No. 15-30987

In the United States Court of Appeals
for the Fifth Circuit

Planned Parenthood Gulf Coast, Inc.;
Jane Doe #1; Jane Doe #2; and Jane Doe #3
Plaintiffs-Appellees

vs.

Rebekah Gee, Secretary,
Louisiana Department of Health and Hospitals
Defendant-Appellant

On Appeal from the United States District Court
Middle District of Louisiana, Hon. John deGravelles
No. 3:15-cv-00565-JWD-SCR

Amicus Curiae Brief of the States of Arkansas, Texas, Indiana, Kansas, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Utah, West Virginia, Wisconsin, the Commonwealth of Kentucky by and through Governor Matthew G. Bevin, and Governor Phil Bryant of the State of Mississippi in Support of Defendant-Appellant's Petition for Rehearing *En Banc*

LESLIE RUTLEDGE
Arkansas Attorney General

LEE RUDOFSKY
Arkansas Solicitor General
MICHAEL A. CANTRELL*
ASHLEY N. LOUKS
323 Center St.
Little Rock, AR 72201
(501) 682-8090

KEN PAXTON
Texas Attorney General

SCOTT A. KELLER
Texas Solicitor General
MICHAEL TOTH
P.O. Box 12548
Austin, TX 78711
(512) 936-1700
**Counsel of Record*

Table of Contents

Table of Authorities

Cases

Statutes

Identity and Interest of *Amici* States

The 15 undersigned States[1] have a strong interest in ensuring that 42 U.S.C. §1396a(a)(23) is not misconstrued to provide a private right of action far beyond anything Congress could possibly have intended. But that is precisely the error the panel majority made. First, directly contrary to controlling Supreme Court precedent,[2] the majority set forth an unnatural and overbroad interpretation of the statutory language in 42 U.S.C. §1396a(a)(23). Second, the majority used this unnatural and overbroad interpretation of §1396a(a)(23) to authorize a sweeping private right of action—ignoring the heightened clarity requirements for finding a private right of action.[3]

This case is one of first impression in the Fifth Circuit.[4] But the Circuit will soon have to decide two other cases presenting essentially the same legal

[1] Arkansas, Texas, Indiana, Kansas, Kentucky by and through Governor Matthew G. Bevin, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Utah, West Virginia, Wisconsin, and Governor Phil Bryant of the State of Mississippi.

[2] *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980).

[3] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (private right of action only available to the extent that "Congress speaks with a clear voice and manifests an unambiguous intent to confer individual rights").

[4] While Planned Parenthood suggests precedents in other circuits are on point, Judge Owen's dissent properly explains why those precedents are inapposite. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, ---F.3d---, 2017 WL 2805637 at *28 (5th Cir. 2017) (Owen, J., dissenting). So does the petition for rehearing *en banc*.

question.[5] Other courts are currently in the process of deciding similar cases (but have not yet issued decisions). A three judge panel of the Eighth Circuit (Colloton, Shepherd, & Melloy, JJ.) heard oral argument ten months ago in a significantly similar case.[6] *Amici* States believe that the Fifth Circuit decision could have an outsized impact on the development of law across the nation, which is a further reason to hear the case *en banc*.

The panel majority's error has wide-ranging and real consequences for states. It authorizes a single uninformed patient to collaterally attack a state agency's decision to disqualify (and thus terminate) a provider from the Medicaid program for misconduct. Incredibly, the patient may even bring such a challenge where the provider itself intentionally did not appeal the disqualification and the supervising agency of the federal government did not object to the action of the state. Such a result simultaneously opens the floodgates of litigation against the States and undermines the careful state-level and federal-level cooperative administrative process crafted by Congress. Moreover, such a result incentivizes gamesmanship—medical providers are included within the state administrative process, but when displeased with it they can unilaterally refuse to contest a

---

[5] *Planned Parenthood Southeast v. Dzielak*, Case No. 16-60773 (5th Cir.) (in briefing); *Planned Parenthood of Greater Texas v. Smith*, Case No. 17-50282 (5th Cir.) (in briefing).

[6] *Planned Parenthood of Arkansas & Eastern Oklahoma v. Gillespie*, Consolidated Case No. 16-4068 (8th Cir. argued Sept. 21, 2016).

decision and later recruit a patient to collaterally challenge the determination on its behalf in a federal court.

In addition to the practical and costly problems associated with the panel majority's error, the decision undermines critical aspects of federalism and state autonomy. Because of the importance of state sovereign immunity in our constitutional system of dual sovereigns, the Supreme Court has repeatedly emphasized that federal courts should only use Spending Clause statutes to authorize private rights of action when Congress clearly and unambiguously manifests an intention to do so. The panel's opinion, and its awkward interpretation of the language in §1396a(a)(23), gives short-shrift to this incredibly important guardrail of federalism.

