No. 17-1340

IN THE

Supreme Court of the United States

JEFF ANDERSEN, SECRETARY,
KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
IN HIS OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF KANSAS
AND MID-MISSOURI, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Tenth Circuit

BRIEF IN OPPOSITION

DIANA O. SALGADO
Counsel of Record
HELENE T. KRASNOFF
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Avenue NW,
Suite 300
Washington, DC 20005
(202) 973-4800
diana.salgado@ppfa.org

QUESTION PRESENTED

Planned Parenthood affiliates provide essential medical care to low-income individuals through state Medicaid programs. Kansas terminated the Medicaid provider agreements of two Planned Parenthood affiliates without cause. The affiliates and their patients sued under 42 U.S.C. § 1983. They invoked the Medicaid Act's free-choice-of-provider provision, which states that "any individual eligible for medical assistance" "may obtain such assistance from any institution" that is "qualified to perform the service or services required" and "undertakes to provide [the individual] such services." 42 U.S.C. § 1396a(a)(23). The question presented is:

Whether the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), confers a right enforceable under 42 U.S.C. § 1983.

RULE 29.6 STATEMENT

Respondents Planned Parenthood of Kansas and Mid-Missouri (now known as Planned Parenthood Great Plains) and Planned Parenthood of the St. Louis Region and Southwest Missouri are Missouri non-profit corporations. Neither has a parent corporation, and no publicly held corporation owns ten percent or more of either entity's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

BRIEF IN OPPOSITION

Respondents Planned Parenthood of Kansas and Mid-Missouri, now known as Planned Parenthood Great Plains (PPGP); Planned Parenthood of the St. Louis Region and Southwest Missouri (PPSLR); and Jane Does 1-3 respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Jeff Andersen, Secretary of the Kansas Department of Health and Environment.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-92a) is reported at 882 F.3d 1205. The opinion of the district court (Pet. App. 93a-168a) is unreported but is available at 2016 WL 3597457.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2018. The petition for a writ of certiorari was filed on March 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

PPGP and PPSLR provide essential medical services to low-income Kansans through the state's Medicaid program. Kansas terminated their participation in that program, even though the state's own investigations revealed no evidence of wrongdoing. Pet. App. 103a-08a. They and three of their patients sued under 42 U.S.C. § 1983, contending that the state's decision violates (among other things) the Medicaid Act's free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23). That provision gives Medicaid recipients the right to choose to receive their

medical care from any qualified and willing provider. Pet. App. 2a.

The district court preliminarily enjoined the state health secretary (petitioner) from terminating the state's Medicaid provider agreements with PPGP and PPSLR. Pet. App. 93a-168a. The court of appeals affirmed in pertinent part. *Id.* at 1a-92a. As relevant here, both the district court and court of appeals held that the patients may sue under Section 1983 to enforce the Medicaid Act's free-choice-of-provider requirement. *Id.* at 34a, 137a.

1. PPGP and PPSLR are two independently incorporated affiliates of Planned Parenthood Federation of America (PPFA). Pet. App. 98a. They provide essential medical care for hundreds of low-income Kansans each year through Medicaid. *Id.* at 6a, 96a. To qualify for Medicaid, an individual must be low-income (monthly income cannot exceed $768 for a family of four) and either pregnant, disabled, or a parent. *Id.* at 98a.

PPGP and PPSLR offer a range of services—annual wellness exams, vaccines, screenings for breast cancer and cervical cancer, contraception, pregnancy testing and counseling, and other preventative health services, such as testing for anemia. Pet. App. 6a, 96a-97a.[1] They offer these services at health centers in Kansas and in Missouri near the Kansas border. *Id.* Several of the health centers are located in areas with primary care provider shortages. *Id.* at 6a, 96a-97a.

---

[1] Medicaid does not pay for abortion except under very narrow circumstances allowed by federal law. Pet. App. 6a, 98a & n.5.

The individual respondents are patients who have received care at these health centers. Pet. App. 100a-02a. They chose to obtain medical care at the health centers for many reasons, including the medical staff's expertise, the quality of care they receive, and the lack of equivalent health care services at other providers. *Id.* at 7a, 12a, 100a-02a.

2. In 2015, an anti-abortion group released heavily edited videos that purportedly depicted individuals from PPFA and other Planned Parenthood affiliates discussing the sale of fetal tissue. Pet. App. 7a-8a, 102a. The videos are misleading and deceptive—no Planned Parenthood affiliate sells fetal tissue for profit.[2] Indeed, although government officials in about a dozen states have conducted investigations, none have found evidence to support that claim. Resp. C.A. Br. 7 n.3. (Petitioner suggests otherwise, Pet. 7, but that suggestion is inconsistent with the facts found by both courts below, Pet. App. 7a-10a, 103a.)

