No. 12-1037

IN THE

# Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, DEBRA F. MINOTT, in her official capacity as Secretary of the Indiana Family and Social Services Administration, and PATRICIA CASANOVA, in her official capacity as Director of Medicaid, Office of Medicaid Policy and Planning,

*Petitioners*,

v.

SANDRA M. BONTRAGER, on her own behalf and on behalf of a class of those similarly situated,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF FOR THE PETITIONER


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**CASES [CONT'D]**

**CASES [CONT'D]**

**CASES [CONT'D]**



**STATUTES**

## REPLY BRIEF FOR THE PETITIONER[1]

The Medicaid Act generally, and Section 1396a(a)(10) specifically, does not "unambiguously confer[]" rights privately enforceable via Section 1983, as required by *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002). The Court should take this case and *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, 699 F.3d 962 (7th Cir. 2012), *petition for cert. filed* (No. 12-1039), to bring private Medicaid enforcement actions in line with *Gonzaga*. Respondents make no attempt to reconcile *Wilder* with *Gonzaga* and assert no compelling reasons for the Court to ignore the lower-court conflicts their obvious tension has prompted.

### I. Respondents' State Claim Is No Barrier to Review Because, if No Federal Claim Exists, Supplemental Jurisdiction Is Improper

Respondents argue that, because the district court preliminarily addressed their state claim as well as their federal claim, it does not matter whether there is a federal cause of action to enforce 42 U.S.C. § 1396a(a)(10). Br. in Opp. at 6-7. The existence of a supplemental state claim, however, does not impede the Court's resolution of federal

[1] On February 25, 2013, Debra F. Minott succeeded Michael A. Gargano as Secretary of the Indiana Family and Social Services Administration.

justiciability issues, particularly prior to final judgment. Again, the district court has entered only a preliminary injunction, not a final judgment. A determination by this Court that no federal cause of action exists would fatally undermine the basis for supplemental federal jurisdiction over the state claim. Upon reversal, the appropriate course would be to remand the case to the district court to address in the first instance whether supplemental jurisdiction may properly be exercised notwithstanding the lack of a federal claim. Thus, the existence of a state claim does not render the federal cause-of-action issue moot.

1. Remand for review of supplemental jurisdiction following negation of a federal claim was exactly the Court's approach in *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 618, 624 (2002). There, the plaintiff professor alleged in state court that university officials had placed allegations of sexual harassment in his personnel files in violation of federal *and* state law. *Id.* at 616. The Court affirmed a district court order that the state had waived its sovereign immunity by removing the case to federal court, but held that no federal claim existed regardless. *Id.* at 620, 624. Because only state claims remained, the Court observed that, notwithstanding the state's removal of the case to federal court, "in the absence of any viable federal claim, the Federal District Court might well remand [] state-law [] claims against the State to state court . . . and the law commits the

remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance." *Id.* at 618.

Here, similarly, a holding that no federal claim exists should prompt remand for the district court to consider supplemental jurisdiction in the first instance. Final judgment has not been entered, and the supplemental jurisdiction question has never arisen before in the case. It would be unfair to allow preliminary district court review of the state claim to shield from review the only basis for federal jurisdiction that exists. The existence of a supplemental state claim should no more be a deterrent to certiorari here than it was in *Lapides*.

2. Furthermore, it is unlikely that supplemental jurisdiction is proper if no federal cause of action exists in this case. *See, e.g.*, *Meredith v. City of Winter Haven*, 320 U.S. 228, 235-36 (1943) (deeming it appropriate for a federal court to "decline to exercise the equity jurisdiction conferred on it as a federal court when the plaintiff fails to establish a [federal] cause of action").

While the decision whether to exercise supplemental jurisdiction without a viable federal claim is discretionary, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006), the Court has emphasized time and again that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent

jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *accord United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well.").

This principle is so ingrained that every Court of Appeals has affirmed that the default course of action when no federal cause of action exists is to decline to exercise supplemental jurisdiction. *See, e.g.*, *Ramos-Echevarría v. Pichis, Inc.*, 659 F.3d 182, 191 (1st Cir. 2011); *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408, 437 (2d Cir. 2011); *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000); *Waybright v. Frederick County*, 528 F.3d 199, 209 (4th Cir. 2008); *Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc.*, 554 F.3d 595, 602 (5th Cir. 2009); *Gamel v. City of Cincinnati*, 625 F.3d 949, 952 (6th Cir. 2010); *RWJ Mgmt. Co. v. BP Prods. N. Am., Inc.*, 672 F.3d 476, 479 (7th Cir. 2012); *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 678 (8th Cir. 2012); *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010); *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011); *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1089 (11th Cir. 2004); *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423-24 (D.C. Cir. 2005).

