No. 15-3271, No. 16-4068
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD ARKANSAS & EASTERN OKLAHOMA, d/b/a Planned Parenthood of the Heartland; JANE DOE #1; JANE DOE #2; and JANE DOE #3,

APPELLEES,

v.

CINDY GILLESPIE, Director, Arkansas Department of Human Services, in his official capacity,

APPELLANT.

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

No. 4:15-CV-566 KGB

THE HONORABLE KRISTINE G. BAKER

APPELLEES' PETITION FOR REHEARING EN BANC

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STATEMENT OF REASONS FOR EN BANC REVIEW

The Panel, over a dissent, wrote an opinion of sweeping breadth and impact that directly conflicts with four circuits that have addressed the same issue. Unlike the Fifth, Sixth, Seventh, and Ninth Circuits, the Panel ruled Medicaid beneficiaries have no private right of action under 42 U.S.C. §1983 to enforce 42 U.S.C. §1396a(a)(23)(A), the Medicaid Act's "Free Choice of Provider" provision. This conflict with the unanimous precedent of four circuits alone creates a question of exceptional importance warranting en banc review.

Moreover, the Panel's sweeping analysis and result conflicts with both Supreme Court and Eighth Circuit precedent holding the *Blessing/Gonzaga* factors must be applied on a provision-by-provision basis—not to an entire statutory scheme—and that some provisions of the Medicaid Act do, under this analysis, create a right enforceable under §1983. *See, e.g.*, *Blessing v. Freestone*, 520 U.S. 329 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990); *Ctr. for Special Needs Trust Admin. v. Olson*, 676 F.3d 688 (8th Cir. 2012); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 293 F.3d 472 (8th Cir. 2002). The Panel disregards this binding precedent and essentially holds there is *no private right of action* to enforce *any* provision of the Medicaid Act. This stunning outcome has not been adopted by a single other

court—and was not even argued by Appellants—and its break with precedent warrants en banc review.

STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

Plaintiffs and their Participation in Medicaid

The Doe Plaintiffs receive family planning and other preventive services through the Arkansas Medicaid program, have chosen Planned Parenthood of Arkansas and Eastern Oklahoma ("PPAEO") as their provider, and represent a class of similarly situated patients. APX 23–29, 931–933. The Doe Plaintiffs choose PPAEO because they receive prompt, high-quality care not available from other area Medicaid providers, APX 933–34, 948; Prelim. Inj. Order on Behalf of Patient Class ("Class PI") 14 (Sept. 29, 2016), ECF No. 127.

PPAEO operates health centers in Little Rock and Fayetteville providing preventive health services, including contraception, breast cancer screening, and screening and treatment for cervical cancer and sexually transmitted infections. APX 15, 930; Decl. in Supp. of Patient Class Mot. for Prelim. Inj. ("McQuade Decl.") ¶¶ 2–3, ECF No. 122-1.[1] The need for publicly supported family planning services is great in Arkansas, which regularly ranks among the worst states for

[1] While PPAEO offers early medication abortion in Arkansas, these services are covered by Medicaid only in extremely narrow circumstances not at issue here.

reproductive care.[2] PPAEO is a wholly-owned subsidiary of Planned Parenthood Great Plains ("PPGP"), which is an affiliate of Planned Parenthood Federation of America ("PPFA"). APX 540–41; McQuade Decl. ¶¶ 3,9. PPAEO was previously operated by a different PPFA affiliate, Planned Parenthood of the Heartland ("PPH"). McQuade Decl. ¶¶ 2–3. Like all Planned Parenthood affiliates, PPGP and PPH are independent corporations with their own boards, finances, operations, and decision-making. APX 105–06, 468–69.