Further, the videos have nothing to do with this case. It is undisputed that the videos do not involve either PPGP or PPSLR (or any of their personnel), and that PPGP and PPSLR "do not participate in fetal tissue donation or sale." Pet. App. 103a; *see id.* at 7a; Pet. 7. And as the courts below recognized, any conduct by other affiliates cannot be attributed to

---

[2] Letter from Cecile Richards, President, Planned Parenthood, to John A. Boehner, Speaker, U.S. House of Representatives, et al. 6-7 (Aug. 27, 2015), ECF No. 37-4, *Planned Parenthood of Kansas and Mid-Missouri v. Mosier*, No. 2:16-cv-2284 (D. Kan. July 5, 2016); Tamar Lewin, *Planned Parenthood Won't Accept Money for Fetal Tissue*, N.Y. Times (Oct. 13, 2015), https://www.nytimes.com/2015/10/14/us/planned-parenthood-to-forgo-payment-for-fetal-tissue-programs.html.

PPGP and PPSLR because each Planned Parenthood affiliate is an independently managed, separate corporation, and the affiliates "are not subsidiaries of," or controlled by, PPFA. *Id.* at 58a-59a, 100a, 145a, 152a-54a.

Following the videos' release, three states—Louisiana, Alabama, and Arkansas—immediately terminated the Medicaid provider agreements of the Planned Parenthood affiliates in those states.[3] Numerous other states, including both Kansas and Missouri, began investigations. Pet. App. 103a-06a.

Kansas conducted two investigations, but neither uncovered any evidence of wrongdoing. First, the state health board investigated PPGP to ensure it was complying with Kansas law regarding fetal tissue. Pet. App. 8a, 103a. After a "careful review," the board found no basis for any further action. *Id.*; *id.* at 154a (noting that a "thorough investigation" found "no evidence" of wrongdoing). Second, the state waste management bureau investigated a PPGP health center located in Overland Park, Kansas. *Id.* at 103a-06a. After taking steps to protect patient privacy and prevent harassment of its vendors, the affiliate provided the bureau with the information it had requested. *Id.* at 8a-9a, 105a-06a. The bureau issued a report finding no violations of law. *Id.* at 9a, 106a.

In the meantime, the Missouri Attorney General investigated PPSLR and found no evidence of

---

[3] *See Does v. Gillespie*, 867 F.3d 1034, 1038 (8th Cir. 2017) (Arkansas); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 452 (5th Cir. 2017) (Louisiana), *petition for cert. pending*, No. 17-1492 (filed Apr. 27, 2018); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1212 (M.D. Ala. 2015) (Alabama).

wrongdoing. Pet. App. 103a; *see id.* at 154a (the investigation "cleared [PPSLR] of wrongdoing").

3. Despite the absence of any evidence of wrongdoing, the Governor of Kansas decided to terminate PPGP's and PPSLR's participation in the state Medicaid program. Pet. App. 10a, 106a. At his direction, the state health department issued notices of intent to terminate their contracts as state Medicaid providers. *Id.* at 10a, 107a.

The notices provided three reasons for termination: (1) the discredited videos, which all agree did not involve PPGP and PPSLR; (2) the Overland Park health center's supposed failure to cooperate during the waste disposal inspection; and (3) concerns about billing errors made by Planned Parenthood affiliates in other states (again, not PPGP and PPSLR). Pet. App. 10a, 107a. The termination notices did not provide any evidentiary or legal support for these asserted reasons. *Id.* at 127a-28a (notices were "summary decisions"). And none of the asserted reasons justified terminating PPGP's and PPSLR's participation in Medicaid. *See id.* at 144a-55a (district court's likelihood-of-success finding).

PPGP and PPSLR met informally with state officials and "presented evidence to rebut the allegations in the notice of termination letters." Pet. App. 107a. But that evidence did not matter—after all, the Governor already had stated his intention to make sure that "not a single dollar of taxpayer money goes to Planned Parenthood," even if it means depriving the state's poorest citizens of health care. *Id.* at 106a-07a. The state health department then issued final notices of termination, with an effective date of just seven days later. *Id.* at 108a.

Faced with imminent termination of the contracts, respondents decided to bring suit to ensure continuity of care for patients, rather than pursuing administrative review (which would not preserve the status quo and was not available to the patients in any event). Pet. App. 17a & n.7, 31a-32a, 108a.

