported by numerous audits, including a 2008 audit by the South Carolina Legislative Audit Council (ECF 81-7, see pages 504-505, 518-524) and two audits by the U.S. Dept. of Health and Human Services Office of Inspector General discussed below. ECF 256-4 at J.A. 3519.

at paragraph 29. In 2011, Kobe requested a bed to elevate his head so that he does not aspirate, after suffering bouts of pneumonia and being informed that he would be moved to a nursing home if his condition deteriorated. J.A. 4244, paragraphs 5-14. When the district court awarded summary judgment to the Respondents the second time, that bed still had not been provided. ECF 404-6, J.A. 4212.

This case falls under the exception for a case that is capable of repetition yet evades review because of the length of time required for courts to resolve the matter.[2] *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969). As Kobe ages and his condition continues to deteriorate, he will need different equipment and additional services:

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

J.A. 3102, paragraph 28.

In the group home, Kobe has no control over the hiring of staff who perform intimate hygiene tasks and treat him as if he has cognitive deficits, such as the three other men who live in the group home have. J.A. 4212-4213. Since 2011, Kobe has consistently requested through court filings and his DDSN case manager to receive services in a less restrictive setting. J.A. 4210-4213. He is prohibited from contacting DDSN directly to request these services. E.C.F. 411-1. Kobe's 2013

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[2] Kobe refers to explanations in his Petition and Reply as to his references in the first Fourth Circuit opening brief regarding his ongoing requests for placement in a less restrictive setting, which he address in both opening briefs to the Fourth Circuit.

Support Plan that was approved by DDSN, identified his need to have "supports in place to be able to live in an apartment setting."J.A. 1877.

The district court dismissed Kobe's claim for placement in a less restrictive setting, instead accepting as true the 2014 affidavit of John King, an employee of the non-moving party, falsely informing the district court that DDSN never received Kobe's request. That affidavit is contradicted by many court filings DDSN received containing that request, as well as that Support Plan, which King's agency had approved in 2013. ECF 228-2, J.A. 1877.

The district court found that Kobe was not harmed by the alleged civil conspiracy and the failure to provide services in the least restrictive setting:

> While Plaintiffs' allegations of wholesale mismanagement and, indeed, criminal conduct within DHHS, DDSN, and the Babcock Center are sobering, "[i]t is an established principle . . . that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action." Lujan, 504 U.S. at 574-76. Plaintiffs show no cognizable particularized injury.

Kobe v. Haley, 2014 U.S. Dist. LEXIS 139172 *23 (D.S.C. 2014). In *Lujan,* plaintiffs complained of U.S. policy that allegedly would endanger crocodiles in Egypt and leopards in Sri Lanka. Here, Kobe's injuries from the failure to provide needed services with reasonable promptness are very direct and very personal. The harms Kobe suffers were described by Congress in the "findings and purpose" provision of the Americans with Disabilities Act at 42 U.S.C. 12101.[3]

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[3] These harms are far more direct than a tourist being denied the "right" to visit crocodiles in the Nile, as complained of in *Lujan*. Congress found in 42 U.S.C. 12101 (a)(4) that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin,

Kobe continues to suffer injuries similar to those suffered by the plaintiffs in its landmark ruling in *Olmstead v. L. C. by Zimring*, 527 U.S. 581(1990), which are certainly "direct injuries" which Congress intended to remedy. When a state violates the integration mandate of the ADA by refusing to provide services in the least restrictive setting, it violates important civil rights more direct than the injuries plaintiffs alleged in *Lujan*.[4] In *Olmstead*, this Court ruled:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life...Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

For ten years since this lawsuit was filed, Kobe, who has severe physical but not intellectual disabilities, has continued to experience this type of discrimination

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religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;" and that "(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of ... communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." Congress' stated purpose in enacting the ADA was to "(b)(4) to invoke the sweep of congressional authority... to address the major areas of discrimination faced day-to-day by people with disabilities."

[4] In *Olmstead v. L.C.,* this Court allowed states to take into account "the resources available to the State and the needs of others with mental disabilities." 527 U.S. 581, 607 (1990). But, when DDSN and DHHS imposed caps on home-based services under the guise of budget reductions, the per capita annual cost actually increased from $37,536 to $51, 889, leaving fewer dollars to provide for the needs of others with mental disabilities.

and injury by being forced to remain in a congregate group home, where his needs are sometimes met, and sometimes not met, by staff not of his choosing, with house mates also not of his choosing.

