

**PIN THE TAIL ON THE DONKEY: BENEFICIARY ENFORCEMENT
OF THE MEDICAID ACT OVER TIME**

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ABSTRACT

During the twentieth century, Congress enacted legislation designed to improve the lives of low-income Americans. A number of these laws were enacted by Congress pursuant to the Constitution's Spending Clause, including the Medicaid Act, which entitles certain low-income individuals to publicly funded health insurance coverage. As enacted in 1965, the Medicaid Act did not include a provision authorizing the statute's beneficiaries to bring private enforcement actions in court. Since the early 1970s, however, program beneficiaries relied upon the Constitution's Supremacy Clause or, more frequently, 42 U.S.C. § 1983 for the cause of action allowing them to obtain relief in court. More recently, the Supreme Court has restricted private enforcement of Spending Clause enactments. This article discusses the judicial and legislative actions affecting private enforcement under the Supremacy Clause and Section 1983. It then reviews Medicaid's enforcement track record in the federal courts of appeals in light of these Supreme Court and congressional activities. Congress intends for program beneficiaries to be able to enforce provisions of the Medicaid Act, and, applying the Supreme Court's traditional enforcement test under Section 1983, the appellate courts are consistently allowing certain Medicaid provisions to be enforced by program beneficiaries while refusing to allow enforcement of others.

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I. INTRODUCTION

The nation's founders relied on English laws and principles, among them the "invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress."¹ The Supreme Court's landmark decision, *Marbury v. Madison*, reflects this notion, stating that "[t]he very essence of civil liberty . . . [is] the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."²

During the twentieth century, Congress enacted legislation designed to improve living conditions for lower-income Americans. A number of these laws were enacted by Congress under the Spending Clause.³ The Social Security Act, of which Medicaid is a part, is an example of a Spending Clause enactment.⁴ Like many Spending Clause enactments, the Medicaid Act makes federal funding available to states that implement Medicaid consistent with the requirements of the federal law and authorizes the federal government to withhold or terminate federal funding to a state that is not operating according to federal requirements.⁵ States are not required to participate in Medicaid, but all do.⁶

Notably, enacting Congresses did not include provisions in these laws that authorize the statute's beneficiaries to bring private enforcement actions when they are being harmed by violations of the law. That is not surprising. These Congresses were acting pursuant to a rights-remedy presumption, with the understanding that courts would "provide such remedies as are necessary to make effective the congressional purpose."⁷ Program beneficiaries have relied upon the Supremacy Clause or, more frequently, 42 U.S.C. § 1983 for the cause of action that allows them to go to court.⁸

In recent years, the Supreme Court has turned away from the remedial imperative, particularly with respect to private enforcement of Spending Clause enactments. This article discusses the Court's opinions affecting private enforcement of the Medicaid Act and describes Congress's response to the Court with respect to the Social Security Act. It then reviews Medicaid's enforcement track record in the courts of appeals in light of these Supreme

1. 3 WILLIAM BLACKSTONE, COMMENTARIES *109.

2. *Marbury v. Madison*, 5 U.S. 1 (Cranch) 137, 163 (1803).

3. See U.S. CONST. art. I, § 8, cl. 1.

4. See 42 U.S.C. § 301 (2012).

5. 42 U.S.C. §§ 1396b, 1396c (2012).

6. *Medicaid*, NAT'L CONF. ST. LEGISLATURES (Nov. 1, 2015), <http://www.ncsl.org/research/health/medicaid-home-page.aspx>.

7. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). *But cf.* *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (stating that understanding has been abandoned).

8. See Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 720, 721, 727 (Mar.-Apr. 2005).

Court and congressional activities. Congress intends for program beneficiaries to be able to enforce provisions of the Social Security Act, and, applying the Supreme Court's traditional enforcement test, the courts of appeals are consistently allowing certain Medicaid provisions to be enforced by program beneficiaries while refusing to allow enforcement of others.

