No. _____

In the

Supreme Court of the United States

WILLIAM F. NORED AND LAWANDA JEAN NORED, AS CONSERVATORS, PARENTS, AND NEXT FRIENDS OF WILLIAM F. NORED, JR., INDIVIDUALLY,
Petitioners,

v.

TENNESSEE DEPARTMENT OF INTELLECTUAL & DEVELOPMENTAL DISABILITIES; COMMISSIONER BRAD TURNER, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF INTELLECTUAL & DEVELOPMENT DISABILITIES,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tennessee Department of Intellectual and Developmental Disabilities has a nondelegable duty to enforce The Medicaid Act, 42 U.S.C. §1396, et seq.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.2(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Sixth Circuit:

William F. Nored and Lawanda Jean Nored, as conservators, parents, and next friends of William F. Nored, Jr., individually, petitioners on review, was plaintiff/appellant below.

Tennessee Department of Intellectual & Developmental Disabilities; Commissioner Brad Turner, in his official capacity as the Commissioner of the Tennessee Department of Intellectual & Development Disabilities, respondent on review, was defendant/appellee below.

No nongovernmental corporations are parties to the present proceedings.

RELATED PROCEEDINGS

This case arises from the following proceedings:

United States Court of Appeals for the Sixth Circuit *Nored v. Tennessee Department of Intellectual & Developmental Disabilities*, Case No. 21-5826, decided September 9, 2022, affirming the opinion of the United States District Court for the Eastern District of Tennessee, Knoxville Division, is unpublished but available at 2022 WL 4115962 (Sixth Circuit 2022).

United States District Court for the Eastern District of Tennessee, Knoxville Division; *Nored v. Tennessee Department of Intellectual &*

Developmental Disabilities, Case No. 3:19-CV-000214-DCLC, decided August 23, 2021, unreported but available at 2021 WL 3729617 (E. D. Tenn., August 23, 2021).

There are no other proceedings in state or federal trial or appellate courts, or this court, directly related to this case within the meaning of this Court's rule 14.1 (b)(iii).

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The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated September 9, 2022, affirming in the decision of the U.S. District Court for the Eastern District of Tennessee is unreported but available at 2022 WL 4115962 (Sixth Circuit 2022) and reproduced at App. 1.

The Order of the U.S. District Court for the Eastern District of Tennessee, Knoxville Division, dated August 23, 2021, finding that Plaintiffs/Petitioners were not entitled to either declaratory or injunctive relief is reported at 2021 WL 3729617 (E. D. Tenn., August 23, 2021) and is reproduced at App. 31.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on September 9, 2022. This Petition is timely filed pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.1. Accordingly, this Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1396(a)(8) provides in pertinent part as follows:

> Provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and such assistance shall be furnished with reasonable promptness to all eligible individuals;

42 U.S.C. § 1983, "Section 1983," provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1396(d)(xvii) (effective March 23, 2020) provides in pertinent part as follows:

> Payment of part or all of the cost of the following care and services or the care and services themselves, or both… [to individuals] who will receive home and community-based services pursuant to a State plan amendment under such subsection.

INTRODUCTION AND STATEMENT OF THE CASE

This case provides this Court with an ideal vehicle to ensure that millions of citizens be provided with

medical assistance under The Medicaid Act, 42 U.S.C. §1396, et seq.

Agencies, such as the DIDD, claim that they can comply with the medical assistance requirement by merely being willing to pay for services (or more accurately, reimburse its selected providers consistent with the spectrum of services amenable to be offered by such agencies). Of course, a provider will not administer services if it believes that the reimbursement is insufficient to maintain a business.

Herein lies the problem. Disabled individuals, such as Mr. Nored, are at the mercy of DIDD's reimbursement schedules to its list of approved providers, who no doubt desire to remain on good terms with DIDD.

The end result is that disabled individuals' particular needs are held hostage to DIDD's desire to do what it wishes and rely on the fallback position, as it did in this case, that it has always been willing to pay.

Yet, it is respectfully submitted that Congress changed the definition of medical assistance in order to ensure that disabled individuals such as Mr. Nored would receive care by either the agency (here in Tennessee as DIDD), or a qualified provider at a market rate. That is not occurring, as the old definition is being permitted to be relied on, or it is simply being ignored by state agencies.

A. Factual Background

This case is not about race and gender, although one would certainly not know that by reading the District Court's Memorandum Opinion finding that Petitioners are not entitled to declaratory and injunctive relief and dismissing their case. [Mem. Op., R. 143, Page ID# 1443-64]. Instead, this case centers on the duties owed to disabled individuals across Tennessee by the Tennessee Department of Intellectual and Developmental Disabilities ("DIDD") following the change in definition of the term "medical assistance." Petitioners argue that the definition change means that DIDD and its Commissioner, Brad Turner, (collectively, "Respondents") must either pay a willing caregiver to provide care and services to qualified individuals or provide the care and services to these individuals directly. [Petitioners' Post-Trial Brief, R. 138, Page ID# 1336, 1338]. Respondents-Appellees claim that they may choose to only pay for services and that merely being willing and able to pay satisfies their duty to provide medical assistance to disabled individuals. [Respondents' Post-Trial Brief, R. 141, Page ID# 1383]. Stated differently, Respondents-Appellees argue that the new definition of medical assistance does not compel them to provide services directly if Petitioners can identify no willing, DIDD-authorized provider for which to provide payment to.