Intervening Circumstances

The record in this case was closed in December, 2018. Kobe prays that the Court will consider intervening circumstances described below that demonstrate continuing deceptive acts and disregard for the State's obligations under the Medicaid Act, the integration mandate of the ADA, as well as the rulings of this Court and the Fourth Circuit.

2020 Fair Hearing Appeal

Respondents argue in their opposition to Kobe's Petition for *Certiorari* that his remedy is to file a new lawsuit. Kobe did that in 2020. Kobe filed an administrative appeal in June, 2020. Exhibit 5, Appx. 159. In December, 2020, DHHS acknowledged that Kobe is entitled to receive services in his choice of settings, to receive psychological services and increased employment services. Exhibit 6, Appx. 166. Five months later, DDSN and DHHS still are not providing those services ordered by the hearing officer.

In an order dated December 1, 2020, the DHHS hearing officer ordered that Kobe's "needs may be met in a less restrictive setting." Exhibit 6 at Appx. 167. That order recognizes that "The CMS Final Rule issued in 2014 requires that the waiver participant has the right to choose the setting in which services are provided and that DDSN has an obligation to work with Petitioner and his attorney to arrange for

services in his choice of (I) an SLP setting, or (2) his own home." Exhibit 6, Appx. 167. Citing *Doe* v. *Kidd II,* 419 Fed. Appx. 411,418 (4th Cir. 2011). The Order prohibits DDSN from denying requested services based on costs. Exhibit 6, Appx. 169. Citing *Stogsdill v. DHHS,* 410 S.C. 273, (S.C. Ct. App. 2014).

The hearing officer found that Kobe had prevailed on the issue of increasing his employment hours and he directed DDSN to "provide psychological services within 30 days of this order from Petitioner's chosen provider." It left unresolved only whether DDSN would be required to provide adult companion or one-on-one services during Kobe's transition to a less restrictive setting.

As DHHS hearing officers regularly do in South Carolina, he ruled that any issues related to violation of due process, *reasonable promptness,* rates paid for psychological services and any other claim brought under the United States Constitution, the ADA, the Rehabilitation Aot or the Medicaid Act are outside of the jurisdiction of DHHS hearing officers.

DDSN and DHHS cannot contradict that on January 8, 2021 - more than 90 days ago - the Chief Finance Officer of DDSN acknowledged receipt of Kobe's requested budget for services in an apartment setting. Exhibit 7 at Appx. 172.

On January 13, 2021, the hearing officer issued a second order reaffirming that Kobe is entitled to receive services in his choice of setting, and again ruling that those services may not be denied based on budgetary reasons. Exhibit 8 at Appx. 175-177. DHHS agreed to provide, in addition to psychological and increased employment services, 150 units of case management services per quarter until Kobe

transitions into the less restrictive setting of his choice. Exhibit 8, Appx. 176-177.

Eleven months after Kobe filed that second administrative appeal in 2020, he remains isolated in the group home with staff not of his choosing, living with three cognitively impaired men, isolated from non-disabled persons.

Kobe still has not been provided with psychological services ordered by the hearing officer. And, instead of increasing his employment hours, Kobe was terminated from his employment, through no fault of his own, in April, 2021 after DDSN decreased the budget of the provider of those services.[5] Exhibit 9 at Appx. 180. DDSN and DHHS have not complied with the order requiring them to transition Kobe to a less restrictive setting, in clear violation of the reasonable promptness mandate and the DHHS hearing officer's two rulings issued after the Fourth Circuit's affirmance. *Doe v. Kidd I,* 501 4th Cir. 348, 354 (4th Cir. 2007).

History of Litigation to Enforce 42 U.S.C. 1396a(a)(8)

Kobe, like other Medicaid waiver participants, does not have resources to fund another decade of federal litigation in a new lawsuit to enforce the Fourth Circuit's 2007 ruling that requires the agencies to provide services within 90 days. *Doe v. Kidd I*, 501 at 354. Kobe has no other remedy.

