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

REPLY FOR PETITIONER

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INTRODUCTION

Respondents concede that there is a square circuit split on the legal issue presented by this petition: whether § 23(A) of the Medicaid Act implies a private right of action under 42 U.S.C. § 1983 for Medicaid patients to challenge their providers' terminations from the program. Respondents do not dispute that this case cleanly presents that question. Nor do they deny that the division in the lower courts has powerful implications for states' abilities to manage their Medicaid programs; states across the country make thousands of termination decisions each year, but they are now subject to different rules regarding challenges to those decisions based on nothing more than the region of the country in which they happen to be located.

Respondents devote the vast majority of their brief in opposition to arguing the merits of the question presented. Petitioner agrees that this Court should resolve those important issues expeditiously—but they should be litigated during plenary review, not at the certiorari stage. Respondents' cursory efforts to downplay the circuit split also fail. For example, Respondents characterize the split as "lopsided" and the Eighth Circuit's decision as an "outlier." Br. in Opp. 18-19. But since this Court's decision in *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), every circuit panel to consider this question has divided over the answer. The Tenth Circuit below split 2-1 in favor of a private right of action, *see* Pet. App. 33a-34a, 76a-78a; the Eighth Circuit split 2-1 against a private right of action, *see Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017); and the Fifth Circuit divided 2-1 in a panel decision supporting a private right, which was

then the subject of an *en banc* petition that was denied by an equally divided 7-7 court, *see Planned Parenthood of Gulf Coast, Inc. v. Gee*, 876 F.3d 699 (5th Cir. 2017). The circuits are sharply divided, and the competing positions have been exhaustively explored by numerous judges on both sides of the issue.

Respondents do not seriously contest the importance of this issue either. They do not even mention (let alone refute) the arguments concerning importance in an amicus brief filed by fifteen states in support of the Petition. Nor do Respondents deny that the decision below permits an end-run around established state administrative remedies that govern terminations of providers. Instead, they merely speculate that Medicaid beneficiaries are unlikely to bring individual actions. That argument is belied by this very case, in which an affiliate of the providers supplied representation for their patients specifically to ensure that the termination could be enjoined without completing the state administrative appeals process. *See* Pet. 10. Allowing the decision below to stand would "disregard the administrative process that Congress envisioned as Medicaid's primary enforcement mechanism" and "interfere[] with the comprehensive planning and review system embodied by federal and State Medicaid statutes, regulations, and plan documents." States' Amicus Br. 17, 21.

Finally, Respondents' half-hearted attempts to identify vehicle issues are unavailing. This Court routinely hears cases that were decided in a preliminary-injunction posture, especially when (as here) the question implicates whether the case should proceed in federal court at all. Nor is there any reason to believe the split will resolve

itself, especially since the Eighth Circuit has already denied rehearing *en banc* by a lopsided vote. And there is no sign of imminent statutory amendments or notice-and-comment regulations that would further shed light on these issues. In short, Respondents identify no persuasive reason why this Court should wait any longer to resolve the acknowledged split of authority below. The Petition should be granted.

I. Certiorari Is Needed to Resolve the Circuit Split over Whether § 23(A) Is Privately Enforceable.

A. As the Petition explains, the circuits are squarely divided on whether § 23(A) grants Medicaid patients the right to challenge a provider's termination in a § 1983 action. *See* Pet. 20-24. Respondents concede that the circuits are divided on this question of federal law, Br. in Opp. 17, but contend that the Eighth Circuit's decision in *Gillespie* is an "outlier" and that the split is "lopsided," *id.* at 18-19. That argument mischaracterizes the recent history of this issue and the current level of division below.

To begin, Respondents repeatedly emphasize that the Court denied two earlier petitions presenting this issue in 2013 and 2014. *See* Br. in Opp. 10, 17. But those petitions involved decisions from the Seventh and Ninth Circuits that predated this Court's 2015 decision in *Armstrong*. *Armstrong*, however, is key to the recent division in the circuits. The Eighth Circuit cited that opinion repeatedly in *Gillespie* as the basis for its decision, 867 F.3d at 1042-44, and the Tenth Circuit discussed *Armstrong* extensively below, Pet. App. 37a-39a, as did the Fifth Circuit in *Gee*, 862 F.3d at 461.

Since this Court decided *Armstrong*, not only have the circuits split over the question presented, but each panel has split 2-1 as well. *See supra* at 1-2. Indeed, if the votes on the *Gee en banc* petition are indicative of those judges' likely views on the merits, then the circuit judges to consider this question within the past year are divided 10-10. There is no question that the lower courts are deeply and intractably divided over the question presented.