Appellant's Attempts to Terminate PPAEO from Medicaid

On August 14, 2015, without previously expressing concerns about PPAEO's participation in Medicaid, Defendant-Appellant Director of the Arkansas Department of Human Services ("DHS"), notified PPAEO it was being terminated. APX 22. While the notice gave no reason, Arkansas Governor Asa Hutchinson stated he directed the termination because "[i]t is apparent that after the recent revelations on the actions of Planned Parenthood, that this organization does not represent the values of the people of our state and Arkansas is better served by terminating any and all existing contracts with them." APX 51. The reference to "recent revelations" appeared to relate to deceptively-edited videos making claims about the practices of a small number of Planned Parenthood affiliates that allow

[2] In 2010, 55% of pregnancies in Arkansas were unintended. APX 34. The state is tied for the third highest rate of teen pregnancy among the 50 states, and 72% of Arkansas's unplanned births are publicly funded. *Id*.

patients to donate fetal tissue following a surgical abortion in order to advance medical research.

DHS later sent a second letter, stating PPAEO was being terminated "for cause" based "in part upon the troubling circumstances and activities that have recently come to light regarding the national Planned Parenthood organization, Planned Parenthood of the Heartland, and other affiliated Planned Parenthood entities, all of which are affiliated with PPAEO." APX 73. The letter further stated "there is evidence that PPAEO and/or its affiliates are acting in an unethical manner and engaging in what appears to be wrongful conduct." *Id.* No other explanation for the termination was given.[3]

Neither letter, nor Governor Hutchinson's release, gave a reason for terminating PPAEO relating to the quality of its Medicaid services. And as the uncontroverted evidence shows, PPAEO has never participated in fetal tissue donation and does not appear in any of the videos.[4] APX 17, 935, 53–54. There is "no evidence that [PPAEO] has been cited, reprimanded, or cautioned by [Defendant] in the past about its qualifications as a provider of the services it

[3] The letter also attached questions about fetal tissue disposal and donation at PPAEO. APX 75. PPAEO provided the requested information, including that it performed only early medication abortion and did not participate in fetal tissue donation. APX 77–78.

[4] PPH and PPGP also have never participated in fetal tissue donation and do not appear on the videos. APX 541–452; McQuade Decl. ¶ 10.

offers." APX 955. Rather, the asserted bases for termination relate to accusations about the conduct of other Planned Parenthood entities in other states.[5] *Id.*

Other States' Attempts to Terminate Planned Parenthood Providers From Medicaid

Other states' similar efforts to terminate Planned Parenthood providers from Medicaid have, prior to the Panel's ruling, been universally enjoined. Indiana and Arizona's attempts to exclude Planned Parenthood providers were blocked by injunctions affirmed by the Seventh and Ninth Circuits. *See Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736 (2013); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014). More recently, the Fifth Circuit affirmed an injunction of Louisiana's similar termination based largely on the same YouTube videos, *Planned Parenthood of Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir. 2017), *pet. for reh'g en banc filed* (Jul. 13, 2017), and

[5] The videos' allegations that *any* Planned Parenthood entity engaged in illegal activity or violated standards regarding the use of fetal tissue in scientific research are false. As the District Court correctly found, completed investigations by numerous states have fully vindicated Planned Parenthood. APX 936. And since that finding, the list of states vindicating Planned Parenthood has grown. *See* Laura Bassett, A Year After "Baby Parts" Videos, Planned Parenthood is Taking its Victory Lap, Huffington Post (July 18, 2016), http://www.huffingtonpost.com/entry/planned-parenthood-baby-partslegacy_us_5787a724e4b03fc3ee4f7fed (twenty-one states either launched investigations and found no wrongdoing or found insufficient evidence to warrant investigation).

district courts in Alabama, Kansas, Mississippi, and Texas have each done likewise. *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015); Order, ECF No. 70 (Nov. 30, 2015), attached; *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457 (D. Kan. July 5, 2016), *appeal docketed*, No. 16-3429 (10th Cir. Aug. 3, 2016); *Planned Parenthood Se. v. Dzielak*, No. 3:16-cv-454-DPJ-FKB, (S.D. Miss. Oct. 20, 2016), ECF No. 25, *appeal docketed*, No. 16-60773 (5th Cir. Nov. 22, 2016), attached; *Planned Parenthood of Greater Tex. Fam. Planning & Preventative Health Servs. v. Smith*, 236 F. Supp. 3d 974 (W.D. Tex. 2017). Each was enjoined based on Free Choice of Provider claims brought by Medicaid beneficiaries, like the Doe Plaintiffs here.