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[5] In its continued assault on services provided outside of congregate settings, in February, 2021, DDSN arbitrarily and retroactively decreased rates paid to Arc of the Midlands for employment services provided to Kobe, retroactive to July, 2020. This reduction was made despite Congress increasing the federal match rate for Medicaid services provided in South Carolina in 2020 by 6.2%, so that the federal government paid 76% of the cost of those services. Arc's rate was reduced despite Congress again increasing the federal matching rate, so that South Carolina now pays only 13.8% of the cost of Medicaid services.

The state courts have declined to rule on issues related to the enforcement of the Medicaid Act and DHHS hearing officers have repeatedy held that they do not have jurisdiction to rule on violations of the reasonable promptness mandate. Exhibits 6 at Appx. 168, 170 and 8 at Appx. 178-179. In 2009 and, again in 2010, Richard Stogsdill filed "fair hearing" appeals in 2009 and 2010, asking DDSN, DHHS, then the state appellate courts to rule upon the reasonable promptness issue. Finally, he filed a federal lawsuit in 2011 seeking to enforce the reasonable promptness and other federal claims, but those claims were dismissed on the grounds of abstention three years later.[6] *Stogsdill v. Azar,* 765 Fed. Appx. 873 (4th Cir. 2019).

After five years of hard-fought litigation in parallel administrative appeals, the South Carolina Court of Appeals declined to consider whether the agencies had violated the reasonable promptness mandate. *Stogsdill v. DHHS,* 410 S.C. at fn. 6. Richard Stogsdill's reasonable promptness claims still remain mired in the district court - in a federal lawsuit he filed in 2011.

Respondent's argument that Kobe simply needs to file a new lawsuit in

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[6] The state court of appeals declined in a footnote to address "Stogsdill's remaining arguments regarding reasonable promptness and comparability as they are not necessary to the disposition of the case." Stogsdill, 410 S.C. at fn. 6. The state Supreme Court then denied *certiorari* on the reasonable promptness issue. In Stogsdill's parallel federal lawsuit filed in 2011, the district court dismissed his reasonable promptness and all other claims on the grounds of abstention. *Stogsdill v. Keck,* 2014 U.S. Dist. LEXIS 158974 (D.S.C. 2014). The Fourth Circuit has twice remanded Stogsdill's federal case, which is currently pending back in the district court. *Stogsdill v. S.C. HHS,* 674 Fed. Appx. 291 (4th Cir. 2017) and *Stogsdill v. Azar,* 765 Fed. Appx. 873 (4th Cir. 2019).

federal court also ignores the history of Sue Doe, who filed a lawsuit against DDSN and DHHS in 2003 seeking to enforce the reasonable promptness mandate. *Doe v. Kidd I, supra.* Despite the Fourth Circuit ruling in *Doe v. Kidd I*, i.e. that the reasonable promptness mandate requires the state to provide services within 90 days, the residential habilitation services Doe sought were not provided until two and a half years after the Fourth Circuit directed DDSN and DHHS to provide those services in 2011. *Doe v. Kidd II, supra* and *Doe v. Kidd III, supra*.

The fact that these Defendants have ignored not only the Fourth Circuit's rulings, but also the order of DHHS' own hearing officer demonstrates that filing yet another lawsuit would be an expensive, but fruitless undertaking.

Civil Conspiracy: DDSN's Failure to Produce Cost Reports

After the record was closed, in October, 2019, a draft report, referred to as the "Mercer Report," was discovered showing that since 2012, DDSN has not filed federally mandated annual cost reports for Medicaid programs costing more than $550 million a year. Exhibits 1 at Appx. 1 at Appx. 1, 2 at Appx. 4 and 3 at Appx. 147. The Mercer Report at Exhibit 2, Appx. 15 confirms that: "...the last HCBS waiver cost reports that SCDDSN submitted to SCDHHS were for the FY 2011/2012 historical time period."[7]

[7] The only Mercer Reports DHHS has released have been "draft reports." But, the DDSN Annual Accountability Report filed in September, 2019 states that the Mercer Report was finalized in 2019. Exhibit 4 at Appx. 153. DDSN reported to the General Assembly that based on two years of delinquent cost reports for FY 2016 and FY 2017, the agency projected a federal recoupment of between $10 and $15 million for just those two years.