Moreover, the split has enormous practical implications. The Eighth Circuit comprises seven states, with a total Medicaid enrollment of 3.2 million individuals. *See* 2016 4Q Medicaid MBES Enrollment, *available at* http://data.medicaid.gov/Enrollment/2016-4Q-Medicaid-MBES-Enrollment/capi-ym43. Under the current state of affairs, those individuals are unable to bring actions in federal court to challenge the terminations of their preferred providers, while the millions of Medicaid patients in the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits do have such a right. Countless regional and national healthcare providers also serve patients in states on both sides of the split and are thus subject to different termination procedures based on the happenstance of their patients' residences. *See* Pet. 24-25.

B. Unable to deny the existence of a split, Respondents devote the bulk of their brief to arguing the merits. Those questions should be resolved during plenary review, but this Court's recent jurisprudence regarding the availability of private rights of action makes clear that § 23(A), enacted pursuant to Congress's Spending Clause power, does not provide Medicaid patients with the right to challenge a state's exclusion of a provider the state deems unqualified. *See* Pet. 29-35. *Armstrong* emphasized that

Gonzaga's requirement of an "unambiguously conferred" right applies fully in the Medicaid context. *Armstrong*, 135 S. Ct. at 1387-88 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)). Moreover, the decision below directly conflicts with this Court's opinion in *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), holding that Medicaid recipients cannot demand services from any provider they wish; rather, the plan merely must permit them "to choose among a range of *qualified* providers, without government interference." *Id.* at 785 (emphasis in original).

Respondents' attempts to distinguish *Armstrong* and *O'Bannon* are unpersuasive. Respondents contend that *Armstrong* involved a "different legal issue"—namely, whether a cause of action could be inferred under the Supremacy Clause, rather than § 1983—and a "different section of the Medicaid Act." Br. in Opp. 14. Those distinctions are immaterial to the question presented here, as *Armstrong* addressed several issues that are directly pertinent to this case: whether Congress intended for there to be judicial enforcement of the Act's provisions, *see Armstrong*, 135 S. Ct. at 1385; whether "enforcement by withholding funds" is sufficient to reject an implied right of action, *id.* at 1385-86; and whether the Medicaid Act, as Spending Clause legislation, can be read to "unambiguously confer[]" a right to enforce its terms, *id.* at 1386 (plurality op.). As the Eighth Circuit explained at length, a faithful application of those principles to § 23(A) compels the conclusion that Congress did not intend to provide patients the right to challenge their providers' terminations in a § 1983 action. *See Gillespie*, 867 F.3d at 1041-44.

Respondents' argument on the merits also depends heavily on their assertion that the Court's holding in *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990), is unchanged by *Armstrong* and "remains good law." Br. in Opp. 15 n.7. But a majority of the Court in *Armstrong* made clear that "our later opinions *plainly repudiate* the ready implication of a § 1983 action that *Wilder* exemplified." 135 S. Ct. at 1386 n.* (citing *Gonzaga*, 536 U.S. at 283) (emphasis added). At a minimum, the substantial confusion over *Wilder*'s vitality after *Armstrong* underscores the need for this Court's intervention. *See* States' Amicus Br. 11-14.

Respondents' attempts to distinguish *O'Bannon* are similarly misplaced. Respondents again retreat to high-level generalities, arguing that the Court did not directly decide the availability of a § 1983 action and that the decision assumed the provider was not qualified. Br. in Opp. 15. But to decide the procedural due process question at issue in *O'Bannon*, the Court necessarily had to consider the scope of any rights provided by § 23(A). And in doing so, the Court was unequivocal: The provision "gives recipients the right to choose among a range of *qualified* providers, without government interference." *O'Bannon*, 447 U.S. at 785 (emphasis in original). "But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." *Id.* That is exactly the type of "right" Respondents sought here and obtained below, and it is exactly why multiple circuit judges have identified *O'Bannon* as directly conflicting with the reasoning of the circuits that have recognized a private right of action. *See Gillespie*, 867 F.3d at 1047 (Shepherd, J., concurring); *Gee*, 862 F.3d at 473 (Owen, J., dissenting).

II. The Circuit Split Implicates Questions of National Importance.

As the Petition explains, it is imperative for this Court to resolve the circuit split given the rapid increase in Medicaid enrollment and the differing routes for appealing a provider's termination that now apply in different states. *See* Pet. 24, 26-27. Respondents do not rebut any of these points. Instead, they try to minimize the importance of this case in two ways, neither of which is reason to deny certiorari.