The Proceedings

Consistent with this universal precedent, the district court preliminarily enjoined DHS from suspending Medicaid payments to PPAEO, holding the Doe Plaintiffs-Appellees had a private right of action to challenge PPAEO's termination from Medicaid and the termination would likely violate their Free Choice of Provider rights.[6] APX 897, 907–10.

[6] This injunction initially applied only to the three Doe beneficiaries. APX 897. The district court subsequently certified a class of Medicaid patients seeking services at PPAEO, and broadened the injunction to that class. Class PI. Appeals of the two preliminary injunctions were consolidated. Order (Nov. 30, 2016).

Defendants appealed and a divided panel of this Court vacated the injunction, holding the Doe Plaintiffs unlikely to succeed on their claims because they did not establish "that Congress clearly intended to create an enforceable federal right." Op. 6 (Aug. 16, 2017) (citing *Gonzaga*, 536 U.S. 273).[7] The Panel did not focus on the language of the Free Choice of Provider provision, but rather, reached its conclusion based on certain "structural elements" of the Medicaid Act as a whole. Op. 12.

ARGUMENT

I. The Panel's Decision Presents a Question of Exceptional Importance because it Conflicts with the Uniform Precedent of Four U.S. Courts of Appeal.

As the dissent recognizes, the Fifth, Sixth, Seventh, and Ninth Circuits have already spoken on the precise issue presented here—whether the Medicaid Act's Free Choice of Provider provision gives rise to a private right of action pursuant to §1983—and unanimously held it does. Op. 23 (Melloy, C.J., dissenting) ("Dissent") ("I would join the four other circuit courts and numerous district courts that all have found a private right of enforcement under 42 U.S.C. §1396a(a)(23)(A)"); *Gee*, 862 F.3d at 457 ("[j]oining every other circuit that has addressed this issue, we conclude that §1396a(a)(23)(A) affords the Individual

[7] Because the Panel ruled as such, it did not reach the other two *Blessing/Gonzaga* factors.

Plaintiffs a private right of action under §1983"); *Comm'r of Ind.*, 699 F.3d 962; *Betlach*, 727 F.3d 960; *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).[8] Each reached this result because it found that application of the binding *Blessing/Gonzaga* three-part test to the language of §1396a(a)(23)(A) is straightforward.

First, these Circuits all properly focused on the provision at issue—§1396a(a)(23)(A)—and found its mandate that the state provide "any *individual* eligible for medical assistance" with assistance from any qualified provider "confer[s] rights on a particular class of persons." *Gonzaga*, 536 U.S. at 285 (citation omitted); *see* Dissent 24 ("individually focused terminology" means that Section 23(A) "unambiguously confers an individual right on Medicaid-eligible patients"), *citing O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980) (Free Choice of Provider provision "*gives recipients the right* to choose among a range of qualified providers, without government interference") (emphasis added).[9]

As the Seventh Circuit explained, this focus on the individual is significant because:

> Medicaid patients are the obvious intended beneficiaries of the statute; it states that *any* Medicaid-eligible person may obtain medical assistance from *any* institution, agency, or person qualified to perform

[8] Multiple district courts have held the same. See Appellees' Br. 16–17.
[9] The Panel majority's erroneous focus on the Medicaid Act as a whole, rather than on the Free Choice of Provider provision, is discussed in Section II, *infra*.

> that service…This language does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled.

Comm'r of Ind., 699 F.3d at 974. *See also Gee*, 862 F.3d at 457–58; *Betlach*, 727 F.3d at 966-67; *Harris*, 442 F.3d at 461. The Panel's decision to ignore this "individual" language is a sharp departure from these precedents: courts have consistently found the use of such "individually focused terminology," *Gonzaga* 536 U.S. at 287, decisive in identifying congressional intent to confer enforceable rights.