II. ENFORCEMENT UNDER THE SUPREMACY CLAUSE

Under the Supremacy Clause, the laws of the United States “shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁹ “The underlying rationale [for this] pre-emption doctrine as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that ‘interfere with or are contrary to, the laws of congress.’”¹⁰

In *Shaw v. Delta Air Lines, Inc.*, the Supreme Court stated that it was “beyond dispute” that federal courts have jurisdiction to hear claims for injunctive relief asserting that a state law is preempted by a federal statute that does not provide an express cause of action:

A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve . . . This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.¹¹

The Court resolved *Shaw* on the merits, holding that the state law was preempted insofar as it prohibited practices that were permitted under federal law.¹² Indeed, over the years corporations and private individuals enforced the Supremacy Clause in hundreds of cases. And on numerous occasions dating from the early 1970s, the Supreme Court recognized that Social Security Act beneficiaries could bring preemption actions to enjoin state laws that conflict with federal law and were, thus, “invalid under the Supremacy Clause.”¹³ Under these precedents, the federal courts of appeals recognized that the Medicaid Act is “supreme” federal law and on this basis invalidated conflicting

9. U.S. CONST. art. VI, § 1, cl. 2.

10. *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

11. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

12. *Id.* at 108-09.

13. *See, e.g., Townsend v. Swank*, 404 U.S. 282, 285 (1971) (recognizing that Social Security Act beneficiaries can bring preemption actions to enjoin state laws that conflict with federal law and are, thus, “invalid under the Supremacy Clause”); *Wos v. E.M.A.*, 133 S. Ct. 1391, 1398 (2013) (finding state law ran afoul of the Supremacy Clause because it conflicted with the Medicaid Act and was “pre-empted for that reason”); *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988); *Blum v. Bacon*, 457 U.S. 132, 138 (1982).

state law.¹⁴ For example, in *Lankford v. Sherman*, Medicaid beneficiaries challenged a state law that eliminated Medicaid coverage of medically necessary medical equipment and supplies for individuals with disabilities other than blindness.¹⁵ The court accepted the plaintiffs' Supremacy Clause claim, explaining that the Supremacy Clause "concerns the federal structure of the Nation."¹⁶ Citing Supreme Court cases that concerned Supremacy Clause actions by corporations, the Eighth Circuit concluded that "[w]hile Medicaid is a system of cooperative federalism, the same analysis applies; once the state voluntarily accepts the conditions imposed by Congress, the Supremacy Clause obliges it to comply with federal requirements."¹⁷

Four years ago, however, the Supreme Court openly questioned this type of private enforcement when it accepted certiorari in *Douglas v. Independent Living Center of Southern California, Inc.*¹⁸ The question before the Court was "[w]hether Medicaid . . . [providers could] maintain a cause of action under the Supremacy Clause to enforce" the Medicaid Act's equal access provision, 42 U.S.C. § 1396a(a)(30)(A), "by asserting that the provision preempts a state law reducing reimbursement rates."¹⁹ The Court ultimately refused to decide the Supremacy Clause question after the Centers for Medicare and Medicaid Services (CMS) expressly approved the state's position in the underlying substantive dispute.²⁰ However, Chief Justice Roberts wrote a strongly worded dissent arguing against the providers' Supremacy Clause enforcement.²¹

14. See, e.g., *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 85 (1st Cir. 2001); *Concourse Rehab. & Nursing Ctr., Inc. v. Whalen*, 249 F.3d 136, 146 (2d Cir. 2001); *Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 639 (6th Cir. 1996); *Hern v. Beye*, 57 F.3d 906, 913 (10th Cir. 1995); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 185 (3d Cir. 1995); *Hope Med. Grp. for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995); *Lewis v. Hegstrom*, 767 F.2d 1371, 1375-76 (9th Cir. 1985); *Randall v. Lukard*, 709 F.2d 257, 264 (4th Cir. 1983), *rev'd on other grounds*, 728 F.2d 966, 967 (4th Cir. 1984); *Hodgson v. Bd. of Cty. Comm'rs*, 614 F.2d 601, 615 (8th Cir. 1980); *Zbaraz v. Quern*, 596 F.2d 196, 202-03 (7th Cir. 1979).