4. Respondents sued under 42 U.S.C. § 1983 to challenge Kansas's decision to terminate PPGP and PPSLR's participation in Medicaid. Pet. App. 108a. They allege that Kansas's decision violates the Medicaid Act and the Equal Protection Clause. *Id.* The first claim relies upon the Medicaid Act's free-choice-of-provider provision, which requires a state Medicaid plan to "provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution" that is "qualified to perform the service or services required" and "undertakes to provide" those services. 42 U.S.C. § 1396a(a)(23)(A). Respondents sought temporary injunctive relief, so that patients could continue receiving care. Pet. App. 108a.

The district court found that respondents established a likelihood of success on the Medicaid Act claim and entered a preliminary injunction. Pet. App. 93a-168a. The court first considered whether the Medicaid Act's free-choice-of-provider requirement is enforceable under Section 1983. *Id.* at 135a. Applying the factors identified by this Court in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the court concluded that it is. Pet. App. 136a-38a.

The district court explained that the statute uses "unambiguous rights-creating language" showing Congress's intent to benefit Medicaid patients, because it gives "*any individual* [who is] eligible" a

right to "obtain [medical] assistance" from her chosen provider. Pet. App. 134a, 137a (emphasis added). The statutory language also provides "concrete and objective standards for enforcement," because it asks whether a provider is "*qualified*" and "*undertakes to provide* [Medicaid] services"—questions courts routinely decide. *Id.* at 137a (emphases added). And the statute uses "mandatory terms"—it says that states "*must* provide" the free-choice-of-provider right in their Medicaid plans. *Id*. (emphasis added).

The district court then concluded that respondents demonstrated a likelihood of success on the merits of their claim. Pet. App. 140a-55a. The court carefully considered each of the state's stated reasons for termination and concluded that likely none of them had merit. *Id.* at 144a. The court found, as a factual matter, that PPGP and PPSLR had nothing to do with the discredited videos or alleged billing errors in other states. *Id.* at 144a-45a, 151a-52a. It also found that the Overland Park health center *did* cooperate with state waste inspectors and *did not* violate any state laws. *Id.* at 146a-48a. And the court noted that, despite multiple state investigations, PPGP and PPSLR had been "cleared" of any "wrongdoing." *Id.* at 154a.[4]

The court also concluded that respondents demonstrated irreparable injury absent a preliminary injunction. Pet. App. 156a-60a. It found that PPGP and PPSLR offer "important health services" and are "located in places with health care provider

---

[4] Although petitioner recites a different version of the facts, Pet. 6-10, that recitation is not consistent with the factual findings made by the district court and upheld on appeal, Pet. App. 6a-13a, 95a-109a. And petitioner does not now attempt to challenge the district court's factual findings as clearly erroneous.

shortages," and that, without an injunction, their patients likely would suffer a disruption or denial of health care. *Id.* at 157a-59a; *see id.* at 160a ("[T]here [is] strong evidence that [the] Kansas Medicaid patients will be irreparably harmed by the termination decisions."). Finally, the court found that the balance of harms and the public interest favored entering the injunction. *Id.* at 155a-64a.

5. The court of appeals affirmed in relevant part. Pet. App. 1a-92a. Like the district court, the court of appeals applied the framework from *Blessing* and *Gonzaga* and concluded that individual patients may sue under Section 1983 to enforce the free-choice-of-provider requirement. *Id.* at 34a-46a.

First, the court of appeals "ha[d] no trouble concluding" from the statute's text "that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients." Pet. App. 37a-38a. The court explained that the text specifically identifies a class of beneficiaries—"Medicaid-eligible patients"—and expressly gives them a particular right—the "right to obtain medical services from the qualified provider of their choice." *Id.* at 38a.

Second, the court determined that the statute provides "concrete and objective standards for [judicial] enforcement" because it asks whether the provider is "qualified" and willing to perform the required services. Pet. App. 40a-42a (internal quotation marks omitted). This question "is no different from the sorts of qualification or expertise assessments that courts routinely make." *Id.* at 42a (internal quotation marks omitted).

Third, the court observed that the right is conferred using mandatory terms—the state "must"

provide this right in its Medicaid plan. Pet. App. 42a. Kansas conceded this point. *Id.* Finally, the court concluded that in the Medicaid Act, Congress neither expressly nor impliedly foreclosed individual enforcement of the free-choice-of-provider requirement. *Id.* at 43a-46a.