Second, the requirement "is not so 'vague and amorphous' that its enforcement would strain judicial competence." Dissent 24, *quoting Blessing*, 520 U.S. at 340–41 (citation omitted). Determining whether a provider is "qualified to perform the service or services required," 42 U.S.C. § 1396a(a)(23)(A), is "'a simple factual question no different from those courts decide every day' and free from 'any balancing of competing concerns or subjective policy judgments.'" *Gee*, 862 F.3d at 459 (quoting *Betlach*, 727 F.3d 960 at 967–68); *Comm'r of Ind.*, 699 F.3d at 974; *Harris*, 442 F.3d at 462.

And *third*, the requirement is "couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341 (citation omitted). Its plain language requires a state plan to give Medicaid recipients a free choice of providers: "A State plan for medical assistance must…provide…" 42 U.S.C. § 1396a(a); *see also* Dissent 24;

Gee, 862 F.3d at 459; *Comm'r of Ind.*, 699 F.3d at 974; *Betlach*; 727 F.3d at 967; *Harris*, 442 F.3d at 462.

The majority's attempt to justify its departure from this unanimous precedent because of "an evolution in the law," Op. 13, most notably the Supreme Court's recent decision in *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378 (2015), falls short. As the dissent properly recognized, "*Armstrong* [does not] overrule or even undermine the reasoning of the other circuits that have addressed whether [the Free Choice of Provider provision] creates a private right of action under §1983." Dissent 28. *Armstrong* "involved the Supremacy Clause and a claim for equitable relief," *id.*, and explained that the Supremacy Clause does not create a cause of action to enforce a right, but rather creates a rule of decision as to how to resolve conflicts between federal and state law. 135 S.Ct. at 1383. In contrast, the very purpose of §1983 is to create a cause of action for violation of a right, and thus "once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *Gonzaga*, 536 U.S. at 274. Further, *Armstrong* addressed a section of the Medicaid Act that (unlike the Free Choice of Provider provision) does not meet the three-part test of *Blessing/Gonzaga*. *See* Dissent 28 (the provision at issue in *Armstrong* "does not

have any rights-creating language"); *Armstrong*, 135 S. Ct. at 1385 ("It is difficult to imagine a requirement broader and less specific than §30(A)'s mandate").[10]

For these reasons, it is not surprising that in the wake of *Armstrong* all other courts have continued to apply the *Blessing/Gonzaga* factors to determine whether a specific provision of the Medicaid Act creates a private right of action under §1983, and have not hesitated to find one where those standards are met. *See, e.g.*, *Gee*, 862 F.3d at 461–21 (*Armstrong* does not change analysis that §1396a(a)(23)(A) creates a private right of action); *Fishman v. Paoluci*, 628 Fed. Appx. 797 *4 n.1 (2d Cir. 2015) (summary order) (same as to §1396a(a)(3)); *BT Bourbonnais Care v. Norwood*, 2017 WL 3392101 (7th Cir. 2017) (same as to §1396a(a)(13)(A)); *Backer ex rel. Freedman v. Shah*, 788 F.3d 341 (2d Cir. 2015) (analysis of §1396a(a)(19) unchanged); *Health Science Funding v. N. J. Dep't of Health and Human Servs.*, 658 Fed. Appx. 139 (3d Cir. 2016) (analysis of §1396a(a)(54) unchanged).

In short, the majority opinion's conflict with the well-reasoned, persuasive analysis of this previously unanimous precedent alone warrants en banc review. Fed. R. App. P. 35(b)(1)(B) ("a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the

[10] The *Armstrong* Court noted that case's plaintiffs likely did not bring a §1983 action because they could not meet *Gonzaga*'s requirement that a statute unambiguously confer a right. 135 S. Ct. at 1386 n.*

authoritative decisions of other United States Courts of Appeals that have addressed the issue").