After a two-day trial and post-trial briefs submitted by both sides, the District Court found that Respondents-Appellees had satisfied their duty to William F. Nored, Jr. ("Bill") by being willing and able to pay for his care and services despite there being no

willing providers to pay. [Mem. Op., R. 143, Page ID# 1448-55]. It also blamed the lack of willing providers to provide Bill with care and services on the unreasonable race and gender restrictions Petitioners had allegedly placed on his caregivers. [Mem. Op., R. 143, Page ID# 1452-55]. However, to be clear, Petitioners do not – and did not – argue that they are entitled to caregivers of a certain race or gender, nor did the proof at trial show that this was the overarching reason no willing DIDD-authorized providers could be found to care for Bill in his Sevierville home.

Plaintiffs Lawanda Jean Nored ("Jean Nored" or "Mrs. Nored") and William F. Nored, Sr. ("Willy Nored" or "Mr. Nored") adopted Bill through an adoption agency when he was an infant. [Transcript of Proceedings 11/3/2020 ("Transcript 1"), R. 134, Page ID# 960, 962]. Bill began suffering from seizures and, despite being told they could "return" Bill and wait for another child who was not disabled, the Noreds followed through with the adoption and have raised Bill ever since. [Transcript 1, R. 134, Page ID# 962-63].

Bill is now 51 years old and has multiple and significant developmental disabilities. [Transcript 1, R. 134, Page ID# 960, 963-67]. Because Bill suffered severe seizures, he underwent a right hemispherectomy when he was 14 years old and the entire right side of his brain was removed. [Transcript 1, R. 134, Page ID# 963, 965]. Bill is disabled and cannot drive, handle his own finances, or understand the severity of emergencies. [Transcript 1, R. 134, Page ID# 953, 967-68, 1054-55]. He has also been diagnosed with intermittent explosive disorder, which affects his

ability to control his behavior when he feels stressed or threatened. [Transcript 1, R. 134, Page ID# 970]. Despite his developmental deficits, Bill is high-functioning and can take care of his own personal hygiene. [Transcript 1, R. 134, Page ID# 966]. He is also a functional reader. [Transcript 1, R. 134, Page ID# 966].

Bill lived with his parents until he was in his 20s, at which point he told them that he wanted to get his own place and become more independent. [*See* Transcript 1, R. 134, Page ID# 969]. Mr. and Mrs. Nored bought Bill a home in downtown Sevierville located at 213 Prince Street. [Transcript 1, R. 134, Page ID# 969]. Bill lived there for about three or four years and then began confusing reality with television. [Transcript 1, R. 134, Page ID# 968-70]. After evaluation by medical professionals, Bill was committed to Clover Bottom Developmental Center in Middle Tennessee, where he remained institutionalized for 12 years. [Transcript 1, R. 134, page ID# 971-72]. While at Clover Bottom, it was determined that Bill could not have a roommate because he became very upset when his roommates moved his possessions and Bill would also move his roommates' things. [Transcript 1, R. 134, Page ID# 972]. Furthermore, while Bill was at Clover Bottom, he was physically and sexually assaulted by three African American men. [Transcript 1, R. 134, Page ID# 1027-28]. Given his disabilities, Bill became afraid of all African American men and could not understand that the race and gender of his three assailants were unrelated to the abuse that he suffered. [*See* Transcript 1, R. 134, Page ID# 1026].

When Clover Bottom was ordered to close, Bill was moved into home and community-based care. [Transcript 1, R. 134, Page ID# 973]. Bill has a Medicaid waiver for home and community-based services, with no cap on the amount of care or services that he can receive. [Transcript of Proceedings 11/4/2020 ("Transcript 2"), R. 135, Page ID# 1124].

The Tennessee Department of Intellectual and Developmental Disabilities ("DIDD") is the agency that oversees provision of care for the intellectually and developmentally disabled in Tennessee. [Transcript 2, R. 135, Page ID# 1101]. Brad Turner is DIDD's Commissioner. [*See* Transcript 2, R. 135, Page ID# 1099]. Individuals with intellectual and developmental disabilities may live in state-run Intermediate Care Facilities ("ICF") where DIDD employees provide direct support services to those living there, or they may receive care and services in their home or community through one of Medicaid's three waiver programs. [*See* Transcript 2, R. 135, Page ID# 1102, 1124]. For individuals who choose to live in their own homes, DIDD contracts with providers to provide support services to the client. [Transcript 2, R. 135, Page ID# 1101, 1173]. Because of Bill's difficulties with roommates and his previous experiences at Clover Bottom, Bill chose home and community-based care. [*See* Transcript 1, R. 134, Page ID# 972; 1027-28].

At first, Bill lived in an apartment in Nashville, where he received Level 6 services – or two staff with him 24 hours a day/7 days a week – from a DIDD-authorized provider. [Transcript 1, R. 134, Page ID# 973-74]. In 2014, Bill's parents moved him from

Nashville to his former home in Sevierville after Bill expressed that he wanted to live closer to them and see them more often. [Transcript 1, R. 134, Page ID# 976]. Additionally, although Bill had been afraid of all African American men following the abuse he suffered at Clover Bottom, by the time Bill returned to Sevierville in 2014, he had worked through this issue and was no longer afraid of African American men, including his male African American caretakers. [Transcript 1, R. 134, Page ID# 1028].

