No. 21-2325

In the United States Court of Appeals for the Seventh Circuit

SAINT ANTHONY HOSPITAL,
Plaintiff – Appellant,

v.

THERESA A. EAGLESON, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,
Defendant – Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
No. 1:20-cv-02561

BRIEF OF NATIONAL HEALTH LAW PROGRAM, SHRIVER CENTER ON POVERTY LAW, AND LEGAL COUNCIL FOR HEALTH JUSTICE, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL

Martha Jane Perkins*
Sarah Jane Somers
Sarah Grusin
NATIONAL HEALTH LAW PROGRAM
1512 E. Franklin Street, Ste. 110
Chapel Hill, NC 27514
Tel: (919) 672-1215
perkins@healthlaw.org
*Counsel of record
Counsel for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2325

Short Caption: Saint Anthony Hospital v. Theresa A. Eagleson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Shriver Center on Poverty Law, Legal Council for Health Justice

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
National Health Law Program

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Martha Jane Perkins Date: 9/16/2021

Attorney's Printed Name: Martha Jane Perkins

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: National Health Law Program
1512 E. Franklin St., Ste 110, Chapel Hill, NC 27514

Phone Number: (919) 968-6308 Fax Number: N/A

E-Mail Address: perkins@healthlaw.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2325

Short Caption: Saint Anthony Hospital v. Theresa A. Eagleson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Shriver Center on Poverty Law, Legal Council for Health Justice

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
National Health Law Program

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Sarah Jane Somers Date: 9/16/2021

Attorney's Printed Name: Sarah Jane Somers

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: National Health Law Program

1512 E. Franklin St., Ste 110, Chapel Hill, NC 27514

Phone Number: (919) 968-6308 Fax Number: N/A

E-Mail Address: somers@healthlaw.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2325

Short Caption: Saint Anthony Hospital v. Theresa A. Eagleson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Shriver Center on Poverty Law, Legal Council for Health Justice

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

National Health Law Program

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Sarah Grusin Date: 9/16/2021

Attorney's Printed Name: Sarah Grusin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: National Health Law Program

1512 E. Franklin St., Ste 110, Chapel Hill, NC 27514

Phone Number: (919) 968-6308 Fax Number: N/A

E-Mail Address: grusin@healthlaw.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI*[1]

The *amici curiae* file this brief pursuant to Federal Rule of Appellate Procedure 29. *Amici* collectively bring to the Court a commitment to advocate on behalf of low-income people, people with disabilities, older adults, people of color, and other vulnerable population groups who are eligible for Medicaid coverage of their medically necessary care. *Amici* also research and provide education on a range of legal and policy issues affecting these populations, including ensuring access to the courts.

The National Health Law Program (NHeLP) advocates, educates, and litigates at the federal and state levels to further its mission of improving access to quality health care for low-income people. For over 50 years, NHeLP has focused on ensuring access and coverage for individuals who qualify for the Medicaid program. The Shriver Center on Poverty Law leads the fight for economic and racial justice by litigating, shaping policy, training, and connecting people in the advocacy community and has represented thousands of Medicaid recipients in the enforcement of their rights under the Medicaid Act. Legal Council for Health Justice (IL) is a 30-year-old nonprofit public interest law organization that engages in individual and

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

class action litigation to advance access to quality health care and protect the legal rights of people facing barriers due to illness or disability. *Amici* have an interest in protecting Medicaid beneficiaries' rights to enforce provisions of the Medicaid Act.

SUMMARY OF ARGUMENT

The Supreme Court has a well-established test for determining when provisions of a federal law create rights that are enforceable under 42 U.S.C. § 1983. Congress has amended the Social Security Act expressly to recognize Medicaid recipients' ability to enforce provisions of the Act under 42 U.S.C. § 1983. *See* 42 U.S.C. §§ 1320a-2, 1320a-10. The Medicaid Act's reasonable promptness provision, 42 U.S.C. § 1396a(a)(8), creates federal rights under the enforcement test established by the Court. The Supreme Court's decision in *Armstrong v. Exceptional Child Center*, *Inc.*, 575 U.S. 320 (2015), did not alter the Court's section 1983 precedents, Congress's endorsement of private enforcement of the Social Security Act, or the federal courts' application of the enforcement test.

