No. 12-1037

In the Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, ET AL., PETITIONERS

v.

SANDRA M. BONTRAGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF MICHIGAN, ALABAMA, ALASKA, ARIZONA, GEORGIA, HAWAII, KANSAS, NEBRASKA, OHIO, TEXAS, AND UTAH IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 42 U.S.C. § 1396a(a)(10)(A)(i) creates federal "rights" in Medicaid beneficiaries that may be privately enforced under 42 U.S.C. § 1983 by Medicaid beneficiaries and providers.

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INTEREST OF *AMICI CURIAE*

The *amici* states administer Medicaid programs that have an extraordinary impact on state spending and services. Of the nearly $400 billion spent on Medicaid in fiscal year 2010, more than $125 billion came from state budgets. Given the Medicaid program's complexity and the vast amounts of money at stake, the *amici* states have an intense interest in the regulation of the Medicaid program.[1]

Congress has delegated the authority to regulate this complex and highly technical subject matter to CMS, the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services. Petitioners ask this Court to decide whether CMS will continue to be the arbiter of state Medicaid plans, as Congress intended, or whether individuals will be able, through private enforcement, to override state decisions regarding Medicaid provider qualifications. Allowing private enforcement disrupts the smooth and efficient operation of the Medicaid program and destroys the balance that Congress established between the states and federal agencies. Accordingly, the *amici* states have a significant interest in this Court's review of the questions presented in this case.

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[1] Consistent with Rule 37.1, more than 10 days in advance of filing, counsel for the *amici* States contacted attorneys for Indiana and for respondent to inform them of the intent to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amici* states respectfully request that this Court grant the petition and hold that Medicaid beneficiaries and providers have no rights under 42 U.S.C. § 1396a(a)(10)(A)(i) that are privately enforceable under 42 U.S.C. § 1983. The Medicaid Act provides no express cause of action to enforce § 1396a(a)(10)(A)(i), so the question is whether Congress "unambiguously" expressed its intent to confer individual rights enforceable as private damage actions under 42 U.S.C. § 1983. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002). For several reasons, the answer is no.

First, § 1396a(a)(10)(A)(i)'s text is not phrased in terms of individual rights. It does nothing more than establish criteria for federal reimbursement. Participating states establish Medicaid programs, and if something is amiss, the Secretary of Health and Human Services turns off the funding spigot. When Congress desires to create private rights of action enforceable under § 1983, it must do so "unambiguously" in the statutory text. Section 1396(a)(10)(A)(i) contains no such right- or duty-creating language.

Second, the Medicaid Act's remedial scheme is inconsistent with a private right of action. Congress gave the Secretary of Health and Human Services responsibility to supervise state Medicaid plans. If a state's plan does not "substantially comply" with the Act, the Secretary has the power to withhold Medicaid funding, 42 U.S.C. § 1396c, or waive compliance with the Act altogether, 42 U.S.C.

§ 1396n(b)(4). A legislative scheme allowing the Secretary to waive compliance is the exact opposite of one demonstrating an unambiguous intent to allow private enforcement. And the Act already provides a remedy for noncompliance: withholding of funds.

Third, it is no small matter for a court to substitute a private cause of action under § 1983 for this congressionally prescribed remedy. Profound federalism and separation-of-powers principles undergird the rigorous standard that this Court requires to imply a private right of action—that congressional intent be unambiguous. Courts should tread cautiously before substituting their own judgment for that of the expert agency that Congress expressly designated as the Medicaid Act's exclusive enforcer.

Finally, § 1396a(a)(10) is not focused on any one individual, but rather on a state's aggregate Medicaid funding: a state plan for medical assistant must "provide . . . for making medical assistance available . . . to all [eligible] individuals." 42 U.S.C. § 1396a(a)(10). As such, it cannot pass this Court's test that the statutory right allegedly protected not be so "vague and amorphous" that its enforcement strains judicial competence. *Blessing* v. *Freestone*, 520 U.S. 329, 343 (1997).