The waiver document at ECF 250-3, J.A. 2469-2470, requires DHHS to base their federal cost claims on these annual reports.[8] The processes required to produce annual cost reports are described in the audit conducted by the U. S. Dept. of Health and Human Services Office of Inspector General (US DHHS OIG) of DDSN's FY 2008 and FY 2009 cost reports.[9] ECF 256-4. In 2012, US DHHS OIG reported at J.A. 3525 that during those years:

> The State agency claimed unallowable room-and-board costs because neither the State agency nor the Department had adequate controls to (1) ensure that the Department followed applicable Federal law and guidance or its own guidance or (2) detect errors or misstatements on the local DSN boards' cost reports.

When US OIG returned several years later to audit DDSN's FY 2010 cost reports, its auditors reported the same delinquencies in 2015. ECF 405-2.

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[8] In *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, fn. 9 (2016), the state Supreme Court reiterated that the waiver document "carries the force and effect of law." Citing *Stogsdill v. S.C. Dep't of Health & Human Servs*., 410 S.C. 273, 280, 763 S.E.2d 638, 642 (Ct. App. 2014) (holding that in the context of Medicaid waivers, once the State's waiver application is approved by CMS, the waiver's terms carry the force and effect of federal law and need not be promulgated as regulations pursuant to the APA), cert. dismissed, 415 S.C. 242.

[9] The South Carolina Legislative Audit Council likewise reported in 2008 that:

> Cost reports are an annual compilation of costs DDSN incurs in order to provide care for its consumers. DDSN submits cost reports to the Department of Health and Human Services DHHS at the end of each fiscal year to claim Medicaid-allowable costs. DHHS is the Medicaid claims processor making Medicaid payments to DDSN for Medicaid-allowable costs. Prior audits by the federal Centers for Medicare and Medicaid Services CMS and DI-IHS have recommended that DDSNs cost reports be independently audited. We found the cost reports have not been independently audited.

ECF 81-7 at JA 518.

The agencies' response was to simply stop providing any cost reports.[10]

The Mercer Report (Exhibit 1 at Appx. 16) and the DDSN Annual Accountability report filed in September, 2019 (Exhibit 4 at Appx. 153) both show that DHHS has been filing fabricated reports with the federal government for more than six years - because no cost reports had been prepared to support those claims.[11]

On January 11, 2021, the Director of the South Carolina Department of Health and Human Services, his Chief of Staff (former Chief Finance Officer) and a third senior official who reported to the Director all resigned on the same day.

A month later, the governing board of DDSN fired its Director, on February 18, 2021 after the meeting where the Director reported that the Medicaid cost reports for fiscal year 2012 still have not been completed.[12] A week later, DDSN's Chief Finance Officer resigned, followed by the resignation, in April, 2021 of DDSN's Internal Auditor.

These events all support Kobe's claims of a civil conspiracy to divert Medicaid funds for unallowable purposes, while failing to provide critical Medicaid services with reasonable promptness. Kobe prays that this Court will

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[10] Those US. DHHS OIG audits only reviewed a sliver of costs, just those related to costs improperly claimed for room and board.

[11] DHHS is required to use these cost reports in preparing claims for reimbursement submitted to the federal government. ECF 250-13, J.A. 2471.

[12] Audio of meeting is located at https://www.youtube.com/watch?v=rmiWHQXjYSo.

either grant *certiorari* or vacate the judgment below and remand to consider intervening circumstances as this Court did in *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012).

Splits in the Circuit Courts
Reasonable Promptness Mandate Issue

This case presents important and recurring questions that have persistently divided the circuits, as described in detail in Kobe's Petition seeking *certiorari*. The Fourth Circuit's decisions regarding of the "reasonable promptness" question in this case flies in the face of the clear statutory text. That unpublished decision even conflicts with the Fourth Circuit's own published opinion in *Doe v. Kidd I*, 501 F.3d. 348, 356 (2007), which held Congressional intent was clear, and that the Medicaid services must be provided within 90 days:

> ...the provision is clear that the standard for informing applicants of their eligibility for Medicaid services is "reasonable promptness" and the relevant federal and state regulations and manuals define reasonable promptness as forty-five days or ninety days, depending on the applicant. See, e.g., 42 C.F.R. § 435.911; South Carolina Medicaid Manual...United States Department of Health & Human Services Center for Medicaid and State Operations, Olmstead Update No: 4... Third, the provision uses mandatory rather than precatory terms: it states that plans "must" provide for assistance that "shall" be delivered with reasonable promptness. See § 1396a(a)(8).