Engstrom Services, Inc. is Bill's Independent Support Coordinator ("ISC"), and has been since he first began receiving home and community-based care in Nashville. [Transcript 1, R. 134, Page ID# 976; *see* Transcript 2, R. 135, Page ID# 1130]. The ISC helps individuals identify DIDD-authorized provider agencies that can provide them with the services and supports they need and are qualified to receive through their waiver program. [Transcript 1, R. 134, Page ID# 1078]. Usually, the ISC generates a list of willing service providers and the individual selects the one he or she wants to become the provider. [Transcript 1, R. 134, Page ID# 1080].

The ISC is also responsible for drafting and submitting the individual's Individual Support Plan ("ISP") to DIDD, which includes the services requested by the individual. [Transcript 2, R. 135, Page ID# 1123, 1252]. The ISP is a support plan that should capture what is important to the individual, what is important for the individual, what kind of help he or she needs, and risks and goals. [Transcript 1, R. 134, Page ID# 1079]. After the ISC drafts the ISP, an annual meeting

is held to discuss anything that needs to be changed, added, or removed. [Transcript 2, R. 135, Page ID# 1196]. Everyone who attends this meeting is required to sign the ISP. [Transcript 2, R. 135, Page ID# 1285]. Following this meeting, the ISP is submitted to DIDD for approval. [Transcript 2, R. 135, Page ID# 1169-70, 1195-96].

When a person who has an ISC wishes to change service providers, the ISC will provide the person with a listing of all available agencies or providers in the area that they have selected. [Transcript 2, R. 135, Page ID# 1178]. The individual may then select a provider from this list. [*See* Transcript 2, R. 135, Page ID# 1178]. Furthermore, a person or his or her conservator cannot just "release" a provider who has contracted with DIDD to provide services to the individual – the individual may request to deny services on an ISP, but he or she cannot simply remove a provider or services without a plan for the future in place, per DIDD guidelines. [*See* Transcript 1, R. 134, Page ID# 1082].

When a provider agency wishes to stop providing services to an individual, the agency may submit its intent to discharge the person to DIDD. [Transcript 2, R. 135, Page ID# 1177-78, 1283]. However, even after submitting its intent to discharge, the provider is required to continue providing services to the individual until another provider is in place and the transition to the new provider is complete. [Transcript 2, R. 135, page ID# 1177-78, 1254, 1283].

Engstrom Services, Inc. continued as Bill's ISC when he began living in his Sevierville home again in

2014. [Transcript 1, R. 134, Page ID# 976]. At this time, Engstrom provided the Noreds with a list of service providers in East Tennessee and they chose New Haven, LLC to provide Bill with services and supports in his Sevierville home. [Transcript 1, R. 134, Page ID# 976-77]. Bill greatly enjoyed living in his Sevierville home because he was able to walk to stores and restaurants and interact with the community. [Transcript 1, R. 134, Page ID# 951, 989-93, 1052-53, 1056-57]. He had friends and was able to live a relatively independent lifestyle, despite his disabilities. [*See id*].

However, Bill began having problems with his New Haven caretakers in late 2015. [Transcript 1, R. 134, Page ID# 995]. He began complaining that his caretakers were hurting him, being mean to him, refusing to let him go out, and that they would not fix his food. [Transcript 1, R. 134, Page ID# 995]. Mr. and Mrs. Nored reviewed camera footage from the cameras in Bill's house to see what was happening, which showed that Bill was being verbally abused, talked-down to, and called names. [*See* Transcript 1, R. 134, Page ID# 996]. The Noreds complained to New Haven's owner and director, Gary Hooks, but the issues continued throughout 2016 and 2017. [Transcript 1, R. 134, Page ID# 997-98, 1001].

DIDD conducted two formal investigations into the abuse and neglect allegations made against Bill's New Haven caretakers. In December 2016, supervision neglect was substantiated against three of Bill's caretakers and emotional abuse was substantiated against one caretaker. [Transcript 1, R. 134, Page ID#

999-1001; Appellant's Appendix ("Appx.") at 94-95]. Each of these caretakers was male. [Transcript 2, R. 135, Page ID# 1275-78].

At the same time, or in December 2016, New Haven submitted an intent to discharge letter to DIDD. [Trial Transcript 2, R. 135, Page ID# 1255-56]. DIDD advised New Haven that there had to be continuity of service until another agency was found to take New Haven's place, consistent with the procedure set forth *supra*. [Transcript 2, R. 135, Page ID# 1263; *see* Transcript 2, R. 135, Page ID# 1177-78, 1254, 1283]. After New Haven submitted its intent to discharge letter, Bill's ISC agency, Engstrom Services, began looking for a new provider for Bill. [*See* Transcript 2, R. 135, Page ID# 1201]. In the meantime, New Haven continued providing services to Bill. [Transcript 2, R. 135, Page ID# 1256].

When it came time for Bill's ISP to be renewed in 2017, an annual meeting was held in Bill's Sevierville home and New Haven was listed as Bill's provider of services on his ISP. [*See* Transcript 2, R. 135, Page ID# 1120; Petitioners' Appx. at 38, 44]. Those who attended the meeting, including Bill's ISC at the time, Johnny McGarrah, and his parents, Mr. and Mrs. Nored, signed the ISP. [*See* Transcript 2, R. 135, Page ID# 1120; Petitioners' Appx. at 44]. Although New Haven was listed as Bill's provider of services on the 2017 ISP, New Haven did not attend the annual ISP meeting and did not sign the ISP. [*See* Transcript 2, R. 135, Page ID# 1120; Petitioners' Appx. at 38, 44].

