IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

MELISSA WILSON., *et al.*, individually and on behalf of all others similarly situated,	
***Plaintiffs*,**	**Civil Action No. 3:14-CV-01492**
v.	**Judge William L. Campbell, Jr.** **Magistrate Judge Newbern**
WENDY LONG, *et al.*,	
***Defendants*.**	

DEFENDANTS' BRIEF IN SUPPORT OF DISMISSAL OF PLAINTIFFS' SECTION 1396a(a)(8) CLAIM ON THE GROUND THAT IT DOES NOT CONFER A RIGHT ENFORCEABLE UNDER SECTION 1983

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INTRODUCTION

The only time the Sixth Circuit has squarely addressed whether Section 1396a(a)(8) creates a private right enforceable through Section 1983, the Court held that it does not. Instead, the Court explained, Section 1396a(a)(8) expresses a "general policy goal[]"—namely, that states furnish "medical assistance" with "reasonable promptness." *Cook v. Hairston*, 948 F.2d 1288, 1991 WL 253302, at *5 (6th Cir. Nov. 26, 1991) (table). And as the Court has since held, such "*systemwide*" goals do not create private rights. *Westside Mothers v. Olszewski*, 454 F.3d 532, 543 (6th Cir. 2006) (quoting *Blessing v. Freestone*, 520 U.S. 329, 343 (1997)). At the same time, the Medicaid Statute provides multiple alternative means to ensure that states comply with Section 1396a(a)(8). Thus, the "reasonable promptness" requirement is enforceable; Congress simply did not intend for Plaintiffs to enforce it in a Section 1983 lawsuit in federal court.

Contrary to Plaintiffs' assertion, the Sixth Circuit in *Westside Mothers* did *not* hold that Section 1396a(a)(8) is enforceable under Section 1983. The Court expressly acknowledged its "*failure* to explicitly decide whether" Section 1396a(a)(8) "confer[s] enforceable rights." *Westside Mothers*, 454 F.3d at 538 (emphasis added). Instead, the Court denied the plaintiffs' Section 1396a(a)(8) claim on the alternative ground that the provision does not provide the specific right that the plaintiffs had asserted. *See id.* at 539–41. Nowhere in *Westside Mothers*, or any other decision, did the Sixth Circuit hold that Section 1396a(a)(8) confers rights enforceable under Section 1983, let alone one to secure a prompt eligibility determination.

ARGUMENT

I. <u>Section 1396a(a)(8) Does Not Confer a Private Right Enforceable Under Section 1983</u>.

Section 1983 provides a remedy for rights that other laws create. *See* 42 U.S.C § 1983. Section 1396a(a)(8) of the Medicaid Statute requires state Medicaid plans to "provide that . . .

[medical] assistance shall be furnished with reasonable promptness to all eligible individuals." *Id*. § 1396a(a)(8). Congress enacted this requirement, like the rest of the Medicaid Statute, pursuant to its spending power. *See* U.S. CONST. art. I, § 8, cl. 1. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions"—such as the conditions of Section 1396a. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

Medicaid recipients are the beneficiaries of this federal-state contract. "Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it." *Blessing*, 520 U.S. at 349 (Scalia, J., concurring). Given the scope of federal-state programs like Medicaid, such suits against governments are potentially endless; thus, "the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—*much less to contracts between two governments*." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015) (plurality) (emphasis added) (citations omitted).

The Sixth Circuit has therefore been appropriately cautious about recognizing private rights of action to enforce provisions of the Medicaid Statute, doing so "only . . . when the putative plaintiffs were *very clearly* the intended beneficiaries of the law." *Barton v. Summers*, 293 F.3d 944, 954 (6th Cir. 2002) (emphasis added). The Supreme Court itself has only found one provision of the Medicaid Statute to be privately enforceable, *see Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990), and the Court has since abrogated that ruling, *see Armstrong*, 135 S. Ct. at 1386 n.* (majority) ("[O]ur later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified.").

Under the Court's more recent decisions, no private right to enforce a statute exists unless the "plaintiff demonstrates" three things. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). First, the right asserted must be "unambiguously conferred" in the statute. *Id.* at 283. Second, the right conferred in the statute must be specific and concrete, "not so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340–41 (quoting *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431–32 (1987)). Third, the statute must "impose a binding obligation on the States." *Id*. at 341.

Even then, the plaintiff has established "only a rebuttable presumption that the right is enforceable under § 1983." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) (quoting *Blessing*, 520 U.S. at 341) (quotation mark omitted). "The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy." *Id*. And Congress can "shut the door to private enforcement either expressly, through 'specific evidence from the statute itself,' or 'impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.' " *Gonzaga*, 536 U.S. at 284 n.4 (citations omitted) (quoting *Wright*, 479 U.S. at 423; *Blessing*, 520 U.S. at 341).