ARGUMENT

I. CONGRESS AND THE SUPREME COURT RECOGNIZE THE RIGHT OF INDIVIDUALS TO ENFORCE PROVISIONS OF THE SOCIAL SECURITY ACT PURSUANT TO 42 U.S.C. § 1983.

Enacted as title XIX of the Social Security Act, the Medicaid Act authorizes a cooperative federal-state program to furnish medical assistance to certain low-income people. *See* 42 U.S.C. §§ 1396-1396w-5. In return for generous federal

funding, states must adhere to requirements set forth in the Medicaid Act. *See*, *e.g.*, 42 U.S.C. § 1396a. One such requirement obligates Medicaid-participating states to "provide that all individuals wishing to make application for medical assistance . . . shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." *Id.* § 1396a(a)(8). A separate Medicaid Act provision, 42 U.S.C. § 1396c, also allows the federal government to terminate or withhold funding to states that do not "comply substantially" with the federal law. However, that drastic provision has rarely—if ever—been enforced by the federal government, and it does not foreclose the ability of recipients to enforce Medicaid provisions that create rights under section 1983.

A. Controlling Supreme Court Precedent Establishes the Right of Individuals to Enforce Provisions of the Social Security Act Pursuant to 42 U.S.C. § 1983.

"Section 1983 creates a federal remedy against anyone who, under color of state law, deprives 'any citizen of the United States . . . of any rights, privileges, or immunities secured by the Constitution and laws.'" *Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012) (quoting 42 U.S.C. § 1983). Section 1983 litigation has long protected the federal rights that Congress guaranteed in the Social Security Act. As Justice Harlan observed in a Social Security Act case filed by program beneficiaries pursuant to section 1983:

> It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.

Rosado v. Wyman, 397 U.S. 397, 422-23 (1970); *id.* at 420 ("We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements."). Indeed, on multiple occasions, the Supreme Court has recognized that various provisions of the Social Security Act may be enforced through section 1983. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990) (allowing enforcement of a Medicaid Act provision concerning payment for institutional services); *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (holding "the phrase 'and laws,' as used in § 1983, means what it says" and allowing enforcement of a Social Security Act provision); *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) ("[S]uits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States."); *King v. Smith*, 392 U.S. 309, 333-34 (1968) (allowing enforcement of the "reasonable promptness" provision of a Social Security Act program).

In *Wilder*, a hospital association filed suit under section 1983 alleging that state officials were violating the hospitals' rights under a payment provision of the Medicaid Act. 496 U.S. at 501. After acknowledging that *Maine v. Thiboutot* authorized a section 1983 action for violations of federal statutes, the Court noted two exceptions to this general rule of enforcement: when the statute does not create individual rights within the meaning of section 1983 and when Congress has foreclosed enforcement through section 1983 in the underlying statute itself. *Id.* at 508-09. The Court then stated a test for determining whether a statutory provision creates a "federal right" under section 1983:

> Such an inquiry turns on whether the provision in question was intend[ed] to benefit the putative plaintiffs. . . . If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, . . . or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Id. at 509 (citations and internal quotations omitted). Applying this test, *Wilder* held that the Medicaid payment provision created a federal right enforceable by hospitals. *Id.* at 509-10; *see also*, *e.g.*, *Miller v. Whitburn*, 10 F.3d 1315, 1319-20 (7th Cir. 1993) (applying *Wilder* three-prong test and holding Medicaid provision created rights enforceable by individuals under age 21).

Thereafter, in *Blessing v. Freestone*, the Supreme Court instructed courts to use this "traditional" enforcement test for determining whether Congress intended a

federal statute to create rights under section 1983. 520 U.S. 329, 340 (1997) (citing *Wilder* and stating, "[w]e have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right."). To restate: the test asks whether the statutory provision cited by the plaintiff: (1) creates a right intended to benefit the plaintiff; (2) is written with sufficient clarity for a court to enforce; and (3) is mandatory on the state. *Id*. at 340-41. *Blessing* also cautioned plaintiffs that the complaint must be broken down into "manageable analytic bites" so that the court can ascertain whether "each separate claim" satisfies the three-part enforcement test. *Id*. at 342; *see also id.* at 346 (finding district court did not apply the test's methodical inquiry and remanding for determination of "exactly what rights, considered in their most concrete, specific form, respondents are asserting").