DIDD approved Bill's 2017 ISP and New Haven continued providing him with services and supports in

his Sevierville home. [*See* Transcript 2, R. 135, Page ID# 1120; Petitioners' Appx. at 38, 44]. However, the abuse and neglect of Bill by his New Haven caretakers did not stop. [Transcript 2, R. 135, Page ID# 1256].

On July 19, 2017, DIDD concluded its second investigation and substantiated supervision neglect against Mr. Eluid Khisa and another male caretaker for leaving Bill alone or unattended for excessive amounts of time, supervision neglect against two male caretakers for sleeping while on duty, and physical abuse against Eluid Ehiksa for pushing Bill down two times during a behavioral episode. [Transcript 1, R. 134, Page ID# 1000-01; Petitioners' Appx. at 132]. Following these findings, Mr. Khisa, who is an African American man, sent the Noreds a death threat in the mail and the Noreds were forced to file a restraining order against him. [Transcript 1, R. 134, Page ID# 1026, 1028]. Given that Bill had been physically and sexually abused by three African American men while he was institutionalized at Clover Bottom, the substantiated abuse and death threat by Mr. Khisa caused a renewed fear of African American men in Bill and he asked that no other African American men be his staff. [Transcript 1, R. 134, Page ID# 1026-29]. Given his disabilities, Bill could not understand that his assailant's race and gender were not connected to the abuse he suffered. [*See* Transcript 1, R. 134, Page ID# 960, 963-67, 1026-29].

Even after the conclusion of DIDD's second investigation, New Haven employees continued abusing and neglecting Bill. New Haven caretakers left him alone in a restaurant in Pigeon Forge for a

significant amount of time in the fall of 2017. [Transcript 1, R. 134, Page ID# 1062]. Then, in October 2017, New Haven staff members got into a physical altercation with Bill after he objected to taking his medications. [Transcript 1, R. 134, page ID# 1001, 1063]. A New Haven employee wrestled Bill to the ground, which resulted in injuries to both Bill and his caretaker. [Transcript 1, R. 134, Page ID# 1000-02, 1063].

After the October 2017 incident, Bill's parents brought him to their home in Knoxville and planned to take care of him for a few days until New Haven could get appropriately trained staff in Bill's Sevierville home to support him. [Transcript 1, R. 134, Page ID# 1001-02, 1063]. They also initiated a civil suit against New Haven, which was ultimately dismissed on July 5, 2018 because it was deemed a medical malpractice case and neither a pre-suit notice nor a certificate of good faith had been filed. [Transcript 1, R. 134, Page ID# 1002-03, 1063-64; New Haven Complaint, R. 51-1, Page ID# 190-203; Order Granting Summary Judgment on New Haven Complaint, R. 51-2, Page ID# 204-06].

Since the fall of 2017, New Haven has not provided services to Bill in his Sevierville home or in his parents' Knox County home. [Transcript 1, R. 134, Page ID# 1005-06, 1064-65]. Further, although Bill's ISC, Engstrom Services, has continued to search for a new provider for Bill, no other DIDD-authorized provider has been found to provide services to Bill in his Sevierville home or in his parents' Knox County home, nor has DIDD been willing to provide care directly to Bill. [Transcript 1, R. 134, Page ID# 1021, 1071;

Transcript 2, R. 135, Page ID# 1201, 1215]. Instead, the responsibility of caring for Bill has fallen on his elderly parents, who are in failing health. [Transcript 1, R. 134, Page ID# 959, 1016-18, 1068-69, 1071; Transcript 2, R. 135, Page ID# 1124]. Mrs. Nored is confined to a wheelchair and has had several mini strokes. [Transcript 1, R. 134, Page ID# 1017]. Mr. Nored has had prostate cancer and skin cancer and is still going through cancer treatments to this day. [Transcript 1, R. 134, Page ID# 1068-69].

Although New Haven was required to remain on Bill's ISP and provide services to him until a new provider was found to ensure continuity of service to Bill [Transcript 2, R. 135, Page ID# 1263; *see* Transcript 2, R. 135, Page ID# 1177-78, 1254, 1283], New Haven stopped providing services to him in the fall of 2017, when the Noreds temporarily moved him to their home after the physical altercation between Bill and his New Haven caretakers. [Transcript 1, R. 134, Page ID# 1005-06, 1064-65]. Although New Haven stopped providing services, it remained listed as Bill's provider on his ISP and cost plan because without a new provider in place, New Haven could not be removed. [Transcript 2, R. 135, Page ID# 1129-30, 1148, 1177-78, 1254, 1283]. The last time that New Haven billed DIDD for services provided to Bill was on October 11, 2017. [Transcript 2, R. 135, Page ID# 1129]. New Haven was then improperly removed from Bill's ISP all together in July 2018.

When it came time to draft Bill's 2018 ISP, the Noreds were still involved in litigation with New Haven and their attorney advised the Noreds not to

communicate directly with New Haven's executives. [Transcript 1, R. 134, Page ID# 1004, 1064; *See* Complaint, R. 51-1, Page ID# 190-203]. Therefore, the Noreds contacted DIDD's Regional Director for East Tennessee, John Craven, and requested that he facilitate a meeting between DIDD's attorneys, their attorney, and New Haven's attorney in order to ensure that New Haven remained Bill's provider until another provider was found and the transition to the new provide was complete. [*See* Transcript 1, R. 134, Page ID# 1004-05]. However, no such meeting was ever arranged, even though the Noreds requested it. [Transcript 2, R. 135, Page ID# 1229, 1295].