The court of appeals rejected petitioner's reliance on *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383-84 (2015), a case where the Court held that health care providers could not bring suit under the Supremacy Clause or general principles of equity to enforce a different provision of the Medicaid Act. The court of appeals explained that *Armstrong* was not a Section 1983 lawsuit, and that the language of the provision at issue there is materially different from the provision here. Pet. App. 38a-39a, 41a.

The court then affirmed the preliminary injunction, concluding that respondents are likely to succeed on the merits of their Medicaid Act claim and that the balance of equities favors freezing the status quo through a preliminary injunction. Pet. App. 46a-65a.[5] In so holding, the court rejected the state's argument that "patients have no right to services from qualified providers whom it has terminated." *Id.* at 48a. The court explained that "[i]f a state could terminate providers without any challenge by affected patients, the patients' § 1396a(a)(23) right would . . . be easily eviscerated." *Id.*

---

[5] The court affirmed the preliminary injunction with respect to PPGP, but vacated and remanded with respect to PPSLR because it found the record insufficient to assess that provider's standing. Pet. App. 4a.

Judge Bacharach concurred in part and dissented in part. Pet. App. 66a-92a. In his view, the free-choice-of-provider provision does not give patients an enforceable right to choose a provider who has been excluded from a state Medicaid program on a ground authorized by 42 U.S.C. § 1396a(p)(1). *Id.* at 86a-92a.

ARGUMENT

Petitioner contends (Pet. 18-35) that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), is not privately enforceable under 42 U.S.C. § 1983. The court of appeals applied this Court's settled precedent and correctly rejected that argument. Nearly every court that has considered the issue has reached the same conclusion. The fact that one outlier circuit has disagreed does not justify this Court's review at this time. That is especially true because this case comes to the Court on a preliminary injunction, and the Court's resolution of the question presented may not matter to the ultimate outcome of this case. There are also pending developments that may shed further light on the legal issue here. Further review is therefore unwarranted. This Court has twice denied petitions presenting the same question, *Betlach v. Planned Parenthood Ariz., Inc.*, 134 S. Ct. 1283 (2014) (No. 13-621); *Sec'y of Ind. Family & Social Servs. Admin. v. Planned Parenthood of Ind., Inc.*, 569 U.S. 1004 (2013) (No. 12-1159), and it should do the same here.[6]

1. The court of appeals correctly held that the Medicaid Act's free-choice-of-provider provision, 42

---

[6] This question also is presented in the pending petition in *Gee v. Planned Parenthood of Gulf Coast, Inc.*, *petition for cert. pending*, No. 17-1492 (filed Apr. 27, 2018).

U.S.C. § 1396a(a)(23), is enforceable under 42 U.S.C. § 1983. Section 1983 expressly authorizes "any citizen of the United States or other person within [its] jurisdiction" to sue any person who, "under color of" state law, "depriv[ed] [her] of any rights, privileges, or immunities secured by" federal law. 42 U.S.C. § 1983. A Section 1983 action may be brought against a state actor who deprives a person of a right created by a federal statute. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

The federal statutory provision at issue ensures that Medicaid patients can obtain care from the qualified and willing provider of their choice. It states:

> A State plan for medical assistance must . . . provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution . . . qualified to perform the service or services required . . . [that] undertakes to provide him such services.

42 U.S.C. § 1396a(a)(23)(A). Congress enacted this provision to ensure that Medicaid recipients, like other individuals, could make deeply personal choices about where to obtain medical care free from state interference. *See, e.g.*, S. Rep. No. 90-744, at 183 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 3021. And Congress specifically recognized the importance of that right in the family planning context, providing that even when a state uses a managed-care system, it cannot limit a patient's free choice of provider of family planning services. *See* 42 U.S.C. § 1396a(a)(23)(B) (cross-reference to 42 U.S.C. § 1396d(a)(4)(C)).

a. The court of appeals correctly applied this Court's settled precedents for determining whether a

federal statute may be enforced under Section 1983. Those precedents teach that, to be enforceable under Section 1983, a statute must provide "a federal *right*," not merely a federal rule. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). And the statute must "unambiguously" provide that right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

The Court has identified several factors that help answer the question whether a federal statute creates a right enforceable under Section 1983. The Court asks (1) whether Congress clearly "intended that the provision in question benefit the plaintiff"; (2) whether the asserted right is "not so vague and amorphous that its enforcement would strain judicial competence"; and (3) whether the obligation created by the statute is "mandatory." *Blessing*, 520 U.S. at 340-41 (internal quotation marks omitted); *see Gonzaga*, 536 U.S. at 284-85; *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508-12 (1990). The Court also asks whether, despite those factors, Congress has expressly or impliedly evidenced an intention to foreclose private enforcement. *Gonzaga*, 536 U.S. at 284-85.