Five years later, the Court reviewed *Wilder* and *Blessing*. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court found some of the language used in these cases had confused lower courts, leading them to find a statute enforceable solely because the plaintiff came within the general zone of interests that the statute intended to protect. *Gonzaga* did not overrule these cases but did clarify that the first prong of the test is met only if the federal provision contains an unambiguously conferred right using "rights-creating terms" that have an unmistakable focus on the individuals benefitted. 536 U.S. at 284-85 (reviewing a provision of the Family Educational Rights and Privacy Act, which is *not* part of the Social Security Act).

When the three-part test is met, "the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 274. The presumption can be overcome only by demonstrating that Congress foreclosed private enforcement expressly or by creating a "comprehensive enforcement scheme that is incompatible with" private enforcement. *Id*. at 284 n.4 (quoting *Blessing*, 520 U.S. at 341); *see also Blessing*, 520 U.S. at 346 (stating this is a "difficult showing"). "[T]he Supreme Court has generally found a remedial scheme sufficiently comprehensive to supplant Section 1983 only where it culminates in a right to judicial review in federal court . . . [on behalf of] aggrieved individuals." *New York State Citizens' Coal. for Children v. Poole*, 922 F.3d 69, 84 (2d Cir. 2019) (cleaned up). The Medicaid Act contains no such remedial scheme. Section 1396c authorizes the federal government to withhold or terminate funding to a state that fails to "comply substantially" with the Medicaid Act. 42 U.S.C. § 1396c. However, neither that section nor any other Medicaid provision provides individual recipients with an avenue for federal judicial review. *New York State Citizens' Coal. for Children*, 922 F.3d at 98 (discussing § 1396c); *see also Wilder*, 496 U.S. at 521-22 ("The Medicaid Act contains no . . . provision for private judicial or administrative enforcement. . . . '[G]eneralized powers' . . . to audit and cut off federal funds [are] insufficient to foreclose reliance on § 1983 to vindicate federal rights."); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (Scalia, J.) (citing *Wilder* and listing Medicaid as a statute whose

enforcement is not foreclosed); *Gonzaga Univ.,* 536 U.S. at 280-81 (noting *Wilder* held the Medicaid Act contains "no sufficient administrative means of enforcing the requirement against States that failed to comply"); *Talevski by next friend Talevski v. Health & Hosp. Corp. of Marion Cty*., 6 F.4th 713, 721 (7th Cir. 2021) ("The Supreme Court has found that a statutory scheme implicitly forecloses section 1983 liability in only three cases," in which individualized judicial review was available, "It has never flatly ruled out private actions under statutes passed pursuant to Congress's Spending Clause powers."); *Anderson v. Ghaly,* 930 F.3d 1066, 1080 (9th Cir. 2019) ("the federal government's approval process for state Medicaid plans, and its concomitant ability to withhold federal funds. . . alone is insufficient to foreclose impliedly a § 1983 remedy where a federal Spending Clause statute has created a right in individual beneficiaries."); *Planned Parenthood of Ind.,* 699 F.3d at 974-75 ("[T]he Secretary's power to shut off all or part of a state's funding is not a 'comprehensive enforcement scheme. . . .'").

The section 1983 enforcement test is the law of the land. Most recently, the Supreme Court denied certiorari in two cases that applied the test to find the Medicaid free choice of provider provision, section 1396a(a)(23)(A), enforceable pursuant to section 1983. *See Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 638 (2018); *Planned Parenthood of Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018).

Three justices dissented, *see* 139 S. Ct. 408. Writing for the dissent, Justice Thomas cited an Eighth Circuit case that broke with six other circuit courts (including the Seventh) and refused to enforce the freedom of choice provision. Justice Thomas said the Eighth Circuit was tactfully saying the Supreme Court had "made a mess of the issue." *Id.* at 409 (citing *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017)).

However, the enforcement track record in the lower courts is not a mess. From 2002, when *Gonzaga* was decided, until 2017, when the split-panel *Does* decision issued from the Eighth Circuit, the appellate courts' decisions on whether a particular Medicaid provision could be privately enforced were remarkably consistent. *See* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 207, 226 tbl. 2 (2016). To the extent there is any confusion now, it stems not from the *Blessing/Gonzaga* test but from the Eighth Circuit's failure in *Does* to apply the test.

B. Congress Has Expressly Stated its Intent to Authorize Private Enforcement of Social Security Act Provisions Under Section 1983.