The State does not dispute that Section 1396a(a)(8) imposes a binding obligation, but Plaintiffs cannot establish the other two prerequisites for a Section 1983 action. Moreover, the Medicaid Statute makes clear that Congress did not intend to remedy Section 1396a(a)(8) violations through Section 1983 suits.

A. Section 1396a(a)(8) Does Not Unambiguously Confer Private Rights.

Plaintiffs cannot show an "unambiguously conferred" right—for two reasons. First, it is at least ambiguous whether Section 1396a(a)(8) confers any private rights at all. Second, even if it does, it does not confer a right to a prompt eligibility determination.

1. As the Supreme Court said in *Gonzaga*, "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' " that are enforceable through Section 1983. 536 U.S. at 283. For that reason, the "typical funding statute" does not confer private rights. *Pennhurst*, 451 U.S. at 22. Those statutes provide benefits (the common term for a Medicaid payment) through federal funding, and any restrictions on recipient states are simply conditions of that funding. Thus, those restrictions have "a systematic focus, seeking to improve care to individuals by encouraging better state planning." *Id*. And statutes concerned with "*systemwide* performance" necessarily focus on the person regulated, whereas statutes that create private rights must be focused "unambiguously" and "unmistakably" on the "persons benefited." *Gonzaga*, 536 U.S. at 281–84, 286 (quotation marks omitted).

Rather than "individually focused terminology" like "[n]o person shall be subjected to discrimination," *id*. at 287 (quotation marks and ellipses omitted), Section 1396a(a)(8) speaks of individuals only in the aggregate, as "all eligible individuals"—i.e., the members of the general group that the state must serve. 42 U.S.C. § 1396a(a)(8). This language shows that Section 1396a(a)(8) seeks only "to improve care to individuals" in that group. *Pennhurst*, 451 U.S. at 22. The Section's "reasonable promptness" requirement thus "is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Medicaid program." *Westside Mothers*, 454 F.3d at 543 (brackets omitted) (quoting *Blessing*, 520 U.S. at 343).

Section 1396a(a)(8) is therefore like statutory provisions that the Supreme Court has explicitly found not to confer private rights. Like those provisions, Section 1396a(a)(8)'s focus is at least one (and arguably two) steps "removed from the interests of individual[s]," since it only sets a standard for *states* to meet (and ultimately for the Secretary to consider when deciding whether a state warrants federal funds pursuant to 42 U.S.C. § 1396(c)). *Gonzaga*, 536

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U.S. at 287; *see also Blessing*, 520 U.S. at 343 (finding that Title IV-D of the Social Security Act "does not constitute a federal right" because, under that Title, "the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied").

Section 1396a(a)(8) is also like Medicaid provisions that the Sixth Circuit has found not to confer private rights. All these provisions redound to the benefit of Medicaid recipients, who after all are the beneficiaries of good systemwide performance, but the language of the provisions focuses on the state. *See Cook*, 948 F.2d 1288, at *5 (finding that neither Section 1396a(a)(8) nor Section 1396a(a)(19) confer privately enforceable rights because "[t]he language in these provisions expresses general policy goals"); *Westside Mothers*, 454 F.3d at 542 (finding that Section 1396a(a)(30) does not confer a private right because "[t]he only reference [therein] to recipients of Medicaid is in the aggregate, as members of 'the general population in the geographic area' " (quoting 42 U.S.C. § 1396a(a)(30)(A))).

By contrast, Section 1396a(a)(8) is unlike Medicaid provisions that the Sixth Circuit has found to be privately enforceable, whose language focuses on specific individuals rather than a group. *See Harris v. Olszewski*, 442 F.3d 456, 461–62 (6th Cir. 2006) (finding a private right in Section 1396a(a)(23)'s requirement that states provide that "*any individual* eligible for medical assistance" may obtain that assistance from any institution (emphasis in original) (quoting 42 U.S.C. § 1396a(a)(23))); *Gean v. Hattaway*, 330 F.3d 758, 772–73 (6th Cir. 2003) (finding a private right in Section 1396a(a)(3)'s requirement that states provide a hearing "to *any individual* whose claim for medical assistance . . . is not acted upon with reasonable promptness," 42 U.S.C. § 1396a(a)(3) (emphasis added)).