15. *Lankford v. Sherman*, 451 F.3d 496, 506 (8th Cir. 2006) (discussing the Medicaid reasonable standards provision, 42 U.S.C. § 1396a(a)(17) (2006)).

16. *Id.* at 509 (citing *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 108 (1989) distinguishing enforcement under 42 U.S.C. § 1983, which involves "the securing of rights, privileges and immunities [established by Congress] to individuals").

17. *Lankford*, 451 F.3d at 510.

18. *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1207 (2012).

19. *Id.* at 1212.

20. *Id.* at 1211 (remanding to determine whether CMS's action was entitled to deference or whether it was arbitrary under the Administrative Procedure Act).

21. *Id.* at 1214 (Roberts, C.J., dissenting).

A. *Armstrong v. Exceptional Child Center*

In the 2014-2015 Term, the Court answered the question raised in *Douglas* when it decided *Armstrong v. Exceptional Child Center*.²² In 2009, the Exceptional Child Center and other in-home habilitation services providers sued Idaho Medicaid Director Richard Armstrong on the grounds that they were not being paid enough.²³ According to the record, the state set the providers' rates based on how much it wanted to spend on the Medicaid program rather than on how much habilitation services actually cost.²⁴ The providers wanted the Medicaid agency to establish rates according to the Medicaid Act's equal access provision, which requires states to set Medicaid payments at a level "sufficient to enlist enough providers so that care and services are available under the [Medicaid] plan at least to the extent that such care and services are available to the general population in the geographic area."²⁵ The lower courts found an implied cause of action under the Supremacy Clause to enforce the provision and that the provision was being violated by the State.²⁶

On March 31, 2015, the Supreme Court reversed and held that health care providers cannot enforce the Supremacy Clause to make a state comply with the Medicaid equal access provision, nor can they rely on courts, sitting in equity, to enjoin state laws that are inconsistent with the provision.²⁷ It comes as no surprise that the case was a close call—a five to four decision.²⁸ The line-up of the justices did not reflect the usual ideological split, however. Justice Breyer voted with the majority; Justice Kennedy, with the dissent.²⁹

Justice Scalia wrote the majority opinion. As noted above, these types of cases have been filed for hundreds of years and, with respect to the Social Security Act, since at least the 1970s. While acknowledging this "long-established practice," Justice Scalia said that it "does not justify a rule that denies [the] . . . fairest reading."³⁰ And according to this reading, the health care providers did not have an implied cause of action under the Supremacy Clause because that provision creates a "rule of decision" that merely "instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances

22. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387-88 (2015).

23. *Id.* at 1382; *Inclusion, Inc. v. Armstrong*, 835 F. Supp. 2d 960, 961-63 (D. Idaho 2011), *aff'd*, 567 Fed. App'x 496, 497 (9th Cir. 2014).

24. *Armstrong*, 135 S. Ct. at 1382.

25. *Id.*; 42 U.S.C. § 1396a(a)(30)(A) (2012).

26. *See Inclusion, Inc.*, 835 F. Supp. 2d at 964.

27. *Armstrong*, 135 S. Ct. at 1387-88.

28. *See id.*

29. *Id.* at 1388, 1390.

30. *Id.* at 1382.

they may do so.”³¹ The dissenting justices, led by Justice Sotomayor, did not dispute this part of the majority opinion.³²

The Court also unanimously agreed that a plaintiff might still be able to obtain equitable relief: “The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action . . . It is a judge-made remedy.”³³ Thus, the Court considered whether the plaintiffs could bring their suit against the Idaho Medicaid officials in equity and, for this, they looked for congressional intent—whether Congress intended to allow courts in equity to hear such actions: “[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations.”³⁴

The *Armstrong* majority held “the Medicaid Act implicitly precludes private enforcement of § (30)(A) [the equal access provision],” so the health care providers could not invoke the court’s equitable powers to “circumvent Congress’s exclusion of private enforcement.”³⁵ In reaching this conclusion, the Court relied on two indications of congressional intent. First, the “sole remedy” Congress provided in the Medicaid Act authorizes the Secretary of the Department of Health and Human Services (HHS) to terminate or withhold federal funding to all or parts of the state Medicaid program until the state stops violating the federal law.³⁶ The majority found that the “express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”³⁷

There are a couple of problems with this reading. First, determination of whether there is a private cause of action is supposed to rest upon congressional intent. As explained above, when Congress enacted Medicaid, it was working under long-standing court precedent recognizing the right of individuals to claim protection of the law and the duty of courts to accord an appropriate remedy in the absence of any express statutory authorization of a

31. *Id.* at 1383 (citations omitted).