Instead, the annual ISP meeting proceeded as scheduled on May 10, 2018. [*See* Transcript 2, R. 135, Page ID# 1121; Petitioners' Appx. at 75]. However, in contrast to Bill's 2017 ISP, New Haven was not listed as Bill's provider on the 2018 ISP, nor were any services to be provided by New Haven listed on the ISP. [*See* Transcript 2, R. 135, Page ID# 1120; Petitioners' Appx. at 38; *see* Transcript 2, R. 135, Page ID# 1121; Petitioners' Appx. at 69]. As in 2017, those attending the 2018 annual ISP meeting signed Bill's ISP, including Bill's ISCs, Stephanie Hernandez and Johnny McGarrah, and his parents. [*See* Transcript 2, R. 135, Page ID# 1121; Petitioners' Appx. at 75]. Just like in 2017, New Haven did not attend the 2018 annual ISP meeting and did not sign the 2018 ISP. [*See* Transcript 2, R. 135, Page ID# 1120; Petitioners' Appx. at 44; *see* Transcript 2, R. 135, Page ID# 1121; Petitioners' Appx. at 75; Transcript 2, R. 135, Page ID# 1207, 1264-65]. However, *unlike* in 2017, New Haven was left off of Bill's ISP, despite no other provider being in place to

care for Bill. [*See* Transcript 2, R. 135, Page ID# 1120; Petitioners' Appx. at 38; *See* Transcript 2, R. 135, Page ID# 1121; Petitioners' Appx. at 69]. Mrs. Nored noted on the 2018 ISP that she "disagree[d] with the Level 4 services and Section C provider, which should by law be New Haven." [*See* Transcript 2, R. 135, Page ID# 1121; Petitioners' Appx. at 75].

Despite no other provider being in place to care for Bill, and with knowledge that Bill's ISC had been searching for another provider for Bill since December 2016, when New Haven turned its intent to discharge letter in to DIDD, and none had yet been found, DIDD approved Bill's 2018 ISP with no provider in place and no Supported Living, Community Based Day, or any other type of care listed. [*See* Transcript 2, R. 135, Page ID# 1121; Petitioners' Appx. at 69].

Since that time, Bill's ISC has continued to search for a replacement provider for Bill, but no willing provider has been found to provide Bill with services in either his Sevierville home or in his parents' Knox County home where he is currently living. [Transcript 2, R. 135, Page ID# 1207-15, 1218-19; Petitioners' Appx. at 136-149; Transcript 2, R. 135, Page ID# 1211-12, 1230; Petitioners' Appx. at 150-155]. In July 2019, DIDD also sent a one-page profile related to Bill which described his support needs and his goal of living in his Sevierville home to 42 providers in the area, but none were willing to provide care to Bill in his Sevierville home. [Transcript 2, R. 135, Page ID# 1140-42, 1293].[1]

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[1] Despite the District Court's conclusion that the Noreds and DIDD could not find a willing provider for Bill because of the

Because Bill has not received care since the fall of 2017 and no DIDD-authorized provider has been found to care for him since that time in his Sevierville home or in the Noreds' Knox County home, the Noreds have requested that DIDD fulfill its duty to Bill by providing

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"unreasonable and unfortunate restrictions based on sex and race of the person who can provide their son the needed services," [Mem. Op., R. 143, Page ID# 1452], the proof at trial showed that (1) Bill is significantly disabled and the right side of his brain was removed [Transcript 1, R. 134, Page ID# 960, 963-67]; (2) Bill was physically and sexually assaulted by three African American men while he was institutionalized at Clover Bottom and became fearful of all African American men [Transcript 1, R. 134, Page ID# 1027-28]; (3) Bill got over his fear of African American men and had African American caretakers, including Mr. Eulid Khisa through New Haven [*See* Transcript 1, R. 134, Page ID# 1026, 1028]; (4) Mr. Khisa physically abused Bill and DIDD conducted an investigation and substantiated this abuse [Transcript 1, R. 134, Page ID# 1000-01; Petitioners' Appx. at 132]; (5) Mr. Khisa then sent a death threat to Bill and his parents, which caused a renewed fear of African American men in Bill [Transcript 1, R. 134, Page ID# 1026, 1028]; (6) Following this incident, Bill requested that no African American men be his staff [Transcript 1, R. 134, Page ID# 1026-29]; (7) Mrs. Nored discussed Bill's request with a single potential provider during a "meet and greet." [Transcript 1, R. 134, Page ID# 1026]. This provider turned down the opportunity to care for Bill for other reasons, not because of Bill's request [Transcript 1, R. 134, Page ID# 1026]; (8) According to Bill's ISC, the remainder of the providers turned Bill down because they didn't service the Sevierville area, did not have enough staff, or could not support Level 6 care on an individual basis. [Transcript 2, R. 135, Page ID# 1209-10, 1214]. In short, because of his disabilities, Bill could not understand that the race and gender of his assailants had nothing to do with the abuse he suffered. However, the search for a provider to care for Bill was not focused on the race or gender of potential providers, nor was this the overarching reason a willing provider could not been found.