Not only does Section 1396a(a)(8) not focus on individuals, but states are not even required to comply with the "reasonable promptness" requirement in all individual cases. The Medicaid Statute instead mandates only that States comply "substantially"—as opposed to completely or totally—with the requirements of Section 1396a. 42 U.S.C. § 1396c(2). And if a state can comply with a provision without satisfying "the needs of any particular person," then no particular person has a right to enforce that provision. *Blessing*, 520 U.S. at 343; *see Gonzaga*, 536 U.S. at 288.

2. The Supreme Court requires courts to ask whether a statute confers "the very specific right" that a plaintiff asserts, not whether it creates "unspecified 'rights.' " *Blessing*, 520 U.S. at 343. Even if this Court finds that Section 1396a(a)(8) confers some sort of private right, it is not a right to prompt eligibility determinations. The Sixth Circuit has held that Section 1396a(a)(8) has a limited scope: the state's "duty" under Section 1396a(a)(8) is "*limited to* paying promptly" for medical services "when presented with the bill." *Brown v. Tenn. Dep't of Fin. & Admin.*, 561 F.3d 542, 545 (6th Cir. 2009) (emphasis added) (quotation marks and brackets omitted); *see also Westside Mothers*, 454 F.3d at 540. This caselaw precludes any argument that the duty to "furnish[]" medical assistance "with reasonable promptness" implies an initial duty to promptly determine eligibility for that assistance. 42 U.S.C. § 1396a(a)(8).

This interpretation comports with Section 1396a(a)(8)'s plain text, which limits the benefit of reasonable promptness to individuals who have already been determined to be "eligible." *Id*. And the term "medical assistance"—the thing that states must furnish "with reasonable promptness" under Section 1396a(a)(8)—likewise says nothing about how quickly eligibility determinations must be made. *See id.* § 1396d(a) (" 'medical assistance' means payment of part or all of the cost of the following care and services or the care and services

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themselves, or both"). The Sixth Circuit has generally enforced Medicaid provisions strictly according to their terms. *See Brown*, 561 F.3d at 547 (requirement that Tennessee reduce waiting times for services was in "clear conflict" with the limited mandate of Section 1396a(a)(8)); *Gean*, 330 F.3d at 773 ("[t]he Medicaid Act is simply not concerned with the type of harm the plaintiffs allege here," i.e., that the state had failed to offer them a hearing under Section 1396a(a)(3) when they had not first made a "claim for medical assistance"). By its terms, Section 1396a(a)(8) does not confer the specific right that Plaintiffs assert here.

B. Section 1396a(a)(8) is Too Vague and Ambiguous To Confer a Right Enforceable Under Section 1983.

To be enforceable under Section 1983, a right must not be written in terms "so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340–41 (citation omitted); *see Gonzaga*, 536 U.S. at 282. The Supreme Court has explained that "judgment-laden" terms like "efficiency, economy, and quality of care" from 42 U.S.C. § 1396a(a)(30)(A)—or like reasonable promptness here—convey Congress's intent to leave the enforcement of that term up to the policy makers, i.e., the agencies. *Armstrong*, 135 S. Ct. at 1385. "The interpretation and balancing of these general objectives would involve making policy decisions for which [a] court has little expertise and even less authority." *Westside Mothers*, 454 F.3d at 543 (quotation marks omitted).

As a result, for a reasonableness standard to satisfy this prong of *Blessing* and *Gonzaga*, Supreme Court precedent requires "further statutory guidance" as to how reasonableness is "to be measured." *Suter v. Artist M.*, 503 U.S. 347, 360 (1992). A provision that only requires "reasonable promptness," like one mandating "reasonable efforts," is too "fuzzy" and "undefined" to enforce judicially. *Wood v. Tompkins*, 33 F.3d 600, 608 (6th Cir. 1994). The meaning of such an open-ended directive "will obviously vary with the circumstances of each

individual case." *Suter*, 503 U.S. at 360. "How the State [i]s to comply with this directive" is therefore, "within broad limits, left up to the State." *Id.*

Section 1396a(a)(8) closely resembles provisions of the Medicaid Statute that the Sixth Circuit has found too vague to enforce under Section 1983. *See, e.g.*, *Barton*, 293 F.3d at 954 ("What Plaintiffs fail to realize is that the States are only required to undertake 'reasonable measures' in pursuing assigned claims . . . , and that, under *Suter*, Plaintiffs have no private right of action to sue to enforce reasonable compliance with these federal statutes."); *Cook*, 948 F.2d 1288, at *5 (explaining that Sections 1396a(a)(8) and 1396a(a)(19) "do not set forth specific guidelines on how the[ir] goals are to be implemented").