Congress is well aware of the basic ground rules established by the Supreme Court: When a provision of a Spending Clause enactment is couched in terms that are "precatory," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981), or is included in a statute that provides alternative, comprehensive private enforcement mechanisms, *see Smith v. Robinson*, 468 U.S. 992, 1011-12 (1984), it

will not give rise to claim under section 1983. However, when the provision at hand binds states and confers entitlements on individuals, those will be regarded as "rights secured by the . . . laws of the United States" under section 1983. 42 U.S.C. § 1983.

Congress has expressly evinced its understanding of this design. Following the Supreme Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), Congress amended the Social Security Act to make clear that beneficiaries can enforce provisions of the Act that meet the traditional enforcement test. *Suter* held that plaintiffs could not use section 1983 to enforce a provision of the Adoption Assistance and Child Welfare title of the Social Security Act. *Id.* at 363. *Suter* further stated that a Social Security Act provision did not create enforceable rights if it was placed in a statute that listed mandatory elements of state plans submitted to receive federal funds. *Id.* at 358. This part of the decision had potentially far-reaching ramifications because most Social Security Act titles, including Medicaid, are written in terms of what a state plan must include for a state to receive federal funds to operate the plan.

Congress reacted to correct the *Suter* error and reestablish the private right of action as it existed in previous cases such as *Wilder*, *Thiboutot*, and *Rosado*. Specifically, Congress amended the Social Security Act to provide:

> In an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan. This section is not intended to

> limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of [the Act] is not enforceable in a private right of action.

42 U.S.C. §§ 1320a-2, 1320a-10 (provision repeated). The Conferees explained:

> The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*

H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257. According to the House Ways and Means Committee:

> Prior to this decision, the Supreme Court has recognized, in a substantial number of decisions, that beneficiaries of Federal-State programs could seek to enjoin State violations of Federal statutes by suing under 42 U.S.C. § 1983. *See Rosado v. Wyman*, 397 U.S. 397 (1970); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

H.R. Rep. No. 102-631, at 364 (1992). The Committee also noted that:

> Social Security beneficiaries, parents, and advocacy groups have brought hundreds of successful lawsuits alleging failure of the State and/or locality to comply with State plan requirements of the Social Security Act. . . . Much of this litigation has resulted in comprehensive reforms of Federal-State programs operated under the Social Security Act, and increased compliance with the mandates of the Federal statutes[.]

Id. at 364-65. Congress provided yet further evidence of its intent when it stated:

> [When] Congress places requirements in a statute, we intend for the States to follow them. If they fail in this, the Federal courts can order

> them to comply with the congressional mandate. For 25 years, this was the reading that the Supreme Court had given to our actions in Social Security Act State plan programs. The *Suter* decision represented a departure from this line of reasoning.

139 Cong. Rec. S3173, S3189 (1993). As is evident from the face of the statute itself, the purpose of the law is to "restore[ ] the right of individuals to turn to Federal courts when States fail to implement Federal standards under the Social Security Act." 138 Cong. Rec. S17689-701 (1992) (statement of Sen. Riegle).

Circuit courts, including the Seventh, have relied on this statute. *See Planned Parenthood of Ind.,* 699 F.3d at 977 n.9 (noting that § 1320a-2 forecloses the argument that federal statutes specifying the requirements of state Medicaid plans cannot impose legal obligations on state officials); *see also*, *e.g.*, *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1200 (8th Cir. 2013); *Ball v. Rodgers*, 492 F.3d 1094, 1112 n.26 (9th Cir. 2007) (finding that courts "around the country have relied on [§ 1320a-2] in holding some Medicaid Act rights enforceable under § 1983 even where the statute's "rights-creating" language is embedded within a requirement that a state file a plan or that that plan contain specific features"); *Rabin v. Wilson-Coker,* 362 F.3d 190 (2d Cir. 2004); *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004); *Harris v. James,* 127 F.3d 993, 1003 (11th Cir. 1997). *But see Does*, 867 F.3d at 1044 (8th Cir. 2017) (discounting § 1320a-2 as "hardly a model of clarity," quoting *Sanchez v. Johnson*, 416 F.3d 1051, 1057, n.5 (9th Cir. 2005)).

In sum, "the touchstone of the [private enforcement] determination is congressional intent, as manifest in the language and legislative history of the statute," *Va. Hosp. Ass'n v. Bailes*, 868 F.2d 653, 657 (4th Cir. 1989), *aff'd sub nom. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990). The language of the Social Security Act and its legislative history establish that Congress intends certain Social Security Act provisions to be privately enforceable under section 1983.