Remand of state claims to state court would be especially appropriate here so that Indiana's courts could decide in the first instance whether a state cause of action to enforce Medicaid exists when a federal cause of action to do so does not. It is true that, to date, the Indiana Court of Appeals has assumed that state statutes pertaining to Medicaid can be privately enforced. *See, e.g.*, *Thie v. Davis*, 688 N.E.2d 182, 185-86 (Ind. Ct. App. 1997). But neither that court nor the Indiana Supreme Court has expressly addressed whether such a state cause of action *actually* exists.

Indeed, to the extent Indiana's appellate courts have explicitly found a private right of action to enforce Medicaid, they have done so only according to the *Wilder* standard. *See Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 637 N.E.2d 1306, 1312 (Ind. Ct. App. 1994) (relying on *Wilder* to permit private enforcement of the Boren amendment). The Indiana Supreme Court has, moreover, rejected a private right of action by Medicaid providers to enforce Section 1396a(a)(30)(A) under the *Gonzaga* standard. *Murphy v. Fisher*, 932 N.E.2d 1235, 1238 (Ind. 2010). Reversal by this Court on the federal cause of action issue would likely prompt Indiana's courts to review the state cause of action issue critically.

In short, judgment in favor of Respondents on their state claim is far from assured in the event of reversal on the federal claim. Accordingly,

Respondents' state law claims should not deter the Court from granting certiorari and addressing whether the Medicaid Act creates federal rights enforceable through Section 1983.

## II. The "Suter Fix" Does Not Make Section 1396a(a)(10) Privately Enforceable

Respondents argue that the whole dispute over whether *Gonzaga* or *Wilder* provides the proper standard for Medicaid claims is moot because 42 U.S.C. § 1320a-2 "was enacted precisely to foreclose the argument . . . that no provision of the Social Security Act can ever be enforced through § 1983." Br. in Opp. at 8. Not so. That provision, which did not provide the rationale for the decision below, was a narrowly targeted response to *Suter v. Artist M.*, 503 U.S. 347 (1992), which held that child beneficiaries could not sue to enforce conditions of grants awarded under the Adoption Assistance and Child Welfare Act of 1980. *Id.* at 350.

Section 1320a-2 reads as follows:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter 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 this title is not enforceable in a private right of action.

42 U.S.C. § 1320a-2 (emphasis added). Respondents argue that the first sentence of this statute precludes any argument that a plan provision cannot provide a private right of action. Br. in Opp. at 7-8. But to treat this sentence of the "*Suter* fix" as dispositive here would be to ignore Congress's stated intent in the very next sentence not to "limit or expand the grounds for determining the availability of private actions to enforce State plan requirements[.]"

These two sentences of the *Suter* fix can be reconciled, but not in a way that precludes the State's arguments here. The first sentence of the *Suter* fix says only that provisions of the Social Security Act cannot be deemed unenforceable in private actions because of their "inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." It is apparently targeted at footnote 11 in the *Suter* opinion, which invokes *Smith v. Robinson*, 468 U.S. 992 (1984), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453

U.S. 1 (1981), to question private enforcement of the Social Security Act on account of the "comprehensive remedial scheme" provided by the Act. *Suter*, 503 U.S. at 360 n.11. Footnote 11 of *Suter* leaves that issue open, the first sentence of Section 1320a-2 resolves it, and the second sentence preserves all other arguments about private enforcement.

The State's argument here does not rest as such on either the inclusion of any statutory provision in sections concerning state plans or on *Sea Clammers*. Rather, it raises a more fundamental point: Medicaid creates no individual rights that state officials might conceivably violate and thereby subject themselves to redress via Section 1983. That issue has nothing to do with *Sea Clammers*, which addresses only whether, *notwithstanding* a federal statute's creation of an individual right, the statute's alternative remedies foreclose Section 1983 claims. *Sea Clammers*, 453 U.S. at 20-21. And it is analytically distinct from whether a provision of Medicaid is included "in a section . . . specifying the required contents of a State plan." 42 U.S.C. § 1320a-2.

Instead, the issue here is whether criteria for federal reimbursement, standing alone, create individual rights. If not, the "*Suter* fix" does not itself create a cause of action under Section 1983.

## III. Circuits Are Split Over the Continued Relevance of *Wilder*

There is disagreement in the lower courts about how much relevance *Wilder* still has in cases involving private enforcement of Medicaid through Section 1983. The issue is not whether lower courts have cited *Gonzaga* along with *Wilder*, Br. in Opp. at 12-15; it is instead whether they actually undertake the analysis required by *Gonzaga*, or instead take the shortcut of relying on *Wilder*.