32. *Armstrong*, 135 S. Ct. at 1391 (Sotomayor, J., dissenting).

33. *Id.* at 1384 (citation omitted); *see id.* at 1390 (Sotomayor, J., dissenting) (citing *Ex parte Young*, 209 U.S. 123 (1908), as “[p]erhaps the most famous exposition of this principle”). Neither the majority nor the dissenting opinions explain the basis for the cause of action.

34. *Id.* at 1385.

35. *Id.* In Part IV of the opinion (not joined by Justice Breyer and, thus, without majority status), Justice Scalia and three other justices expressed doubt that health care providers can ever enforce the Medicaid Act. *Id.* at 1387 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The justices stated, “We doubt . . . that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves.” *Id.*

36. *Id.* at 1385 (citing 42 U.S.C. § 1396c (2012)).

37. *Armstrong*, 135 S. Ct. at 1385 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

federal cause of action. So, the enacting Congress would not have thought it necessary to insert provisions about private enforcement. Second, a statutory enforcement scheme either substitutes for private enforcement or it does not. In *Wilder v. Virginia Hospital Association*, the Court had already held in the Section 1983 context that the Medicaid Act does not contain a statutory scheme that would foreclose private enforcement.³⁸

Armstrong's second major point is that, while the termination of funding provision might not, by itself, preclude the providers' lawsuit, the Medicaid equal access provision does because it is so broad and non-specific as to be "judicially unadministrable."³⁹ But this rationale also is problematic. The Medicaid equal access provision does require significant evidentiary proof, but it was certainly not beyond the competency of previous courts to administer. Indeed, prior to this opinion, courts had enforced the equal access provision dozens of times.⁴⁰

Nevertheless, according to the *Armstrong* majority, the providers' remedy is to compel the Secretary of HHS to take action against the state.⁴¹ As noted, the action that the Medicaid Act authorizes the Secretary to take is the termination of all or part of the state's federal Medicaid funding.⁴² In other words, the Court is saying that health care providers, who are not being paid enough by the state Medicaid agency, can ask the federal government to deny the state the federal funding that the state needs to operate its Medicaid program.⁴³ That does not seem fair; in fact, it seems nonsensical that Congress would have ever expected a health care provider to seek such a remedy. Indeed, former HHS officials submitted a brief to the Supreme Court in this case stating:

Every aspect of [HHS's] administration of the Medicaid program—from its regulations to its annual budget—is premised on the understanding that private parties will shoulder much of the enforcement burden. CMS [the part of HHS in charge of Medicaid] lacks the logistical and financial resources necessary to be the exclusive enforcer of the equal access mandate, and it is highly unlikely to receive the necessary resources in the future.⁴⁴

38. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 522 (1990).

39. *Armstrong*, 135 S. Ct. at 1385.

40. *See, e.g.*, NAT'L HEALTH LAW PROGRAM, THE ADVOCATE'S GUIDE TO THE MEDICAID PROGRAM 4.15, 4.77-78 & 45 n.244 (May 2011 & Oct. 2012 Supp.) (providing a string citation of cases).

41. *Armstrong*, 135 S. Ct. at 1387.

42. *Id.* at 1385-87.

43. *Id.* at 1387.

44. Brief for Former HHS Officials as *Amici Curiae* in Support of Respondents at 6, *Armstrong*, 135 S. Ct. 1378 (No. 14-15).