The court of appeals correctly identified (Pet. App. 36a-37a) and applied (*id.* at 37a-46a) those principles. First, the court concluded that the plain text of the free-choice-of-provider provision unambiguously shows Congress's intent to give individual Medicaid patients a specific right. *Id.* at 37a-38a. It identifies the people Congress intended to benefit—"individual[s] eligible for medical assistance" under Medicaid—and grants them a particular right—the right to "obtain such assistance" from any qualified and willing provider. 42 U.S.C. § 1396a(a)(23)(A). The statute is "phrased in terms of the persons benefited" and has an "*unmistakable focus*" on those per-

sons, showing Congress's intent "to create not just a private *right* but also a private *remedy*." *Gonzaga*, 536 U.S. at 284 (internal quotation marks omitted). There is no question *who* Congress intended to benefit in this statute, or *what* benefit Congress intended to give them. Pet. App. 38a.

Relatedly, the court of appeals observed that Congress defined this individual right using administrable terms. When a statute is written in "vague and amorphous" terms, that is good evidence that Congress did not intend for courts to enforce the statute through individual lawsuits. Pet. App. 40a (quoting *Blessing*, 530 U.S. at 340-41). But here, Congress defined the right using clear and administrable terms: An individual has a right to use a provider that is "qualified" to perform the medical services required and that "undertakes to provide" those services. 42 U.S.C. § 1396a(a)(23)(A). The term "qualified" has a clear, plain meaning, and courts decide similar questions of qualification and expertise every day. Pet. App. 40a-41a.

And petitioner conceded that the right set out in the free-choice-of-provider provision is "mandatory," as is required for the right to be enforceable under Section 1983. Pet. App. 42a. The statute's language that states "must" include the free-choice-of-provider right in their plans is an "affirmative[] require[ment]" that states must "allow Medicaid-eligible people to obtain medical services from their willing and qualified provider of choice." *Id.*

Finally, the court of appeals found no indication in the statutory text that Congress intended to foreclose a Section 1983 remedy. Pet. App. 43a-44a. No language expressly rejects that remedy, and the federal government's "generalized powers . . . to audit

and cut off federal funds [are] insufficient to foreclose reliance on § 1983 to vindicate federal rights." *Id.* at 44a-45a (quoting *Wilder*, 496 U.S. at 522).

That application of settled law is straightforward and unremarkable. Indeed, nearly every court to have considered the issue has reached the same conclusion. *See* pp. 17-18 & note 8, *infra.*

b. Petitioner's primary response (Pet. 20-23, 28-31) is that *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), compels a different result. But as the court of appeals recognized, that case concerned a different legal issue and a different provision of the Medicaid Act. Pet. App. 38a. The issue was not whether the plaintiffs could sue under Section 1983—which expressly provides a right of action in federal court—but whether they could imply a right of action under the Supremacy Clause or general principles of equity. *Armstrong*, 135 S. Ct. at 1383-85; *see* Pet. App. 44a. The purpose of Section 1983 is to create a cause of action to redress deprivation of a federal right. As a result, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284.

Further, the provision in *Armstrong*, 42 U.S.C. § 1396a(a)(30)(A), was materially different from the provision here. Pet. App. 39a. It "directed states to adopt rate-setting plans in accordance with certain general standards." *Id.* Unlike the provision here, it did not identify specific individuals to benefit or describe an individual right in specific and administrable terms. *Id.* The court of appeals therefore appropriately recognized that "*Armstrong* does nothing to undermine the Patients' claim" here. *Id.*

Petitioner also relies (Pet. 33-35) on *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). But that case also did not concern enforcement under Section 1983. The question in *O'Bannon* was whether residents of a nursing home had a procedural due process right to a hearing in front of *state* authorities before those authorities closed the home, *id.* at 775—not whether they could bring a Section 1983 action in *federal* court. Further, there was no claim that state authorities had closed the home on an invalid ground not authorized by the Medicaid Act. Rather, the Court took it as a given that the facility was unqualified, and determined that the residents had no right to a pre-termination hearing on whether an unqualified facility should be closed. *Id.* at 785-88. *O'Bannon* therefore does not cast doubt on enforceability of the free-choice-of-provider right under Section 1983. Pet. App. 49a-51a.