II. The Panel's Decision Conflicts with Supreme Court and Circuit Precedent.

En banc reconsideration by this Court is also necessary because the majority's analysis conflicts with binding precedent by improperly discounting the clear individual rights-granting language of the Free Choice of Provider provision in favor of analysis of the structure of the Medicaid Act as a whole. Rather than engage with the language of §1396a(a)(23)A (as four other courts of appeal have done, *see supra* I), the majority improperly concluded that "[w]here structural elements of the statute and language in a discrete subsection give mixed signals about legislative intent, Congress has not spoken…with a 'clear voice' that manifests an 'unambiguous intent' to confer individual rights." Op. 12 (citing *Gonzaga*). This analysis is contrary to binding precedent in at least two ways.

First, as Judge Melloy's dissent reflects, both the Supreme Court and this Court are clear that the *Blessing/Gonzaga* factors must be applied to individual provisions—not an entire statutory scheme. Thus, the majority's "broad focus is inappropriate." Dissent 26 (*citing Blessing*, 520 U.S. at 342 ("We [do] not ask whether the federal…legislation generally [gives] rise to rights; rather, we focus[] our analysis on a specific statutory provision…"); *Golden State Transit Corp. v.*

City of L.A., 493 U.S. 103, 106 (1989) (asking whether "the provision in question" was designed to benefit the plaintiff); *Walters v. Weiss*, 392 F.3d 306, 312 (8th Cir. 2004) ("the specific right must be drawn from a particular statutory provision").

Indeed, the majority's blanket conclusion that structural elements of the Medicaid Act outweigh the rights-granting language of the Free Choice of Provider provision is simply incompatible with this Court's cases finding a private right of action to enforce other Medicaid Act provisions. S*ee Olson*, 676 F.3d 688 (applying *Blessing/Gonzaga* factors to Medicaid Act provision on treatment of trusts of the disabled, and finding a private right of action under §1983); *Pediatric Specialty Care, Inc.*, 293 F.3d 472 (finding private right of action to enforce Medicaid Act provisions on early and periodic screening, diagnosis and treatment); *see also* Dissent 24. It is also incompatible with circuit precedent analyzing each Medicaid Act provision to determine whether *that* provision gives rise to a right of action under §1983—analysis that would be superfluous if structural factors common to the entirety of the Medicaid Act foreclosed such a right of action. *See Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) (*Blessing/Gonzaga* factors not met as to Medicaid Act's "reasonable standards" provision that "lacks any reference to 'individuals' or 'persons'" and enforceable standards).

Second, the specific structural factors in the Medicaid Act the majority suggests are sufficient to nullify the clear rights-granting language in

§1396a(a)23(A) have been rejected by both the Supreme Court and this Court as not precluding a private right of action under §1983. Thus, while the majority relies heavily on the availability of other remedies for violation of §1396a(a)(23)(A) (including that HHS may withhold funds from a state that violates plan requirements and the Provider Plaintiffs' right to administrative appeal),[11] *see* Op. 9–10, binding precedent is clear the availability of other remedies is insufficient to preclude a private right of action—rather, it must be considered *in conjunction with* the language of the specific provision at issue. In *Blessing*, for example, the Supreme Court expressly held the Secretary's "limited powers to…cut federal funding" for a state's violations of its child support collection obligations did not foreclose a private right of action. 520 U.S. at 348. *See also Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 522 (1990) (administrative mechanisms available under the Medicaid Act "cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of §1983")[12]; *Golden State*, 493 U.S. at 108–09. Indeed, a unanimous

[11] No administrative appeal is available to the Doe Plaintiffs. *See* Dissent 27–28 (noting *Blessing* concluded enforcement scheme inadequate to preclude private right of action where it lacked any "private remedy…through which *aggrieved persons* can seek redress") (emphasis added); *Gonzaga*, 536 U.S. at 288 (finding significant that scheme "permits *students and parents* who suspect a violation…to file *individual* complaints") (emphasis added).