C. Courts of Appeals Have Consistently Applied the Enforcement Test to Decide Whether a Medicaid Act Provision Creates a Federal Right Under Section 1983.

In *Gonzaga*, the Supreme Court addressed confusion surrounding application of the first (intent-to-benefit) prong of the enforcement test by clarifying that a general intent to benefit individuals will not do; rather, the federal law at issue must contain unambiguous rights-creating language. 536 U.S. at 282-84. Since 2002 when *Gonzaga* was decided, the federal courts of appeals have reviewed the enforceability of thirty Medicaid Act provisions, finding just over half of these provisions privately enforceable.[2]

[2] *See* Jane Perkins, *Private Enforcement of the Medicaid Act under Section 1983* at 4 (July 30, 2021), https://bit.ly/2XaCtDY, as updated by *Talevski v. Health &Hosp. Corp. of Marion Co.*, 6 F.4th 713 (7th Cir. 2021) (allowing enforcement of Nursing Home Reform Act provisions, 42 U.S.C. §§ 1396r(c)(1)(A)(ii) and 1396r(c)(2)).

The Second Circuit has explained that the crux of the *Gonzaga* holding is that provisions containing individual rights-granting language support a private action while those focusing on state "policy or practice" in the aggregate do not. *Rabin*, 362 F.3d at 201 (enforcing a provision regarding transitional Medicaid coverage, 42 U.S.C. § 1396r-6, finding "no qualifying language akin to [*Gonzaga's*] 'policy or practice'"). *See also*, *e.g.*, *Talevski*, 6 F.4th at 718 ("*Gonzaga* clarified that . . . nothing 'short of an unambiguously conferred right . . . phrased in terms of the persons benefitted' can support a section 1983 action.") (quoting *Gonzaga*, 536 U.S. at 283-84); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) (noting that "as required by *Gonzaga* [the Medicaid provision, § 1396a(bb)] contains rights-creating language because it specifically designates the beneficiaries—the [health clinics]—and . . . has an individual focus rather than an aggregate focus on institutional policy or practice").[3]

In this case, the parties are addressing whether Saint Anthony Hospital, a health care provider, can enforce the Medicaid reasonable promptness provision, 42

[3] In *McCready v. White,* Judge Easterbrook noted that some federal provisions create enforceable rights and others do not: "The [*Gonzaga*] Court's oxymoron—how can an 'implied' right of action be phrased in 'clear and unambiguous terms,' when statutory *silence* is what poses the question whether a right may be implied?—does not detract from the point of its message: § 1983 depends on person-specific 'rights.' What must be 'clear and unambiguous' in the Court's formulation is the right-creating language." 417 F.3d 700, 703 (7th Cir. 2005).

U.S.C. § 1396a(a)(8). This case does not raise the question of whether Medicaid applicants and recipients can enforce that provision. However, all seven federal circuit courts of appeals to have addressed that question have concluded that they can. *See Waskul v. Washtenaw Co. Com'ty Health*, 979 F.3d 426, 447-48 (6th Cir. 2020); *Romano v. Greenstein*, 721 F.3d 373, 377-79 (5th Cir. 2013); *Doe v. Kidd*, 419 F. App'x 411, 415-16 (4th Cir. Mar. 24, 2011), *reaff'g,* 501 F.3d 348 (4th Cir. 2007); *Westside Mothers v. Olszewski,* 454 F.3d 532 (6th Cir. 2006); *Sabree v. Richman*, 367 F.3d 180, 189-90 (3d Cir. 2004); *Bryson v. Shumway*, 308 F.3d 79, 88-89 (1st Cir. 2002); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 976-77 (10th Cir. 2001); *Doe v. Chiles*, 136 F.3d 709, 718-19 (11th Cir. 1998). *Cf. Nasello v. Eagleson*, 977 F.3d 599, 602 (7th Cir. 2020) (assuming, without deciding, that the provision is privately enforceable).