Petitioner's other argument (Pet. 30-31) is that the free-choice-of-provider provision may be enforced only through the federal government withholding funds from noncomplying states. But the possibility of federal enforcement does not foreclose a private remedy under the Medicaid Act. This Court so held in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 522 (1990), when it concluded that a health care provider could sue under Section 1983 to enforce a provision of the Medicaid Act regarding reimbursement rates.[7] Indeed, the federal government has agreed

---

[7] *Wilder* remains good law: The Court distinguished it in *Gonzaga*, 536 U.S. at 289-90, and cited it with approval in *Blessing*, 520 U.S. at 347-48, and *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 122 (2005). To the extent language in *Armstrong* suggests to the contrary, *see* 135 S. Ct. at 1387-88, that language was dicta (the provider did not sue un-

that the free-choice-of-provider provision *is* enforceable under Section 1983. *See, e.g.*, U.S. Br. at 7-9, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017) (No. 15-30987) (U.S. *Gee* Br.). And federal withholding of funds is cold comfort to the many low-income individuals who will be denied necessary medical care if states are allowed to terminate providers' contracts without any judicial oversight. *See* Pet. App. 44a-45a (concluding that the "federal Secretary's withholding Medicaid funds would not redress [the patients'] injuries at all").

Finally, petitioner contends (Pet. 17-18, 31) that states have "broad authority to exclude providers for violating state or federal requirements." 42 U.S.C. § 1396a(p). That argument goes to the merits, not whether the free-choice-of-provider provision is enforceable under Section 1983. And petitioner's merits argument is wrong. Section 1396a(p) does not authorize states to terminate providers for any reason; rather, it provides a list of specific reasons that generally relate to whether a provider is qualified. 42 U.S.C. § 1396a(p); *see* Pet. App. 49a. A federal regulation confirms that states may set "reasonable standards *relating to the qualifications of providers*." 42 C.F.R. § 431.51(c)(2) (emphasis added). The provision at issue here likewise focuses on whether the provider is "qualified." 42 U.S.C. § 1396a(a)(23)(A). The important point is that the state's reason for termination generally must be related to whether the provider is qualified to provide the requested medical services, rather than a pretextual reason. Here, Kansas investigated and found *no* violations of law. The courts below therefore found a likelihood of suc-

---

der Section 1983 or the Medicaid Act) and it did not command a majority of the Court.

cess on respondents' claim that PPGP and PPSLR are qualified providers and that petitioner violated Section 1396a(a)(23) by terminating their contracts without cause. Pet. App. 46a-61a, 140a-60a. Petitioner did not seek this Court's review of that holding.

2. a. Every court of appeals but one has agreed that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), is privately enforceable under Section 1983. *See* Pet. App. 34a-46a; *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017), *petition for cert. pending*, No. 17-1492 (filed Apr. 27, 2018); *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 966-68 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283; *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974-75 (7th Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013); *Harris v. Olszewski*, 442 F.3d 456, 461-62 (6th Cir. 2006); *see also Silver v. Baggiano*, 804 F.2d 1211, 1216-18 (11th Cir. 1986), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 618 (2002) (noting in passing that "Medicaid recipients do have enforceable rights under § 1396a(a)(23)"); *but see Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017). And nearly every district court that has considered the question presented has agreed that the free-choice-of-provider provision is enforceable under Section 1983.[8]

---

[8] *See* Pet. App. 137a; *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 236 F. Supp. 3d 974, 978 (W.D. Tex. 2017), *appeal docketed*, No. 17-50282 (5th Cir. Apr. 4, 2017); *Planned Parenthood Se., Inc. v. Dzielak*, No. 3:16-cv-454, 2016 WL 6127980, at *1 (S.D. Miss. Oct. 20, 2016), *appeal docketed*, No. 16-60773 (5th Cir. Nov. 21,

The Eighth Circuit's decision is an outlier in both outcome and approach. That court failed to use the analysis set out by this Court in *Blessing*, *Gonzaga*, and similar cases, which focuses on whether the specific language at issue includes the necessary "rights-creating language." *Gonzaga*, 536 U.S. at 290. Rather than analyze the specific text of 42 U.S.C. § 1396a(a)(23), the Eighth Circuit instead focused on the fact that the provision exists within a set of requirements for state Medicaid plans. *Gillespie*, 867 F.3d at 1041. The Eighth Circuit also treated the possibility of federal enforcement as a clear indication that Congress intended to preclude private enforcement, *id.*—even though *Wilder*, a binding precedent of this Court, rejected that exact argument, *see* 496 U.S. at 521-23, and the Eighth Circuit has recognized *Wilder*'s continuing vitality, *see Ctr. for Spe-*