Argument

I. The Panel Majority's Opinion is Inconsistent with Supreme Court Precedent and Significantly Waters Down the Test for Determining the Existence and Scope of a Private Right of Action.

While this case involves a controversial organization, that ought not obscure two crucial legal issues that have now come to the fore: whether 42 U.S.C. §1396a(a)(23) authorizes any private right of action at all and the proper scope of any such right of action. The answers to these questions have monumental consequences for states and for enforcement of the rules of the Medicaid

program—consequences that are completely divorced from funding or not funding Planned Parenthood.

The panel majority concluded that 42 U.S.C. §1396a(a)(23) authorizes any one patient to collaterally attack a state agency's decision to disqualify (and thus terminate) a provider from the Medicaid program for misconduct. Incredibly, this is true even where—as here—the provider itself intentionally did not appeal the disqualification. That is not and cannot possibly be what Congress intended.

Even assuming *arguendo* that 42 U.S.C. §1396a(a)(23) could support some type of private right of action under 42 U.S.C. §1983,[7] it does not support the unwieldly type of §1983 claim that Patients assert in this case. That is because the language of §1396a(a)(23) does not *clearly and unambiguously manifest an intent*[8] to allow a patient to collaterally challenge a state's decision to exclude a provider for misconduct. It would be difficult enough to conclude that §1396a(a)(23) meets this high clarity burden if writing on a completely clean slate. But in light of the United States Supreme Court's decision in *O'Bannon*, such a conclusion should have been impossible for the panel.

[7] *But see Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015).

[8] *Gonzaga Univ.*, 536 U.S. at 280.

O'Bannon explains that §1396a(a)(23) concerns Medicaid patients' freedom to choose among the pool of providers deemed qualified by a state, *not* the antecedent question of whether a particular provider has been rightly included or excluded by the State from the pool of qualified providers. While the majority correctly states that *O'Bannon* was a due process case, this observation misses the point, as Judge Owen in dissent notes. *O'Bannon* authoritatively construed the meaning of the language in §1396a(a)(23) and that authoritative construction is completely inconsistent with the interpretation the majority panel has now adopted of the exact same provision. At a minimum, *O'Bannon* forecloses the argument that §1396a(a)(23) clearly and unambiguously means something other than what the Supreme Court thought it meant.

Perhaps the panel majority worried that an overbroad interpretation of 42 U.S.C. §1396a(a)(23) was necessary to prevent a state from erroneously (or even nefariously) excluding a provider from the pool of qualified providers and therefore stretched to reach this result. But, if so, that ignores important checks on state action Congress built into the Medicaid Act and that are required by the Act's implementing regulations.

For example, a provider who believes it has been wrongly excluded from the program is entitled to an administrative appeal and can in most circumstances even go to state court to attempt to overturn the exclusion. The opportunity for an

appeal by the provider is a required feature of the program.[9] Moreover, if the federal government believes a state improperly removed a provider from the Medicaid program, it can withhold all or a part of a state's Medicaid funding until the improper removal is reversed.[10] It is through this carefully constructed state-federal cooperative administrative scheme that the program has operated for decades. Nothing in the underlying facts of this case compels judicial re-writing of the statute to manufacture standing to undo Louisiana's decision.

Of course, it makes eminent sense that the Medicaid program requires states to afford the provider an administrative appeal and even further judicial review by a state court—for example, to argue that the agency decision was arbitrary and capricious. This provides due process to the medical provider charged with the misconduct, which is the entity that has the best incentive to challenge the disqualification. The medical provider is also obviously in a very good position to have an important perspective on whether it violated program rules, both in terms of the knowledge of its own conduct and the necessary medical expertise to argue about the rules.

Similarly, it makes eminent sense that the federal government—specifically the Centers for Medicare and Medicaid Services (CMS) within the Department of

[9] *See, e.g.*, 42 C.F.R. §1002.213.

[10] *See* 42 U.S.C. §1396c.

Health and Human Services—is afforded by the Medicaid Act a strong lever to prevent state action with which it disagrees. CMS has the medical and policy expertise to know whether a state has improperly found a provider engaged in disqualifying misconduct. Indeed, this potential sanction of withholding funds heavily incentivizes policy experts from the federal and state level—the two entities with enforcement interest and expertise—to work collaboratively to resolve disputes.