First, Respondents contend that any concerns that the decision below will "open the floodgates" and frustrate the state administrative review process for disqualifying providers are overstated. Br. in Opp. 19. They note the existence of "only" twelve district court cases in which a beneficiary sought to enforce § 23(A) in federal court. *Id.* at 17-19 & n.8. Respondents concede, however, that most of those cases have arisen within the last few years. *Id.* at 19. Moreover, the decisions in the Fifth and Tenth Circuits recognizing a private right of action under § 23(A) are only a few months old and can be expected to spur increased litigation going forward. Respondents offer no reason to second-guess the concerns of multiple judges below that "a Medicaid provider can now make an end run around the administrative exhaustion requirements in a state's statutory scheme." *Gee*, 876 F.3d at 702 (Elrod, J., dissenting from denial of rehearing *en banc*); *see also Gillespie*, 867 F.3d at 1041 (criticizing the majority rule for permitting "a curious system for review of a State's determination that a Medicaid provider is not 'qualified'").

Respondents also seek to minimize the importance of this issue by arguing that "it is wrong to assume that

Medicaid recipients … are enthusiastic about bringing lawsuits against states under § 1983." Brief in Opp. 20. But this very case illustrates the potential for mischief, as the patients are simply proxies for the providers themselves and are often even represented by the same counsel (the individual Respondents here are represented by a national affiliate of the provider Respondents). Providers intent on protecting their payments from the Medicaid program have every incentive to encourage their patients to bring suit on their behalf and thereby avoid completing the state's administrative appeal procedures. That is precisely what happened here. *See* Pet. 10-11. This is perhaps why Respondents chose to ignore the expressed concern of fifteen states in their amicus brief that "[a]llowing a private right of action under the provider-choice provision for Medicaid recipients would frustrate both the federal-state contract that the Medicaid Act creates and the Congressionally-intended enforcement mechanism of state administrative review processes." States' Amicus Br. 18.

III. This Case Is an Appropriate Vehicle for Addressing the Question Presented.

The Tenth Circuit expressly acknowledged that it was "joining" the circuit split over whether § 23(A) "affords the Patients a private right of action under § 1983." Pet. App. 34a. This case is thus an excellent candidate for resolving the question presented. Respondents' half-hearted attempts to construct vehicle issues are unavailing.

Respondents' contention that the case is "interlocutory," Br. in Opp. 21-22, misses the mark. The existence of a private right of action is a discrete, threshold question of law, and the Tenth Circuit held, in no uncertain

terms, that § 23(A) creates such a right. *See* Pet. App. 34a-46a. The court in no way suggested that this holding was preliminary, tentative, or contingent on further proceedings. Indeed, because the existence of a private right of action is a threshold question, the Tenth Circuit addressed and resolved that issue *before* it turned to the other preliminary-injunction factors. In all events, this Court routinely grants certiorari to resolve important questions of law even when the decision below arises in a preliminary-injunction posture. *See*, *e.g.*, *Luis v. United States*, 136 S. Ct. 1083, 1085 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766-67 (2014); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 212 (2013); *Ashcroft v. ACLU*, 535 U.S. 564, 572-73 (2002). The posture of this case poses no obstacle to this Court's review of the question presented.

Respondents are also wrong to suggest that "additional pending developments" may diminish the need for this Court's intervention. Br. in Opp. 24. Contrary to Respondents' suggestion, there is no reason to believe the Eighth Circuit will reconsider its position. The *Gillespie* panel decision remains binding precedent in that jurisdiction, *see United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) (noting that the Eighth Circuit abides by the law-of-the-circuit rule, which prevents "one panel [from] second-guess[ing] another"); and the court has already denied rehearing *en banc* on this issue, *see Gillespie*, 867 F.3d at 1034. The circuit split will persist indefinitely absent this Court's intervention.[1]

1. Respondents sharply criticize the Eighth Circuit's decision in *Gillespie* as "an outlier in both outcome and approach," Br. in Opp. 18, but Respondents and their parent organization did not seek certiorari after the Eighth Circuit ruled against them and

Finally, there is no reason to forgo deciding the question presented based on Respondents' speculation that the federal government "*may* provide further guidance in the future" regarding its understanding of the relevant statutory provisions. Br. in Opp. 23 (emphasis added). There is always a possibility that executive agencies may revise or issue new guidance regarding the administration of their rules and regulations, but this is no reason to decline to resolve a live circuit split on an important question of statutory interpretation.

In all events, Respondents offer no reason to believe that additional federal guidance about § 23(A) is forthcoming anytime soon. There are no active rulemaking proceedings that could result in authoritative agency interpretations worthy of *Chevron* deference. And, although the U.S. Department of Health and Human Services recently rescinded a 2016 guidance letter discussing this statutory provision, neither the original letter nor the rescission letter discussed the question at issue here: whether § 23(A) is *privately enforceable*. The mere possibility that additional agency guidance might someday materialize is no reason to delay resolution of a sharp division in the lower courts over the availability of a private right of action under a federal statute.

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denied rehearing *en banc*. Although Respondents apparently decided that they could live with unfavorable precedent in one circuit, this Court's role is to ensure national uniformity in the interpretation of federal statutes.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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