No. 11-2464

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF INDIANA, INC., *et. al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et. al.*,

Defendants-Appellants.

Appeal from the United States District Court
Southern District of Indiana, No. 1:11-cv-630-TWP-DKL
Honorable Tonya Walton Pratt

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND TEN OTHER STATES

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QUESTION PRESENTED

Does either 42 U.S.C. § 1396a(a)(23) or 42 U.S.C. § 247c, which do nothing more than specify criteria for federal reimbursement, confer federally-protected "rights" on individuals enforceable through 42 U.S.C. § 1983 or through an implied cause of action under the Supremacy Clause?

STATEMENT OF *AMICI CURIAE*

The *amici* states administer Medicaid programs that have an extraordinary impact on state spending and services. In fiscal year 2009, Medicaid spending exceeded $350 *billion* annually. Given the vast amounts of money at stake, and the complexity of the Medicaid program, Congress has wisely delegated to the U.S. Department of Health & Human Services' Centers for Medicare & Medicaid Services (CMS) the authority to regulate this complex and highly technical subject matter, and the states have an intense interest in it.

Plaintiffs' claims in this litigation ask this Court to decide whether CMS will continue to be the arbiter of state Medicaid plans, or whether state decisions in designing Medicaid plans will instead be subject to private enforcement. Allowing private enforcement destroys the balance that Congress established between the states and federal agencies, and it disrupts the smooth and efficient operation of the Medicaid program. Accordingly, the *amici* states respectfully request that this Court hold that private litigants are barred from bringing actions to enforce 42 U.S.C. § 1396a(a)(23) or 42 U.S.C. § 247c.

This *amici* brief is being filed pursuant to Fed. R. App. P. 29(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Medicaid Act provides no express cause of action to enforce the Act's so-called freedom-of-choice-provision, 42 U.S.C. § 1396a(a)(23). The question for this Court, then, is whether Congress "unambiguously" expressed its intent in the Act 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). The answer is no, for two basic reasons.

First, the plain language of § 1396a(a)(23) is not phrased in terms of individual rights. It does nothing more than establish criteria for federal reimbursement, and participating states retain the lawful prerogative to establish non-compliant Medicaid programs and wait for the Secretary of Health and Human Services to turn 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. The freedom-of-choice provision contains no such right- or duty-creating language. In fact, sub-provision (23)'s language is quite similar to the language in sub-provision (19), which this Court has already held does not create a private right of action. *Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003).

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 even to *waive* compliance with the Act altogether, 42 U.S.C. § 1396n(b)(4). Such a legislative scheme is the exact opposite of one demonstrating an unambiguous intent to allow private enforcement; it allows the Secretary to foreclose the very cause of action Plaintiffs advance. And the Act has already created a remedy—withholding of funds.

It would be no small matter for this Court to substitute a private cause of action under § 1983 for these congressionally prescribed remedies. Profound federalism and separation-of-powers principles undergird the rigorous standard—"unambiguous" Congressional intent—that the Supreme Court requires before implying a private right of action. The courts should tread cautiously before substituting their own judgment for that of the expert agency that Congress expressly consecrated as the exclusive enforcer of the Medicaid Act.

Moreover, the Supremacy Clause does not provide an independent vehicle for privately enforcing § 1396a(a)(23) or 42 U.S.C. § 247c (which the District Court concluded could not be enforced via § 1983). Only Congress has the power to create a private right of action to enforce a federal law, *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and it is already well established by Supreme Court precedent that the Supremacy Clause, on its own, cannot create a cause of action when Congress has declined to do so. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989).

A contrary result would transform private litigants into federal attorneys general of great destructive force, with the power to enforce their own interpretations of virtually any federal statute, regardless of whether Congress intended a private cause of action. This would force the *amici* states to defend actions in circumstances where Congress chose to vest enforcement authority exclusively in an expert federal agency rather than private litigants.

For all these reasons, the *amici* states respectfully request that this Court reverse and remand for entry of an order dismissing Plaintiffs' complaint in its entirety. Such a result leaves to the

Secretary of Health and Human Services the role of policing the Medicaid Act, precisely as Congress intended when it enacted this voluntary federal-state program.