Nothing in Respondents' response in opposition to Kobe's Petition undermines the conclusion that this case is certworthy. As explained in Kobe's Petition and Reply Brief, the circuits are persistently split over the questions presented in this case. Medicaid participants in the Second, Third, maybe the Fourth, the Eleventh and D.C. Circuits have a right to enforce the reasonable

promptness mandate through an action brought under Section 1983. But, those similarly situated impoverished persons struggling to live with disabilities in the Fifth Circuit clearly may not. Disabled folks in the Seventh, Eighth, Ninth and Tenth Circuits need clarity about whether they may enforce that mandate in federal courts in those Circuits, or whether their Circuit Courts will treat 42 U.S.C. 1396a(a)(8), as the Fifth Circuit has done, as nothing more than unenforceable Congressional verbiage.

Section 1985 Civil Conspiracy Issue

The question of whether severely disabled residents living in congregate facilities constitute a class entitled to protection pursuant to 42 U.S.C. 1985 is also an important issue about which the Circuit Courts are in conflict. Citizens who have certain disabilities may exercise their rights established in Section 1985 in the Second, Third and Eighth Circuits, but similarly situated citizens in the Sixth, Seventh and Tenth Circuits are denied those same rights.

Had the district court allowed Kobe to enforce those rights under Section 1985 in South Carolina in 2011, the ongoing massive misappropriation of taxpayer dollars, could have been prevented, and more Medicaid waiver participants would be receiving the services Congress intended them to receive in the least restrictive setting.

The record in this case, along with recent revelations documenting years of the state failing to provide federally mandate cost reports for programs costing hundreds of millions of tax dollars, emphasize the public importance of

protecting the civil rights of this class of persons who are totally dependent, through no fault of their own, upon Medicaid for life sustaining services.

An analysis of DDSN end-of-year budget reports shows that DDSN has each year diverted funds allocated by the South Carolina General Assembly specifically to provide "In Home Services" for other purposes not authorized in the State Budget:

FY	"In Home Supports" Budget	Actually Spent For In Home Supports	% of In Home Support Funds Diverted for Other Purposes
2016	76,340,895	39,432.530	49%
2017	102,211,827	54,344,114	47%
2018	87,577,481	53,000,487	40%
2019	89,589,626	58,110,817	35%
2020	91,285,431	51,663,774	44%

This is not a political issue, nor is it a matter best left to the states. It is a matter of whether Respondents will be allowed to continue to disregard Congress' intent that states comply with the Medicaid Act if they choose to receive federal funding. Between 70% and, now, 86.2% of the funds paid to South Carolina for Medicaid services come from the federal government. This case involves executive branch officials disregarding not only state legislative intent, but also conditions of participation in the Medicaid program and whether they will be allowed disregard federal case law in the violation of substantial civil rights of Kobe and other DDSN clients living in congregate settings.

The South Carolina General Assembly has clearly expressed its legislative intent to provide services to DDSN clients in the least restrictive setting in the Family Support Act. S.C. Code § 44-21-10 et seq. Yet, the same diversions of funds allocated to provide services to DDSN clients that were reported by the South Carolina Legislative Audit Council in 2008 continue today unabated.

Conclusion

This case presents issues of national importance and there are compelling reasons for this Court to determine whether persons with disabilities living in congregate settings have a right to enforce their rights under Section 1985 and the failure of states to provide services with reasonable promptness. Without intervention in this case, states will be free to continue to deny the rights of severely disabled Medicaid waiver participants who will continue to be forced to live in isolated congregate group homes, segregated from non-disabled persons and states will be allowed to recklessly continue to disregard, without consequences, the urgent needs for services and equipment funded by Medicaid.

Kobe respectfully moves pursuant to Rule 44 of the Rules of this Court for reconsideration of the Court's denial of his Petition and grant *certiorari* on the grounds of intervening circumstances of a substantial or controlling effect and other substantial grounds not previously presented. In the alternative, Kobe prays that this Court will vacate the judgment below and remand this case to consider those circumstances of a substantial or controlling effect and other substantial grounds not previously presented.

Respectfully submitted,

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LIST OF EXHIBITS IN APPENDIX