care to Bill directly. [Transcript 1, R. 134, Page ID# 1021, 1071]. However, DIDD claims that it cannot do this because it only provides direct care to individuals in its Intermediate Care Facilities, not to individuals inside their own homes. [Transcript 2, R. 135, Page ID# 1102, 1110, 1121, 1148]. DIDD asserts that unless an individual with a waiver for home and community-based services lists a willing provider on his or her ISP, there is no way that payment for care for that person can be approved and therefore, there is no way for that individual to receive the care that he or she is qualified for. [*See* Transcript 2, R. 135, Page ID# 1132-33, 1138-39]. Additionally, DIDD claims that providing direct care to qualified individuals in their own homes would fundamentally alter its program. [Transcript 2, R. 135, Page ID# 1176]. In part, this is because DIDD claims it would be pre-authorizing and then approving the care given to those receiving waiver services, which DIDD claims would be a conflict of interest. [Transcript 2, R. 135, Page ID# 1176].

Because New Haven was removed as Bill's provider without a new provider in place, another provider who is willing to provide care and services to Bill has not been found, and DIDD refuses to provide Bill with services directly, Bill has been forced to live with his parents in their Knox County home since he was temporarily moved there in the fall of 2017. [Transcript 1, R. 134, Page ID# 1013, 1021, 1055, 1065, 1071]. Mr. and Mrs. Nored's home is located in rural South Knox County along curvy roads and it is unsafe for Bill to walk anywhere from their house. [Transcript 1, R. 134, Page ID# 1019-20]. Thus, Bill is unable to live the same independent lifestyle he had previously been living in

his Sevierville home and must now rely on his parents for everything. [Transcript 1, R. 134, Page ID# 1058-59]. This is problematic because Mrs. Nored cannot drive due to her health conditions and Mr. Nored still works and is often required to be in the office. [Transcript 1, R. 134, Page ID# 1018-19, 1055-56]. Further, and as set forth *supra*, Mr. and Mrs. Nored are elderly, in poor health, and are unable to provide Bill with the type of care that he needs. [Transcript 1, R. 134, Page ID# 959, 1017-18, 1068-69].

The Petitioners brought suit against Respondents-Appellees pursuant, in part, to 42 U.S.C. § 1983 for violations of 42 U.S.C. § 1396 *et seq* and its regulations, which set forth the duty of Respondents-Appellees to pay for or provide medical assistance Bill and other disabled individuals across Tennessee. [2nd Amended Complaint, R. 41, Page ID# 133-41]. The District Court concluded that Respondents-Appellees had satisfied their duty to provide medical assistance to Bill under 42 U.S.C. § 1396a. [Mem. Op., R. 143, Page ID# 1448-55]. Petitioners then filed the subject appeal. [Notice of Appeal, R. 145, Page ID# 1466-67].

On September 9, 2022, the U.S. Court of Appeals for the Sixth Circuit affirmed the opinion of the United States District Court for the Eastern district of Tennessee.

B. Procedural Background

Petitioners filed their Complaint [Complaint, R. 1, Page ID# 1-4] on June 1, 2019, alleging violations of the Rehabilitation Act of 1973. Petitioners then filed an

Amended Complaint [Amended Complaint, R. 16, Page ID# 46-50] on August 8, 2019.

Respondents-Appellees filed a Motion to Dismiss [Initial Motion to Dismiss ("MTD"), R. 26, Page ID# 71-73] and Memorandum in Support thereof [Initial MTD Memo, R. 27, Page ID# 74-83] on August 30, 2019. Thereafter, Petitioners sought leave from the Court to file their Second Amended Complaint [Motion. to File 2nd Amended Complaint., R. 33, Page ID# 95-96; Motion to File 2nd Amended Complaint Memo, R. 34, Page ID# 106-07] to add claims pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act. A few days later, or on September 26, 2019, Petitioners filed their Motion for Partial Summary Judgment [Initial Motion for Partial Summary Judgment ("MSJ"), R. 36, Page ID# 110-11], memorandum in support thereof [Initial Partial MSJ Memo, R. 37, Page ID# 112-18], and Statement of Undisputed Material Facts "SUMF") [Initial SUMF, R. 38, Page ID# 119-21]. Petitioners also filed their Response in Opposition to Respondents' Motion to Dismiss on September 26, 2019 [Response to Initial MTD, R. 39, Page ID# 122-30].

The Court granted Petitioners' Motion to file their Second Amended Complaint on October 1, 2019 [Order 2nd Amended Complaint, R. 40, Page ID# 131-32] and Petitioners filed the same the next day. [2nd Amended Complaint., R. 41, Page ID# 133-41]. The Court then denied all pending motions without prejudice as they were based on complaints which were superseded by the Second Amended Complaint. [Order Denying Motions, R. 44, Page ID# 148].

On November 6, 2019, Petitioners filed their Renewed Motion for Partial Summary Judgment [Renewed Partial MSJ, R. 46, Page ID# 152-53], memorandum in support thereof [Renewed Partial MSJ Memo., R. 47, Page ID# 154-60], and Statement of Undisputed Material Facts [Renewed SUMF, R. 48, Page ID# 161-63]. Respondents-Appellees filed their Motion to Dismiss Second Amended Complaint [MTD 2nd Amend. Complt., R. 50, Page ID# 167-70] and memorandum in support thereof [MTD 2nd Amend. Complt. Memo., R. 51, Page ID# 171-89].