ARGUMENT

I. 42 U.S.C. § 1396a(a)(23) 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. Generally, the remedy for a state's noncompliance with a spending-power act 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 prove the right to a private cause of action, an individual must show that the statute 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 the *Gonzaga* Court's analysis, it 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). Similarly, Title IX 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)). "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.*

Here, Medicaid's so-called freedom-of-choice provision, 42 U.S.C. § 1396a(a)(23)(A), does not include this express right- or duty-creating language. Rather, the provision merely creates an individual benefit:

> *any individual* eligible for medical assistance (including drugs) *may* obtain such assistance from any institution,

> agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services . . .

42 U.S.C. § 1396a(a)(23)(A) (emphasis added). And while this statutory sub-division is itself contained within a mandatory context, 42 U.S.C. § 1396a(a) (stating that a "State plan for medical assistance *must*" provide for the freedom of choice set forth in subsection (23)), the mandate does nothing more than establish criteria for federal reimbursement; it is no different from a statute that says: "a state must establish a 21-year-old drinking age to qualify for federal highway funds." This seemingly mandatory language does not confer federal "rights" on anyone; indeed, non-compliant states do not even violate federal law by daring the Secretary to reduce their federal funds. In sum, § 1396a(a)(23)(A) does not unambiguously confer a *right* on private individuals; rather, the section mandates only that a state's Medicaid program comply with federal standards as a condition of receiving federal reimbursement. *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1306 (D. Utah 2003).

Significantly, this Court has already analyzed an analogous sub-provision of § 1396a(a) and concluded that it does not create a private cause of action. *Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (no private cause of action under 42 U.S.C. § 1396a(a)(19)). Like sub-provision (23), sub-provision (19) of § 1396a(a) says that a state plan for medical assistance "must" "provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of recipients." 42 U.S.C. § 1396a(a)(19).

Despite the specific references to "recipients," this Court had no difficulty determining that Congress did not intend to create a private cause of action. Sub-provision (19)'s language "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*, 324 F.3d at 911 (citations omitted). The exact same thing can be said about sub-provision (23), which contains language that is not materially different from that of sub-provision (19).

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 (23) is consistent with the Medicaid Act's remedial scheme. As the Supreme 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, the Secretary must notify the state that Medicaid funding will be cut off until the state convinces the Secretary that the state is complying with the Act's provisions. This de-funding provision acts as a federal review mechanism, which is strong evidence that there is no private right of action to be asserted under § 1983. *Gonzaga*, 536 U.S. at 289–90.

Moreover, Congress did not stop by vesting the Secretary with authority to cut off billions of dollars in federal funding. Congress went

on to grant the Secretary the power to waive § 1396a's requirements altogether: "*The Secretary*, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, *may waive such requirements of section 1396a* (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) . . .)" for a variety of different reasons. 42 U.S.C. § 1396n(b). Thus, the Secretary decides whether Indiana's plan deserves a waiver, and whether she grants the waiver is legally irrelevant: either way, the availability of the Secretary's 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) (holding there was no § 1983 action under 42 U.S.C. § 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 essentially discretionary. This scheme does not support the existence of an individual § 1983 action. And a contrary holding by this Court would place the burden of resolving sub-provision (23) disputes on the courts, rather than the administrative agency that Congress selected to resolve the technical disputes that arise whenever a state's Medicaid plan is alleged to be inconsistent with the Medicaid Act. This Court should decline Plaintiffs' invitation to create a private right of action to enforce § 1396a(a)(23).

III. Recognizing a § 1983 action under 42 U.S.C. § 1396a(a)(23) 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, the Supreme 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). Such terms "alter the usual constitutional balance between the States and the Federal Government," thus Congress "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 omitted).[1] Because the freedom-of-choice provision does not unambiguously confer a § 1983 right upon individuals, states have not accepted § 1983 actions as a "contractual" condition to Medicaid funding.

In addition, implying a private right of action implicates serious separation-of-power concerns. Whether 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 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). Separation of powers requires this because "[u]nder Art. III, Congress alone has the responsibility for determining the jurisdiction of

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[1] *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).

the lower federal courts . . . . When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 730–31 (1979) (Powell, J. dissenting).