B. *The Emerging Post-Armstrong Landscape*

Both federal and state government defendants are seeking to expand *Armstrong*. In *Georgia Department of Community Health v. United States*, Georgia Medicaid filed suit against the United States after forty-five million dollars was mistakenly credited to CMS rather than Georgia.⁴⁵ The federal government argues that *Armstrong* prohibits the court from providing equitable relief and that the state's sole remedy is an appeal to the HHS Department Appeals Board, followed by judicial review of that decision.⁴⁶ The district court rejected the argument on grounds that the Georgia agency is neither relying on the Supremacy Clause to establish an implied cause of action nor asking the court to enjoin a federal statute.⁴⁷ The ruling has been appealed.⁴⁸ The federal government also raised *Armstrong* in *United States House of Representatives v. Burwell*; however, the district court found *Armstrong* is "of no concern" and that the House has an implied cause of action under the Constitution's appropriations provision to complain that Obama administration officials spent billions of unappropriated dollars to support implementation of the Affordable Care Act.⁴⁹

State defendants are also citing *Armstrong* to support dismissal of Supremacy Clause claims and in arguments to extend *Armstrong* to claims filed under 42 U.S.C. § 1983.⁵⁰ Section 1983 developments are discussed in the next section.

Armstrong immediately affected a number of pending California cases that relied on the Supremacy Clause to enjoin state Medicaid payment policies. The Ninth Circuit reversed its opinion in *Armstrong*, vacated the district court injunction, and ordered the district court to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.⁵¹ Another court granted the plaintiff's request to dismiss *Santa Rosa Memorial Hospital v. Maxwell-Jolly* in light of *Armstrong*.⁵² The court had denied the plaintiff's request to dismiss the case while *Armstrong* was pending because there was no clear guidance on the Supremacy Clause claim and, thus, concern that the plaintiff was simply trying

45. *Ga. Dep't of Cmty. Health v. U.S. Dep't of Health & Human Servs.*, 110 F. Supp. 3d 95, 96-97 (D.D.C. 2015).

46. Defendant's Reply on Motion to Alter or Amend the Judgment at 2, *Ga. Dep't of Cmty. Health*, 110 F. Supp. 3d at 95 (No. 13-1281).

47. *See Ga. Dep't of Cmty. Health*, 110 F. Supp. 3d at 98-99.

48. *Id.* at 98, *appeal docketed*, No. 15-5236 (D.C. Cir. Aug. 21, 2015).

49. *See House of Representatives v. Burwell et al.*, No. 14-1967, 2015 WL 5294762, at *21 (D.D.C. Sept. 9, 2015).

50. *See infra* Section III.B.

51. *Exceptional Child Ctr., Inc. v. Armstrong*, 788 F.3d 991, 991-92 (9th Cir. 2015).

52. *See Santa Rosa Mem'l Hosp. v. Maxwell-Jolly*, No. 08-cv-5173 SC, 2015 WL 4451377, at *1 (N.D. Cal. July 20, 2015), *appeal docketed*, No. 15-16650 (9th Cir. Aug. 18, 2015).

to avoid the federal courts.⁵³ And when the court did grant the plaintiff's request following *Armstrong*, it did so over the defendant's objection that dismissal of the complaint would deny the defendant of a favorable federal forum for judgment on the merits.⁵⁴ The defendant's argument was rejected because the court decided that the case had not progressed far enough to unduly harm the defendant.⁵⁵ In yet another California case, the district court relied on the doctrine of law of the case and refused to vacate a permanent injunction but, following *Armstrong*, did vacate that portion of the order providing that "[t]he State is further enjoined from making any future changes to payments [received] by providers without complying that [sic.] the requirements of [§ 30(A)] [on a prospective basis] and demonstrating that approval has been obtained from the Center for Medicaid Services."⁵⁶

Armstrong has also prevented Medicaid providers and beneficiaries in Florida from continuing to pursue a Supremacy Clause claim to enjoin state policies that they argue violate Medicaid's Section (30)(A) requirements.⁵⁷ A New York court dismissed a Supremacy Clause claim brought by Medicaid beneficiaries seeking to enjoin state laws that exclude services associated with Gender Identity Disorder/Gender Dysphoria on the grounds that the state laws are inconsistent with the Medicaid reasonable standards provision, 42 U.S.C. § 1396a(a)(17).⁵⁸ And two separate cases from New Jersey refused to allow Medicaid-participating health care providers and their patients to enforce the Supremacy Clause to enjoin state policies that they argued were inconsistent with the Medicaid Act.⁵⁹ One of these cases involved the Medicaid equal access requirement.⁶⁰ The other involved Medicaid's service comparability, reasonable standards, freedom of choice, and Early and Periodic Screening,

53. *Id.*

54. *Id.* at *2.