Plaintiffs invoke the regulation requiring states to determine eligibility within 45 days (or 90 for applications based on disability), but a vague statutory standard does not become privately enforceable under Section 1983 when a regulator supplies the specifics. "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). Allowing a federal agency to supply the necessary specifics turns "the sorcerer's apprentice" into "the sorcerer himself," and violates the separation of powers. *Id.* Plaintiffs therefore must rely on the words within the four corners of Section 1396a(a)(8). *See Harris*, 442 F.3d at 465 (regulation enforceable only where it "simply effectuates the express mandates of the controlling statute" (quoting *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 906 (6th Cir. 2004))).

C. The Medicaid Statute Provides Other Means To Enforce Section 1396a(a)(8).

Even if Section 1396a(a)(8) provides a specific private right, and even if that right includes prompt eligibility determinations, Congress nevertheless implicitly "shut the door to private enforcement" of that right in two ways. *Gonzaga*, 536 U.S. at 284 n.4.

1. In *Armstrong*, the Supreme Court held that "the Medicaid Act implicitly precludes private enforcement of § 30(A)," which requires state Medicaid plans to provide any methods and procedures necessary "to assure that payments are consistent with efficiency, economy, and quality of care." *Armstrong*, 135 S. Ct. at 1385; 42 U.S.C. § 1396a(a)(30)(A). The majority found this conclusion compelled by two features of Section 1396a(a)(30)(A), both of which Section 1396a(a)(8) shares. First, the Court held that the "*sole remedy* Congress provided for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services" pursuant to Section 1396c. *Armstrong*, 135 S. Ct. at 1385 (emphasis added); *see* 42 U.S.C. § 1396c(2). The Court noted that this feature "might not, *by itself*, preclude" private enforcement. But the Court held that "it does so when combined" with the provision's second salient feature: the "judicially unadministrable nature" of its text. *Armstrong*, 135 S. Ct. at 1385. For like "reasonable promptness," the Court found that the "efficiency, economy, and quality of care" standard is inherently "judgment-laden." *Id.*

2. The Medicaid Statute provides a second remedy, in addition to enforcement by the Secretary, for violations of Section 1396a(a)(8). Section 1396a(a)(3) requires state plans to "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance . . . is not acted upon with reasonable promptness." *See* 42 U.S.C. § 1396a(a)(3). A Section 1396a(a)(3) appeal is thus a comprehensive remedy for processing delays: anyone whose claim is not promptly adjudicated can invoke it, and it remedies the delay by mandating an inquiry into the delay's cause. And it is well-settled that "where a statute expressly provides a particular remedy," particularly one so comprehensive, "a court must be chary of reading others into it." *Middlesex Cty. Sewage Auth. v. Nat'l Sea*

Clammers Ass'n, 453 U.S. 1, 14–15 (1981) (quoting *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)); *see Gonzaga*, 536 U.S. at 284 n.4. Absent "strong indicia" to the contrary, courts must presume that "Congress provided precisely the remedies it considered appropriate." *Middlesex*, 453 U.S. at 15. Here there are no indicia to the contrary.

II. The Cases Plaintiffs Cite Have Been Abrogated by *Armstrong*.

Plaintiffs invoke decisions from other circuits finding Section 1396a(a)(8) to be privately enforceable, but all of them predate *Armstrong*. Moreover, each of these decisions extended the reasoning of *Wilder* to Section 1396a(a)(8). *See Romano v. Greenstein*, 721 F.3d 373, 378–79 (5th Cir. 2013); *Doe v. Kidd*, 501 F.3d 348, 357–59 (4th Cir. 2007); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 192 (3d Cir. 2004); *Doe v. Chiles*, 136 F.3d 709, 716–19 (11th Cir. 1998); *cf. Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) (citing *Chiles* which in turn relied extensively on *Wilder*). But the Supreme Court has "repudiate[d]" the reasoning of *Wilder* in its subsequent decisions, *Armstrong*, 135 S. Ct. at 1386 n.* (majority), and the one Court of Appeals decision in this area postdating *Armstrong* has confirmed that *Wilder* is no longer good law. *See Does v. Gillespie*, 867 F.3d 1034, 1040 (8th Cir. 2017) (holding that Section 1396a(a)(23)(A) does not create a right enforceable under Section 1983); *see also id*. at 1043 (rejecting Plaintiffs' reliance upon "decisions of other courts" that rely on "the Supreme Court's analysis in the now-repudiated *Wilder* decision").

CONCLUSION

Plaintiffs cannot assert their Section 1396a(a)(8) claim through Section 1983. That claim should therefore be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendants' Brief in Support of Dismissal of Plaintiffs' Section 1396a(a)(8) Claim on the Ground That It Does Not Confer a Right Enforceable Under Section 1983 was served upon the following counsel of record on this 19th day of October, 2018, via the Court's Electronic Case Filing system:

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