The court of appeals should be reversed.

ARGUMENT

There is nothing in the plain language, context, or history of § 1396a(a)(10)(A)(i) suggesting that Congress intended to allow private rights of action to enforce the statute. Rather, all indications are that Congress intended the Secretary of Health and Human Services to be the sole arbiter of whether a state's Medicaid plan complies (or needs to comply) with § 1396(a)(10). Allowing private actions to enforce this statute undermines the principles of federalism and separation of powers that Congress sought to promote when enacting the Medicaid Act.

I. Section 1396a(a)(10)(A)(i) does not unambiguously confer a private right of action enforceable under 42 U.S.C. § 1983.

Congress enacted the Medicaid Act using its spending power. The remedy for a state's noncompliance with a spending-power act generally is not a private right of action, but rather an action by the federal government to terminate the funds provided to the state. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981).

To establish the right to a private cause of action, an individual must show that the statute at issue creates "an unambiguously conferred *right* to support a cause of action." It is not enough that the statute confers an individual *benefit*. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002) (emphasis added). "[I]f Congress wants to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.* at 290.

In *Gonzaga*, the Court contrasted the plain language of the Family Educational Rights and Privacy Act—which the Court concluded did not create a private right of action—with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—both of which contain rights-creating language "with an unmistakable focus on the benefited class." 536 U.S. at 284 (quotation omitted). Title VI provides: "*No person* in the United States *shall* . . . be subjected to discrimination" based on race, color, or national origin. *Id.* at 384 n.3 (quoting 42 U.S.C. § 2000d) (emphasis added). Title IX similarly states: "*No person* in the United States *shall*, on the basis of sex, . . . be subjected to discrimination" under any federally funded education program. *Id.* (quoting 20 U.S.C. § 1681(a)) (emphasis added). "Where a statute does not include this sort of explicit 'right- or duty-creating language,'" the Court said, "we rarely impute to Congress an intent to create a private right of action." *Id.*

Section 1396a(a)(10)(A)(i) does not include express right- or duty-creating language like Title VI and Title IX. Instead, the provision merely expresses a state's aggregate funding obligation: a state plan for medical assistance must "provide . . . for making medical assistance available . . . to all [eligible] individuals." 42 U.S.C. § 1396a(a)(1).

Tellingly, Congress provided states with considerable flexibility: even if a state program does not comply with federal law in some way, the Secretary is not obligated to withdraw funding. In fact, the Secretary may choose to waive compliance altogether. Such a scheme is the exact opposite of an unambiguously conferred right to support a cause of action. In sum, § 1396a(a)(10)(A)(i) creates nothing more than a waivable requirement for states to receive federal Medicaid reimbursement. See *Casillas* v. *Daines*, 580 F. Supp. 2d 235 (S.D.N.Y. 2008) (§ 1396a(a)(10)(A) not sufficiently definitive to constitute the unambiguous conferral of a private right of action).

The Seventh Circuit previously analyzed an analogous sub-provision of § 1396a(a) and concluded that it "cannot be interpreted to create a private right of action, given the Supreme Court's hostility, most recently and emphatically expressed in *Gonzaga* . . ., to implying such rights in spending statutes." *Bruggeman* v. *Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (no private cause of action under 42 U.S.C. § 1396a(a)(19)). The same is true for sub-provision 10.

II. The Medicaid Act's enforcement scheme does not support an individual § 1983 action.

The absence of any right- or duty-creating language in sub-provision 10 is consistent with the Medicaid Act's remedial scheme. As this Court has noted, "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds." *Pennhurst*, 451 U.S. at 28. The Medicaid Act is no different, as it grants CMS the power of the purse to police alleged violations.

Under 42 U.S.C. § 1396c, if the Secretary concludes that a state plan does not "comply substantially" with the Act's provisions and chooses not to waive compliance, the Secretary must notify the state that Medicaid funding will be cut off until the state changes course. This de-funding provision acts as a federal review mechanism, which is strong evidence that Congress did not intend a private right of action to be asserted under § 1983. *Gonzaga*, 536 U.S. at 289–90.