55. *Id.*

56. *Arc of Cal. v. Douglas*, 11-cv-02545-MCE-CKD, 2015 WL 5147433, at *2 (E.D. Cal. Sept. 1, 2015).

57. *Fla. Pediatric Soc'y v. Dudek*, No. 05-23037-CIV-JORDAN/O'SULLIVAN, 2015 BL 130043, *1 (S.D. Fla. Apr. 30, 2015); see *Levin v. S.C. Dep't of Health & Human Servs.*, No. 3:12-cv-0007-JFA, 2015 WL 4545931, at *6, n.12 (D.S.C. July 28, 2015) (dismissing claim to enforce Section (30)(A) pursuant to Section 1983 stating that plaintiffs' claim for equitable relief could not be used "as a mechanism to circumvent Congress's exclusion of private enforcement of § (30)(A)" (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 (2015))).

58. *Cruz v. Zucker*, No. 14-cv-4456 (JSR), 2015 WL 4548162, at *11 (S.D.N.Y. July 29, 2015). *But see id.* at *3-10 (recognizing plaintiffs' rights under Section 1983 to enforce Medicaid provisions requiring availability of services (Section (a)(10)(A)), comparability of services (Section (a)(10)(B)), and child health services (Section (a)(43))).

59. *Providence Pediatric Med. DayCare, Inc. v. Alaigh*, 112 F. Supp. 3d 234, 249 (D.N.J. 2015); *Mercer Co. Children's Med. Daycare, LLC v. O'Dowd*, No. 13-1436, 2015 WL 5335590, at *1 (D.N.J. Sept. 14, 2015).

60. *Providence*, 112 F. Supp. 3d at 251.

Diagnostic, and Treatment (EPSDT) provisions.⁶¹ The opinion looks only at whether the Supremacy Clause can provide a cause of action, not whether a court sitting in equity can provide injunctive relief under these federal laws.⁶²

Since *Armstrong*, some plaintiffs have opted to pursue their Medicaid claims in state, rather than federal, court. But this avenue can also be fraught with obstacles. For example, the California Civil Procedure Code Section 1085 authorizes a state court action for a writ of mandate against the state.⁶³ Citing this provision, Medi-Cal participating hospitals filed a case in state court to require the state Medicaid agency to make adequate payments.⁶⁴ The state defendant removed the case to federal court arguing that the action actually arose under the Medicaid equal access provision.⁶⁵ Even though removal statutes are ordinarily strictly construed against removal, the court ruled against the plaintiffs.⁶⁶ According to the court,

there can be no question that Plaintiffs' state court complaint raises a number of issues of federal law, including the adequacy of Medi-Cal reimbursements under Section (30)(A) . . . [E]ven though state law creates [a party's] causes of action, its case might still arise under the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.⁶⁷

The plaintiffs' argued that they lacked standing in federal court to bring the Section (30)(A) claim in light of *Armstrong*, and thus the federal court lacked subject matter jurisdiction and removal was improper.⁶⁸ The court, however, said *Armstrong* never mentioned standing but rather discussed the failure to state a claim upon which relief can be granted.⁶⁹ The court stated:

It appears that Petitioners are actually arguing that a favorable decision is unlikely in light of *Armstrong*. Redressability [for purposes of standing], however, has to do with the likelihood that the injury will be redressed *if* a

61. *Mercer*, 2015 WL 5335590, at *1-2.