As explained in the Petition, the courts in nine circuits do not make an initial determination as to whether Medicaid and its plan requirements create individual rights that may be privately enforced consistent with *Gonzaga*. Pet. at 18-20. Instead, they skip that initial step because they believe *Wilder* to stand for the proposition that at least *some* of Medicaid's plan provisions are privately enforceable. They look only at the particular plan requirement in question to see if it can plausibly be construed to benefit individual recipients. *See, e.g.*, *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 604 (5th Cir. 2004) (finding that "because it is undisputed that the plaintiff is an eligible recipient of EPSDT services . . . the Act evidences a congressional intent to confer a right . . . upon the plaintiff"); *Westside Mothers v. Haveman*, 289 F.3d 852, 863 (6th Cir. 2002) (finding that "the provisions were clearly intended to benefit the putative plaintiffs, children who are eligible for the screening and treatment

services"); *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Servs.*, 443 F.3d 1005, 1015 (8th Cir. 2006) (finding that the statute was "intended to benefit both CHMS recipients and providers, and creates enforceable rights for both groups"); *see also* Pet. at 18-20 (citing more such examples).

That is, there is a circuit conflict over whether, in light of *Wilder*, courts in Medicaid cases should start at *Gonzaga* step 1 (which is to ask whether Medicaid is generally structured such that its plan requirements "unambiguously confer[]" rights on Medicaid recipients), or proceed directly to step 2 (which is to ask nothing about individual rights, and examine only if a particular plan requirement *benefits* recipients). Respondents' discussion of the cases, Br. in Opp. at 12-14 n.5-6, does not negate this conflict.

The decision below, of course, started at step 2 and said that even though *Gonzaga* had changed the "analytical approach" required in cause of action cases, lower courts are still bound by *Wilder*. Pet. App. 5a-6a. Similarly, the Third Circuit in *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 192 (3d Cir. 2004), decided that *Wilder* trumps *Gonzaga*: "Section 1396 was in effect at the time of *Wilder*, in which the Court allowed claims to proceed under Title XIX" and "*Gonzaga University* did not overrule *Wilder*[.]" In *Hood*, 391 F.3d at 605, the Fifth Circuit held that *Wilder* rendered analysis under the Court's more recent precedents unnecessary. Such analysis fails

to recognize the fundamental analytical shift *Gonzaga* represents.

On the other side of the split, Respondents underplay the extent to which *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006), distinguished pre-*Gonzaga* holdings from post-*Gonzaga* decisions. Br. in Opp. at 13. The Tenth Circuit observed not only that *Gonzaga* "tightened" private-enforcement analysis, but also that while *Gonzaga* "profess[ed] not to overrule *Wilder*," that case did in fact "recharacterize[] the earlier [*Wilder*] decision . . . ." *Id.* at 1147. The court went on to state, "[e]ven though *Wilder* addressed a similar statute, our approach is controlled by *Gonzaga*[.]" *Id.* at 1148. Accordingly, unlike the Third and Fifth Circuits that freely imported *Wilder*'s holding when confronted with a similar provision, the Tenth Circuit expressly rejected *Wilder* in favor of *Gonzaga*.

Recently, the Eleventh Circuit, in rejecting private enforcement of a Medicaid plan provision, illustrated the diminished role *Wilder* plays in post-*Gonzaga* jurisprudence in *Martes v. Chief Executive Officer of South Broward Hospital District*, 683 F.3d 1323 (11th Cir. 2012). The *Martes* court analyzed whether 42 U.S.C. § 1396a(a)(25)(C) creates individually enforceable rights without referencing *Wilder*. Rather than beginning its opinion with the assumption that at least certain provisions of the Medicaid Act create privately enforceable causes of

action, the Eleventh Circuit conducted a complete analysis consistent with *Gonzaga*. *Id.* at 1325-30. The court even cited *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981), for the proposition that private causes of action to enforce federal Spending Clause statutes are disfavored. *Martes*, 683 F.3d at 1326. The *Martes* court adeptly recognized *Gonzaga* as a controlling shift in cause of action analysis.

Similarly, *Jones v. District of Columbia*, 996 A.2d 834 (D.C. 2010), not only rejected the theory that all Medicaid provisions were enforceable in view of *Wilder*, but also said that *Wilder* held little significance post-*Gonzaga*. *Id.* at 845. This approach cannot be reconciled with, among other cases, the approach of the decision below.

Finally, Respondents suggest that the chart provided in the Petition somehow proves that there is no conflict here. Br. in Opp. at 14-15. The purpose of the chart, however, is not so much to demonstrate conflicting outcomes concerning particular provisions (though it does confirm that several such conflicts exist) as to show more generally that lower courts permit private enforcement of some Medicaid plan requirements but not others. Such a patchwork in itself demonstrates the unworkability of the *Wilder* doctrine, which is on shaky ground anyway in light of *Gonzaga*. The Court needs to bring Medicaid into

line with other federal spending enactments when it comes to private enforcement via Section 1983.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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