What *doesn't* make sense is to allow a patient (collectively *millions* of patients) to collaterally challenge a provider's disqualification from the Medicaid program. The patient—who in a very human way just wants to be able to keep using his or her provider—has no direct, relevant knowledge of the misconduct of the provider and no expertise with which to justifiably second-guess a state's conclusions as to the misconduct or the proper consequences. Allowing a collateral attack by a patient opens the floodgates of litigation against states in federal courts, does almost no good (if it does any), and could do a lot of harm. One could easily imagine a patient challenging a provider's disqualification even after the federal government, state government, and the provider itself all affirmatively agreed to the penalty. There is simply no reason to believe Congress would have given a patient (collectively millions of patients) the ability to interfere in the highly complex administrative process between the federal government, the

state government, and the provider regarding enforcement of the technical rules of the Medicaid program.

But what then is the proper meaning of—and potential scope of a private right of action provided by—§1396a(a)(23)? The answer is that it is an anti-steering provision. 42 U.S.C. §1396a(a)(23) reflects Congress's intent that state agencies not (1) directly or indirectly steer patients to one or more "favored" Medicaid providers within the overall pool of qualified providers, or (2) create a monopolistic arrangement that forces Medicaid patients to get a certain service from a particular Medicaid provider. Numerous federal cases have made clear that this is the actual meaning of 42 U.S.C. §1396a(a)(23).[11]

This understanding of 42 U.S.C. §1396a(a)(23) better comports with the actual language of the provision. It makes far greater sense within the overall statutory scheme of the Medicaid Act. And it does not run afoul of *O'Bannon*'s authoritative discussion of §1396a(a)(23).

[11] *See Chisholm v. Hood*, 110 F. Supp. 2d 499, 505-07 (E.D. La. 2000) (state may not require that children only receive Medicaid services from local school board) (collecting cases). *See also Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (addressing where patient had a private right of action to challenge a single-supplier contract that required all state Medicaid patients to receive incontinence products from one specific supplier).

Conclusion

The 15 *Amici* States respectfully request that the Court hear this case *en banc*. The resolution of the legal questions here have great potential to impact our States, both those inside the Fifth Circuit (directly) and outside the Fifth Circuit (indirectly). Moreover, the extended period of time the Fifth Circuit panel and Eighth Circuit panel have grappled with this matter is itself an indication of the seriousness, difficulty, and novelty of the question. An *en banc* opinion would ensure that the development of the law on such questions reflects the judgment of the full Fifth Circuit.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

KEN PAXTON
Texas Attorney General

By: /s/ *Michael A. Cantrell*

LEE RUDOFSKY
Arkansas Solicitor General
MICHAEL A. CANTRELL*
Assistant Attorney General
ASHLEY N. LOUKS
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Ph: (501) 682-2401
Fax: (501) 682-2591
Email: michael.cantrell@arkansasag.gov
lee.rudofsky@arkansasag.gov
ashley.louks@arkansasag.gov

SCOTT A. KELLER
Texas Solicitor General
MICHAEL TOTH
Office of the Texas Attorney General
P.O. Box 12548
Austin, TX 78711
Ph: (512) 936-1700
Fax: (512) 936-0545
Email: scott.keller@oag.texas.gov
michael.toth@oag.texas.gov

**Counsel of Record*

July 19, 2017

CURTIS T. HILL, JR.
Attorney General
State of Indiana

SEAN D. REYES
Attorney General
State of Utah

DEREK SCHMIDT
Attorney General
State of Kansas

PATRICK MORRISEY
Attorney General
State of West Virginia

MATTHEW G. BEVIN
Governor
Commonwealth of Kentucky

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

BILL SCHUETTE
Attorney General
State of Michigan

PHIL BRYANT
Governor
State of Mississippi

JOSHUA D. HAWLEY
Attorney General
State of Missouri

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

MICHAEL DEWINE
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

Certificate of Service

I, Michael A. Cantrell, hereby certify that a copy of the above and foregoing *Amicus Curiae* Brief In Support of Defendant-Appellant's Petition for Rehearing *En Banc* has this day been filed with the Clerk for the Fifth Circuit Court of Appeals utilizing the CM/ECF System in accordance with Fed. R. App. P. 25 and Fifth Circuit Rule 25 which will send a notice of electronic filing to counsel for Plaintiffs-Appellees, Defendant-Appellant, and *amicus curiae*.

Little Rock, Arkansas, this 19th day of July, 2017.

/s/ Michael A. Cantrell
Michael A. Cantrell

Certificate of Compliance

1. This document complies with the word limit of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1907 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point, Times New Roman font.

Little Rock, Arkansas, this 19th day of July, 2017.

/s/ Michael A. Cantrell
Michael A. Cantrell