If federal courts are not bound by congressional intent, they are free to choose when plaintiffs can pursue private enforcement of any particular federal statute. Such action represents the exercise of legislative, rather than judicial, authority. *Sandoval*, 532 U.S. at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.") (Scalia, J., concurring in part and concurring in the judgment).

This separation-of-powers concern is particularly relevant here. Congress initially enacted Medicaid's freedom-of-choice provision in 1968. Pub. L. No. 90-248, § 227(a)(3), 81 Stat. 821 (codified as amended at 42 U.S.C. § 1396a(a)(23) (2011)).[2] It was not until 1980, some 12 years later, that the Supreme Court first recognized that § 1983 applies

[2] The language of the 1968 provision is identical to the language found at 42 U.S.C. § 1396a(a)(23)(A).

to violations of federal statutory law, rather than just constitutional-law violations. *Maine v. Thiboutot*, 448 U.S. 1 (1980). Given this context, it is impossible to say that Congress, when drafting sub-provision (23), intended that it be enforceable under § 1983.

IV. The Supremacy Clause cannot be used to create a private right of action where Congress has declined to do so.

In *Golden State Transit Corporation v. City of Los Angeles*, the Supreme Court expressly rejected the Supremacy Clause as a source of any privately-enforceable rights. 493 U.S. 103, 107–10 (1989). Specifically, the Court stated that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983." Rather, the Clause "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Id.* at 107 (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

As noted in Indiana's appeal brief, the Supreme Court is considering this very issue—whether the Supremacy Clause can be used to circumvent § 1983 in enforcing the Medicaid Act—in *Douglas v. Independent Living Center of Southern California, Inc.*, 131 S. Ct. 992 (2011) (granting certiorari). Thirty-one states filed a joint *amici curiae*

in that litigation opposing such a change in the law. If the Supremacy Clause, on its own, created a stand-alone action based on preemption, then every federal statute would implicitly authorize a private cause of action against a state or local governmental defendant. Such a concept would usurp Congress's authority to say not only what the law is, but *who* has the right to enforce it. This is no small point.

Plaintiffs' position here would allow every person or entity to play private attorney general, able to enforce federal statutes or regulations whenever someone believes a state is violating federal law. Allowing such suits requires the federal courts to resolve questions that Congress thought best suited to resolution by federal agencies with technical knowledge and firsthand experience in the regulated area.

Moreover, private litigation will inevitably produce inconsistent results in an area where Congress delegated-enforcement authority to a federal agency to ensure uniformity. *Cf. Conboy v. AT&T Corp.*, 241 F.3d 242, 253 (2d Cir. 2001) ("[A] private right of action would place the [agency's] 'interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the [agency and] . . . would . . . deprive the [agency] of necessary

flexibility and authority in creating, interpreting, and modifying . . . policy.'") (quoting *New England Tel. & Tel. Co. v. Public Utils. Comm'n*, 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.). These considerations militate strongly in favor of maintaining the Framers' vision of the Supremacy Clause: as a choice-of-law provision, not an affirmative grant of individual rights.

Properly applied, the Supremacy Clause cannot be read to infer a private right to enforce § 1396a(a)(23). For the same reason, it does not create a right to sue under 42 U.S.C. § 247c.

CONCLUSION AND RELIEF REQUESTED

There is nothing in the plain language, context, or history of § 1396a(a)(23) that would suggest Congress intended to allow private rights of action to enforce the statute. 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 sub-provision (23)'s freedom-of-choice provision. This is particularly true given that Congress enacted sub-provision (23) some 12 years before the Supreme Court even recognized § 1983's applicability to federal statutory violations.

There is also no authority for allowing Plaintiffs to enforce either § 1396a(a)(23) or 42 U.S.C. § 247c under a Supremacy Clause theory. The Supreme Court has already foreclosed such a cause of action, and until the Supreme Court lifts that bar, it must be applied. Thus, there is no authority for Plaintiffs to pursue an action challenging Indiana House Enrolled Act 1210.

Accordingly, the *amici* states request that this Court reverse the District Court and remand for entry of an order dismissing this lawsuit.

Respectfully submitted,

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Dated: August 8, 2011

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains no more than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 3,335 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on August 8, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below or on ECF confirmation sheet).

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