2016); *Bader v. Wernert*, 178 F. Supp. 3d 703, 718-20 (N.D. Ind. 2016); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1217 (M.D. Ala. 2015); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 639-40 (M.D. La. 2015), *aff'd sub nom. Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-566, 2015 WL 13710046, at *6 (E.D. Ark. Oct. 5, 2015), *vacated sub nom. Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017); *Planned Parenthood Ariz., Inc. v. Betlach*, 922 F. Supp. 2d 858, 864 (D. Ariz. 2013), *aff'd*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 902 (S.D. Ind. 2011), *aff'd in part, rev'd in part*, 699 F.3d 962 (7th Cir. 2012); *G. ex rel. K. v. Hawai'i Dep't of Human Servs.*, No. 08-cv-551, 2009 WL 1322354, at *12 (D. Haw. May 11, 2009); *Women's Hosp. Found. v. Townsend*, No. 07-cv-711, 2008 WL 2743284, at *8 (M.D. La. July 10, 2008); *L.F. v. Olszewski*, No. 04-cv-73248, 2004 WL 5570462, at *7 (E.D. Mich. Nov. 1, 2004), *rev'd on other grounds and remanded sub nom. Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006). *But see M.A.C. v. Betit,* 284 F. Supp. 2d 1298, 1307 (D. Utah 2003).

cial Needs Tr. Admin., Inc. v. Olson, 676 F.3d 688, 700 (8th Cir. 2012).[9]

b. There is no urgent need to resolve the lopsided disagreement in the courts of appeals. Petitioner suggests (Pet. 3) that immediate review is necessary because the decision below will open the floodgates to free-choice-of-provider litigation under Section 1983. But that assertion has been disproven by the experience in the many circuits that have permitted individuals to bring those claims. Since the first appellate decision permitting enforcement of the free-choice-of-provider provision under Section 1983 (the Sixth Circuit's decision in *Harris* in March 2006), we are aware of only nine district court decisions involving lawsuits challenging the termination of Medicaid providers through the free-choice-of-provider provision and Section 1983, *see* note 8, *supra* (first nine cases), plus a handful of cases challenging other state policies using those statutes, *see, e.g.*, *id*. (next three cases).

All but one of the nine decisions are part of a recent trend of terminations of Planned Parenthood affiliates that courts have recognized as unwarranted and politically motivated. *See Bader*, 178 F. Supp. 3d at 724. They involve pretextual termination attempts lacking any legal basis or evidentiary support, often based on conduct by different entities in other states. A typical decision to terminate a

---

[9] Other courts of appeals also have recognized that provisions of the Medicaid Act are enforceable under Section 1983 despite the prospect of federal enforcement. *See Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 370-73 (5th Cir. 2018) (42 U.S.C. § 1396a(bb)); *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 817, 820-21 (7th Cir. 2017) (42 U.S.C. § 1396a(a)(13)(A)).

provider, by contrast, is based on valid standards and supporting evidence concerning the Medicaid provider being terminated. *See* U.S. *Gee* Br. at 15-16. In the typical case, therefore, the patient has no reason or basis to claim that she has been denied her choice of any qualified and willing provider. *See id*.

And it would be wrong to assume that Medicaid recipients—some of the poorest members of our society—are enthusiastic about the prospect of bringing lawsuits against states under Section 1983. They would much prefer that states just follow the rules and allow them to obtain healthcare from qualified and willing providers.

Petitioner also contends (Pet. 3) that immediate review is necessary because the decision below "runs roughshod over the existing state procedures" for administrative review of termination decisions. But *patients*—the people with the free-choice-of-provider right—have no right to participate in the administrative review process. Pet. App. 31a-32a. They are not thwarting the administrative process by filing suit because they cannot participate in the administrative process in the first place.

And even if administrative remedies were available to them, it is well-established that a person is not required to exhaust administrative remedies before filing suit under Section 1983. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982). That principle is especially salient here because the administrative review process does not freeze the status quo. *See* Pet. App. 29a ("the clock was running on certain termination"). Accordingly, the only way for patients to continue to receive care from the provider of their choice is by filing suit under Section 1983 and obtaining a preliminary injunction. *Id.*

Finally, it is especially odd for the state to urge use of an administrative appeal process in this case, where the state's position about whether such appeals affected the termination date was "a moving target," *id.* at 18a, and where any such appeals likely would have been futile, *see id.* at 106a (Governor's statement).