[12] The majority is wrong in suggesting *Wilder* has been overruled. While the Court has clarified that *Wilder* does not stand for the proposition that mere "benefits" or

panel of this Court specifically rejected the Panel majority's reasoning as recently as 2012. *See Olson*, 676 F.3d at 699 ("The availability of administrative mechanisms alone, however, cannot defeat the plaintiffs' ability to invoke section 1983 [for Medicaid Act claim], so long as the other requirements of the three-part test are met") (citation omitted); *see also Lankford*, 451 F.3d at 508; Dissent 27. And even *Armstrong*, on which the majority purports to rely, recognizes the Secretary's ability to withhold funds and other structural features of the Medicaid Act do not preclude a cause of action in equity—rather, they "do[] so when combined with the judicially unadministrable nature of §30A's text," 135 S. Ct. at 1385;[13] *see also* Dissent 28–29.

The other two structural factors on which the majority relies—that the Medicaid Act's requirements are framed as directives to HHS for its approval of a

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"interests" can be enforced through §1983, *see Armstrong*, 135 S. Ct. at 1386 n.* (citing *Gonzaga*, 536 U.S. at 283), *Wilder*'s holding that the ability to withhold federal funds does not evidence a Congressional intent to specifically foreclose a remedy under §1983 remains good law. Indeed, courts in this Circuit and elsewhere continue to recognize this aspect of *Wilder*. *See Lankford*, 451 F.3d at 508; *Olson*, 676 F.3d 688 (8th Cir. 2012) (citing *Lankford*); *see also Briggs v. Bremby*, 792 F.3d 239, 245 (2d Cir. 2015); *BT Bourbonnais Care*, 2017 WL 3392101 at *4.

[13] While Justice Breyer joined Parts I–III of Justice Scalia's opinion, he also wrote separately to underscore how narrowly the Court's ruling should be read. This concurrence makes clear that the nature of the rate-setting provision at issue was critical to his determinative vote. 135 S. Ct. at 1388.

state Medicaid plan, and that a state's "substantial compliance" with these requirements suffices to maintain its funding—have been similarly rejected as inadequate to foreclose a §1983 action. *See Blessing*, 520 U.S. at 344–46 (recognizing statutory scheme requires only substantial compliance and remanding for consideration of whether individual provisions give rise to enforceable rights); *Wilder*, 496 U.S. at 522; *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1200 (8th Cir. 2013) (provision "cannot be deemed individually unenforceable solely because of its situs in a larger regime requiring a State plan or specifying the required contents of a state plan," *citing* 42 U.S.C. §1320a-2, or because of "substantial compliance requirement"); Dissent 27–28. Thus, as with the availability of administrative remedies, it was simply impermissible for the Panel to hold these factors trumped §1396a(a)(23)(A)'s clear rights-granting language.

Finally, the majority's broad and unprecedented analysis—which goes far beyond anything Appellants ever suggested—is likely to have wide-ranging implications as the structural factors upon which the majority relies apply to *all* provisions of the Medicaid Act (and likely similar factors appear in other federal laws as well).[14] In these circumstances, en banc review is warranted.

[14] Indeed, the dissenting judge in *Gee* and the state of Louisiana, which is seeking rehearing en banc of that decision, agree that §1396a(a)(23) gives rise to a § 1983

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Petition for Rehearing En Banc.

Respectfully Submitted,

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private right of action. They object only to the scope of that right. *Id. at* 474 ("§1396a(a)(23) . . . provides a right upon which a Medicaid patient may base a suit under § 1983") (Owen, J., dissenting); Defs.'Appellants' Pet. for Reh'g En Banc, No. 15-3097 (5th Cir. July 13, 2017), attached ("Appellant agrees that §1396a(a)(23)(A) creates a private right of action for Medicaid recipients to pursue certain claims in certain instances.")

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th of August, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that counsel for the appellant are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Jennifer Sandman

Jennifer Sandman

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and formatting requirements of Fed. R. App. P. 27 and 32, and that it contains 3888 words in compliance with Fed. R. App. P. 35. The brief was prepared with Microsoft Word and typed using Times New Roman 14-point font.

/s/Jennifer Sandman

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