When it applied the *Blessing/Gonzaga* test to the reasonable promptness provision, the Fourth Circuit found that it satisfies the first prong of the test because "it is expressly intended to benefit 'all' individuals eligible for Medicaid assistance." *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007). The second element is met because the provision is "not so 'vague and amorphous' that the judiciary cannot competently enforce it." *Id.* (citing (a)(8) and implementing regulation, 42 C.F.R. § 435.911 [now codified at § 435.912(c)(3)], defining reasonable promptness as 45 days or, in the case of disability, 90 days). Continuing, the *Doe* panel found the provision uses

mandatory terms when it "states that plans 'must' provide for assistance that 'shall' be delivered with reasonable promptness." *Id.* (quoting § 1396a(a)(8)). Finally, *Doe v. Kidd* concluded that the Medicaid Act does not explicitly forbid recourse to section 1983 or "contain a '*comprehensive* enforcement scheme that is *incompatible* with individual enforcement under § 1983.'" *Id.* (quoting *Blessing,* 520 U.S. at 341) (emphases added by Fourth Circuit). *Accord Pennhurst*, 451 U.S. at 17-18 (J. Rehnquist) (contrasting a provision of the Developmentally Disabled Assistance and Bill of Rights Act—which is not part of the Social Security Act—with a Social Security Act provision that, like section 1396a(a)(8), required States to furnish aid "with reasonable promptness to all eligible individuals,") (citing *King*, 392 U.S. at 333, which allowed welfare recipients to enforce the provision under § 1983, and stating that "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly"). To sum up, Medicaid applicants and enrollees can enforce the reasonable promptness provision.

II. THE SUPREME COURT'S *ARMSTRONG* DECISION DOES NOT IMPLICATE ENFORCEMENT ACTIONS BY MEDICAID BENEFICIARIES UNDER 42 U.S.C. § 1983.

Armstrong v. Exceptional Child Care Center, 135 S. Ct. 1378 (2015), does not alter the analysis for determining whether Medicaid beneficiaries can enforce a provision of the Medicaid Act pursuant to section 1983. "*Armstrong* isn't a § 1983

case." *Andersen*, 882 F.3d at 1229. Further, *Armstrong* addressed an entirely different provision of the Medicaid Act: 42 U.S.C. § 1396a(a)(30)(A). *See Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring) (emphasizing the unique difficulty of § 30(A)'s application to ratemaking and concluding that "Congress intended to foreclose respondents from bringing *this particular action* for injunctive relief") (emphasis added).

Armstrong did not concern and certainly did not overrule the section 1983 test established in *Wilder* and refined in *Blessing* and *Gonzaga*, and it did not address 42 U.S.C. § 1320a-2, which is an express congressional statement for private enforcement of Social Security Act provisions. For these reasons, in the wake of *Armstrong* courts of appeals, have continued to apply the *Blessing/Gonzaga* factors to determine whether a specific provision of the Medicaid Act creates a private right of action.

While the Supreme Court has clarified and tightened the section 1983 enforcement test over the years, it has not removed Medicaid beneficiaries' ability to obtain relief from federal courts when states violate unambiguously conferred rights within the Medicaid Act. As the Seventh Circuit has noted:

> [N]othing in *Armstrong*, *Gonzaga*, or any other case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers. There would have been no need, had that been the Court's intent, to send lower courts off on a search for "unambiguously conferred rights." A simple 'no' would have sufficed.

BT Bourbonnais Care v. Norwood, 866 F.3d 815, 820-21 (7th Cir. 2017). *See also Talevski,* 6 F.4th at 725 ("The Court could have saved itself a great deal of time if it had wanted to establish an unbending rule that Spending Clause legislation never supports a private action. It did not do so in *Armstrong*, and it did not even hint that it was overruling *Wilder*. In keeping with that guidance, neither we nor other courts have found any such categorical rule.").

CONCLUSION

For the foregoing reasons, *amici curiae* ask that this Court reverse the District Court's decision.

Dated: September 16, 2021

Respectfully submitted,

/s/ Martha Jane Perkins
Martha Jane Perkins*
Sarah Jane Somers
Sarah Grusin
NATIONAL HEALTH LAW PROGRAM
1512 East Franklin Street, Suite 110
Chapel Hill, North Carolina 27514
Tel: (919) 672-1215
perkins@healthlaw.org
**Counsel of record*

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I certify that the foregoing brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5), and that the total number of words in this brief is 4,531 according to the count of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)

Date: September 16, 2021

/s/Martha Jane Perkins
Martha Jane Perkins

CERTIFICATE OF SERVICE

I certify that on this day, September 16, 2021, I electronically filed the forgoing brief with the Clerk of the Court by using the CM/ECF system.

/s/Martha Jane Perkins
Martha Jane Perkins