On November 25, 2019, Petitioners filed their Response in Opposition to Defendant's Motion to Dismiss Second Amended Complaint. [Response to MTD 2nd Amended Complaint., R. 60, Page ID# 230-43]. Respondents-Appellees filed their Response to Plaintiffs-Appellees' Amended Statement of Undisputed Material Facts in Support of Renewed Motion for Summary Judgment [Response to Renewed SUMF, R. 69, Page ID# 268-79] and Response in Opposition to Petitioners' Renewed Motion for Partial Summary Judgment [Response to Renewed Partial MSJ, R. 70, Page ID# 280-89] on December 10, 2019.

The Court issued its Memorandum Opinion granting in part and denying in part Respondents' Motion to Dismiss on August 11, 2020. [Order MTD 2nd Amend. Compt., R. 103, Page ID# 738-49]. It then found disputes of fact and denied Petitioners' Motion for Summary Judgment on August 14, 2020 [Order Renewed Partial MSJ, R. 104, Page ID# 750-54].

The parties proceeded to trial on November 3 and 4, 2020. On December 30, 2020, Petitioners filed their

Post-Trial Brief [Petitioners' Post-Trial Brief, R. 138, Page ID# 1308-60]. Respondents-Appellees filed their Post-Trial Brief on January 27, 2021 [Respondents' Post-Trial Brief, R. 141, Page ID# 1367-1405]. On February 3, 20201, Petitioners filed their Reply to Respondents-Appellees' Post-Trial Brief. [Petitioners' Reply Post-Trial Brief, R. 142, Page ID# 1406-42].

On August 23, 2021, the Court entered its Memorandum Opinion and Judgment finding that Petitioners were not entitled to any declaratory or injunctive relief and dismissing their case with prejudice. [Mem. Op., R. 143, Page ID# 1443-64; Judgment, R. 144, Page ID#1465]. Petitioners then filed their timely Notice of Appeal on August 31, 2021 [Notice of Appeal, R. 145, Page ID# 1466-67].

On September 9, 2022, the U.S. Court of Appeals for the Sixth Circuit affirmed the opinion of the United States District Court for the Eastern district of Tennessee.

REASONS FOR GRANTING THE PETITION

The Medicaid Act serves as the primary fund so states may administer services through its own agencies to individuals with intellectual and developmental disabilities. In Tennessee, this is accomplished through the Tennessee Department of Intellectual and Developmental Disabilities ("DIDD"). DIDD voluntarily seeks and receives millions of dollars in federal funds year. Yet, despite seeking and receiving federal dollars, DIDD does not desire to comply with The Medicaid Act. Specifically, DIDD claims it complies with The Medicaid Act's definition of

medical assistance by merely being willing to pay for the services assuming one of its approved providers determines that the provision of services fits within its business model. DIDD's willingness to pay is nothing more than its willing to reimburse its own providers if and only if the provider provides approved DIDD services.

That position may have been sufficient under the previous definition of "medical assistance" under The Medicaid Act. Yet, the definition changed in 2010, and the legislative history behind the change, as well as the plain meaning of the new definition of "medical assistance" indisputably shows that DIDD must provide the services itself in the event one of its approved providers will not.

A state plan for medical assistance must "provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and the assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). Further, a state plan for medical assistance must provide "medical assistance" to eligible individuals. 42 U.S.C. § 1396a(a)(10). The definition of medical assistance has been changed to mean "payment of part or all of the cost of the following care and services or the care and services themselves, or both . . . ." 42 U.S.C. § 1396d(a).

The District Court found that Respondents-Appellees have satisfied their duty to provide medical assistance to Bill Nored under 42 U.S.C. § 1396a by merely being willing and able to pay for his care and services, despite there being no willing, DIDD-

authorized provider to pay. [Mem. Op., R. 143, Page ID# 1455, 1458]. However, the Court's holding contradicts the legislative intent behind the change in definition for the term "medical assistance" and the straightforward language within this definition which sets forth that the care and services that Bill qualifies for through his Medicaid waiver must either be paid for or provided by the State. 42 U.S.C. § 1396d(a).

As background, in 2006, the Sixth Circuit rejected a suit by a class of Medicaid-eligible children who argued that Michigan was violating federal law by failing to provide certain screening, diagnostic, and treatment services. *Westside Mothers v. Olszewski* ("*Westside Mothers II*"), 454 F.3d 532, 540 (6th Cir. 2006). The Court noted that "[t]here appears to be disagreement among the courts of appeals as to whether, pursuant to the Medicaid Act, a state must merely provide financial assistance to eligible individuals to enable them to obtain covered services, or provide services directly." *Id*. At the time, the Medicaid Act defined "medical assistance" as "payment of part or all of the cost of . . . care and services." *Id*. Notably, this definition did not refer to provision of care and services. *Id*. Relying upon this former definition of medical assistance, the Court interpreted "medical assistance" to mean financial assistance, rather than medical services. *Id*. Accordingly, the court held that the plaintiffs failed to state a claim because they sought to compel the state to provide care directly. *Id*.

In *Brown v. Tennessee Dept. of Finance and Admin*., 561 F.3d 542 (6th Cir. 2009), the Court relied on the

reasoning set forth in *Westside Mothers II* and *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006), along with the former definition of medical assistance, and held that being placed on a waiting list to obtain waiver services does not violate federal law because the state's duty is to pay for services, not ensure they are provided. *Brown*, 561 F.3d at 545.