And again, Congress did not stop by vesting the Secretary with authority to cut off billions of dollars in federal funding. Congress granted the Secretary power to waive § 1396a's requirements altogether. 42 U.S.C. § 1396n(b).

Of course, whether the Secretary actually grants the waiver is legally irrelevant. Either way, the waiver power demonstrates that § 1396a is not

mandatory. And to create an individual right, a statutory provision "must be couched in mandatory, rather than precatory terms." *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997) (citation omitted).

In sum, § 1396a "express[es] a congressional preference for a certain kind of conduct." *Sanchez* v. *Johnson*, 301 F. Supp. 2d 1060, 1062 (N.D. Cal. 2004) (no § 1983 action under § 1396a(a)(30)(A)). It is not possible to say that any individual plaintiff has a "right[] . . . secured by the law[]," 42 U.S.C. § 1983, if the Secretary has the power to waive that "right" as she sees fit. Not only can the Secretary enforce the statute by terminating funding, but the enforcement scheme itself is discretionary. Such a scheme does not support the existence of an individual § 1983 action. The Seventh Circuit's contrary holding places the burden of resolving technical, sub-provision 10 disputes on the courts, rather than on the administrative agency that Congress selected to address alleged state violations of the Medicaid Act. This Court should hold that no private right of action to enforce § 1396a(a)(10)(A)(i) exists.

III. Recognizing a § 1983 action under 42 U.S.C. § 1396a(a)(10)(A)(i) violates principles of federalism and separation of powers.

Conditions on federal funding implicate issues of federalism. When states receive federal funds under federally imposed terms, this Court has described the situation as analogous to that of a contract: the state cannot accept ambiguous terms. *Pennhurst*, 451 U.S. at 17. Accord *Arlington Cent. School Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). "[I]f Congress intends to alter the usual

constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (citation and internal quotation marks omitted).[2] Because § 1396a(a)(10)(A)(i) does not unambiguously confer a § 1983 right on individuals, states have not accepted § 1983 actions as a "contractual" condition to funding.

Implying a private right of action also implicates serious separation-of-power concerns. Whether or not a federal statute creates a private cause of action is a quintessential legislative judgment. *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive law itself, private rights of action to enforce federal law must be created by Congress."). Without such Congressional intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* (citation omitted).

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[2] See also *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1991) (Kennedy, J., dissenting) ("[T]he Spending Clause Power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern . . . . A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it 'must do so unambiguously.'") (quoting *Pennhurst*, 451 U.S. at 17).

If federal courts are not bound by congressional intent, they are free to allow individuals to pursue private enforcement of any particular federal statute. Such action represents the exercise of legislative, rather than judicial, authority.

IV. Section 1396a(a)(10)(A)(i) does not satisfy this Court's test in *Blessing*.

In *Blessing* v. *Freestone*, 520 U.S. 329 (1997), this Court distinguished a provision that does not deal with "the needs of any particular person" from one that simply addresses "the aggregate services provided by the State." *Id*. at 343. In the case of a provision, like § 1396a(a)(10)(A)(i), which addresses aggregate services, it is improper to create a private right of action under § 1983 unless the statutory right allegedly protected is not so "vague and amorphous" that its enforcement strains judicial competence. *Id*. at 340–41.

Here, enforcement of any right conferred by § 1396a(a)(10)(A)(i) "would require the application of vague and amorphous standards and, therefore, would strain judicial competence." *Casillas* v. *Daines*, 580 F. Supp. 2d 235, 243 (S.D.N.Y. 2008). That reality makes § 1396a(a)(10) a particularly unsuitable candidate for private rights of action under § 1983. The Court should grant the petition and so hold.

CONCLUSION

The petition for writ of certiorari should be granted.

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