3. This case would be an unsuitable vehicle for reviewing the question presented for several reasons.

a. The Court's resolution of the question presented may not matter to the ultimate outcome in this case. This case comes to the Court on grant of a preliminary injunction. The district court froze the status quo so that low-income individuals would not immediately lose their health care while the courts determined whether the state's termination decision was lawful. This Court reviews a preliminary injunction for "abuse of discretion" and "uphold[s] the injunction" if "the underlying . . . question is close." *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004) (internal quotation marks omitted).

Further proceedings will be necessary in this case regardless of whether and how this Court decides the question presented, and those further proceedings may make resolution of the question presented unnecessary. The preliminary injunction is based on only one of respondents' claims for relief, the Medicaid Act free-choice-of-provider claim. Respondents also challenged the state's termination decision on equal protection grounds. Pet. App. 134a.[10] If re-

---

[10] Although a court ordinarily would not enter an injunction on constitutional grounds when there is a statutory ground available, here, the district court may need to consider the

spondents prevail on that basis, then the legal question here will not matter. *See Kliebert*, 141 F. Supp. 3d at 652 (noting that "it appears likely that Plaintiff will be able to prove that the attempted terminations against it are motivated and driven, at least in large part, by reasons unrelated to its competence and unique to it"). Further, the district court did not decide the ultimate merits of the free-choice-of-provider claim; it only found that respondents demonstrated a likelihood of success. Pet. App. 140a. If the court ultimately concludes that that claim fails on its merits, there also would be no need to finally resolve the question presented here.

The Court normally does not review interlocutory orders, and for good reason. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) (explaining that further proceedings assist the Court by sharpening the dispute and providing additional context). There is no reason to depart from that practice here. Petitioner could, of course, seek this Court's review of the question presented once the courts below have definitively resolved the merits. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

b. There are additional pending developments that may shed light on the issues in this case.

First, petitioner's argument rests in significant part on the availability of federal enforcement of the Medicaid Act. *See* Pet. 30-31. But recent developments suggest that the federal government's views on what states must do to comply with the free-

---

equal protection claim if it concludes that PPSLR does not have standing to raise the Medicaid Act claim. *See* Pet. App. 4a.

choice-of-provider provision may be changing. In April 2016, the Department of Health & Human Services issued "guidance to state Medicaid agencies on protecting the right of Medicaid beneficiaries to receive covered services from any qualified provider willing to furnish such services." U.S. Dep't of Health & Human Servs., State Medicaid Director Letter No. 16-005, Clarifying "Free Choice of Provider" Requirement in Conjunction with State Authority to Take Action against Medicaid Providers (Apr. 19, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/smd16005.pdf. The guidance did not address whether the free-choice-of-provider right is enforceable under Section 1983, but it did set out the federal government's view of the scope of that right. *E.g.*, *id.* at 2 (under that provision, a state may not "target a provider or set of providers for reasons unrelated to their fitness to perform covered services or the adequacy of their billing practices," and failure to apply otherwise reasonable standards evenhandedly suggests improper targeting).

On January 19, 2018, the Department issued a new letter to state Medicaid directors rescinding its prior guidance and stating that the federal government "may provide further guidance in the future." *See* U.S. Dep't of Health & Human Servs., State Medicaid Director Letter No. 18-003, Rescinding SMD #16-005 Clarifying "Free Choice of Provider" Requirement (Jan. 19, 2018), https://www.medicaid.gov/federal-policy-guidance/downloads/smd18003.pdf. As a result, there is some uncertainty about whether and how the federal government will enforce the free-choice-of-provider provision. Because federal enforcement is so important to petitioner's argument in this case, the Court should not grant review while that aspect of the case is in flux. *See* Appl. at

2, *Gee v. Planned Parenthood Gulf Coast*, S. Ct. No. 17-1492 (filed Jan. 30, 2018) (invoking this uncertainty to support an extension of time to file a certiorari petition).

Moreover, there may be further developments in the courts of appeals that bear on the issue in this case. The Eighth Circuit, like the courts below, considered the question presented in the preliminary-injunction context. *Gillespie*, 867 F.3d at 1039. That court may refine its views in further proceedings. Also, a case is pending in the Fifth Circuit that raises the same issue as in this case. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, No. 17-50282 (5th Cir. oral arg. scheduled for June 4, 2018).

In light of the interlocutory posture of this case, the questions about enforcement by the federal government, and the ongoing cases in the courts of appeals, it would be better for the Court to allow the issues to percolate than to grant certiorari at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DIANA O. SALGADO
Counsel of Record
HELENE T. KRASNOFF
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Avenue NW,
Suite 300
Washington, DC 20005
(202) 973-4800
diana.salgado@ppfa.org

MAY 23, 2018