By 2010, however, 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, or both . . . ." 42 U.S.C. 1396d(a) (Effective March 23, 2010) (emphasis added). The United States District Court for the Middle District of Tennessee discussed this change in *John B. v. Emkes*, 852 F. Supp.2d 944 (M.D. Tenn. 2012) (aff'd by *John B. v. Emkes*, 710 F.3d 394 (6th Cir. 2013)):

> [T]he term "medical assistance," at the time *Westside Mothers II* was decided, was still defined by the Medicaid Act to mean payment for service. Congress has recently clarified, however, that the term "medical assistance" means "payment of part or all of the cost of . . . care and services, or the care and services themselves, or both." 125 Stat. 119, at § 2304 (March 23, 2010) ("Patient Protection and Affordable Care Act") (amending Section 1905(A) of the Social Security Act as codified at 42 U.S.C. § 1396d(a)). Under this amendment, whether a particular provision of the Medicaid Act requires payment for services or the provision of the services themselves is not controlled by the old definition of "medical assistance" as referring

> only to financial assistance. Indeed, the legislative history behind this amendment clearly shows that Congress intended to clarify that where the Medicaid Act refers to the provision of services, a participating State is required to provide (or ensure the provision of) services, not merely to pay for them[.]

Id. at 951. The *Emkes* Court then quoted portions of the legislative history behind the change in definition for medical assistance. *Id*. The full text of the legislative history behind this change is as follows:

> ["Medical assistance"] is expressly defined to refer to payment but has generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves. The Committee, which has legislative jurisdiction over *Title XIX* of the Social Security Act, has always understood the term to have this combined meaning. Four decades of regulations and guidance from the program's administering agency, the Department of Health and Human Services, have presumed such an understanding and the Congress has never given contrary indications.
>
> Some recent court opinions have, however, questioned the longstanding practice of using the term "medical assistance" to refer to both the payment for services and the provision of the services themselves. These opinions have read the term to refer only to payment; this reading makes some aspects of the rest of *Title XIX* difficult and, in at least one case, absurd. *If*

> *the term meant only payments, the statutory requirement that medical assistance be furnished with reasonable promptness "to all eligible individuals"[as set forth in § 1396a(a)(8)] in a system in which virtually no beneficiaries receive direct payments from the state or federal governments would be nearly incomprehensible.*
>
> Other courts have held the term to be payment as well as the actual provision of the care and services, as it has long been understood. The Circuit Courts are split on this issue and the Supreme Court has declined to review the question. To correct any misunderstandings as to the meaning of the term, and to avoid additional litigation, the bill would revise section 1905(a) to read, in relevant part: "The term 'medical assistance' means payment of part or all of the cost of the following care and services, or the care and services themselves, or both." This technical correction is made to conform this definition to the longstanding administrative use and understanding of the term. It is effective on enactment.

H.R. REP. 111-299, No. 299, 111th Cong., 1st Sess. 2009, 2009 WL 3321420 (Leg. Hist.), at * 649-50 (Oct. 14, 2009) (emphasis added).

Petitioners agree that a state may indeed satisfy its Medicaid obligations by paying for services for those qualified to receive them. *See id*. However, this assumes that there is a willing provider to pay so that the disabled individual is provided with the care and services that he or she is qualified to receive with

reasonable promptness. *See* 42 U.S.C. § 1396d(a); 42 U.S.C. § 1396a(a)(8); H.R. REP. 111-299, No. 299, 111th Cong., 1st Sess. 2009, 2009 WL 3321420 (Leg. Hist.), at * 649-50 (Oct. 14, 2009). Merely being willing to pay, when there are no willing, DIDD-authorized providers to pay to provide Bill with care and services in his Sevierville home falls far short of Respondents-Appellees' duty to provide medical assistance to Bill with reasonable promptness. *Id*.

This is the ideal case for the Court to provide guidance to DIDD and other agencies throughout the United States as to its responsibilities to provide care. As even the District Court noted, there is no dispute that Mr. Nored was entitled to receive services under The Medicaid Act. Moreover, no dispute exists that Mr. Nored's home in Sevierville, Tennessee was not only the least restrictive environment but also clearly within DIDD's stated goal of acclimating its "clients" into the community. DIDD just simply did not want to adopt. Candidly, it was not unwilling to provide the services to Mr. Nored in what everybody agrees is the best venue considering DIDD's stated goals.

In light thereof, Petitioners request that the Court accept this cause to determine whether DIDD has a nondelegable duty to provide services to Mr. Nored, and others in the event one of its approved providers will not.

This result is consistent not only with The Medicaid Act, but fundamental fairness. It is simply not fair for DIDD to accept federal moneys, and then discount any responsibility to individuals such as Mr. Nored. Therefore, it is respectfully submitted that DIDD be

required to provide the services itself or pay the market rate for doing so if it wants to rely on its approved providers to discharge its duties.

To accomplish this, it is respectfully submitted that this Court recognize a nondelegable duty. It is respectfully submitted that the result is considered consistent with the Complaint, The Medicaid Act, and long-standing tort law. To hold otherwise, is to allow DIDD to contract out of its responsibilities to individually service clients such as Mr. Nored.

CONCLUSION

For the reasons discussed above, the Court should grant certiorari.

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