62. *Id.* For cases outside of the Medicaid context, *see, e.g.*, *All. v. Alt. Holistic Healing, LLC*, No. 1:15-cv-00349-REB-CBS, 2016 WL 223815, at *2-3, *7 (D. Colo. Jan. 19, 2016) (refusing to exercise equitable power in Controlled Substance Act case); *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, No. 15-cv-2246(JS)(ARL), 2015 WL 3936346, at *9, *18 (E.D.N.Y. June 26, 2015) (holding *Armstrong* precludes plaintiffs from filing claims to obtain injunctive relief under the Airway Improvement Act and Airport Noise and Capacity Act).

63. CAL. CIV. PROC. §1085 (2011).

64. *Tulare Local Health Care Dist. v. Cal. Dep't of Health Care Servs.*, No. 3:15-cv-02711-SC, 2015 WL 5260437, at *2 (N.D. Cal. Sept. 9, 2015).

65. *Id.* at *1.

66. *Id.* at *2-3.

67. *Id.* at *2 (internal quotations and citation omitted). The complaint also includes equal protection claims under the U.S. and state constitutions. *Id.* at *1.

68. *Id.* at *3.

69. *Tulare*, 2015 WL 5260427, at *3.

favorable decision is rendered, not the likelihood *that* a favorable decision will be rendered.⁷⁰

In sum, the hospitals are left in federal court—with no viable claim for relief under Section (30)(A). Indeed, in an Answer filed with the federal court on September 22, 2015, the state defendant argued that the case should be dismissed because of the failure to state a claim upon which relief can be granted, lack of subject matter jurisdiction, and lack of standing.⁷¹

III. ENFORCEMENT UNDER 42 U.S.C. §1983

Title 42, Section 1983 of the U.S. Code provides an express cause of action to individuals when a state actor is depriving them of their rights under the U.S. Constitution or a federal law.⁷² Over the years, low-income individuals have relied heavily upon Section 1983 to make real the federal rights that Congress has promised. Enforcement of the Social Security Act, of which Medicaid is part, has been no exception.⁷³

A. *The Supreme Court's Section 1983 Cases*

A Social Security Act case from 1980, *Maine v. Thiboutot*, addressed enforcement under Section 1983 and expressly held that “the phrase ‘and laws’

70. *Id.*

71. Respondents' Answer to Verified Petition for Writ of Mandate at 6, *Tulare Local Health Care Dist.*, 2015 WL 5260427 (No. 3:15-cv-02711-SC).

72. 42 U.S.C. § 1983 (2012). 42 U.S.C. § 1983 states:

[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id. Unlike in Supremacy Clause actions where attorneys' fees are not available, plaintiffs can obtain attorneys' fees if they are the “prevailing party” in a Section 1983 case. 42 U.S.C. § 1988 (2012).

73. *See, e.g.,* *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) (“[S]uits in federal court under Section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states.”) (quoting *Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970)); *Rosado*, 397 U.S. at 422-23 (stating “[i]t is . . . 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,” and allowing Section 1983 cases to enforce provisions of the Social Security Act); *King v. Smith*, 392 U.S. 309, 317 (1968) (allowing welfare recipients to enforce the “reasonable promptness” provision of the Social Security Act’s welfare law pursuant to Section 1983); *accord* *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981) (citing *King v. Smith* with favor in case not involving Social Security Act and stating “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”).

means what it says” and, thus, Section 1983 enforcement applies not only to constitutional rights but also to federal laws.⁷⁴ *Thiboutot*’s holding is simple and straightforward, but it did not satisfy a majority of the evolving Supreme Court, particularly with respect to laws enacted pursuant to the Spending Clause. A year after *Thiboutot*, the Court began to restrict private enforcement in *Pennhurst State School & Hospital v. Halderman*.⁷⁵ Discussing the Developmentally Disabled Assistance and Bill of Rights Act (which was a Spending Clause enactment but not part of the Social Security Act), Justice Rehnquist’s majority opinion likened legislation enacted pursuant to the Spending Clause to a contract between the federal government and the states with the typical remedy for state noncompliance being an action by the federal government to terminate funding.⁷⁶ Subsequently, the Court cautioned that Section 1983 actions require a plaintiff to assert a violation of a federal “right,” not merely a violation of federal law.⁷⁷

In *Wilder v. Virginia Hospital Association*, 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.⁷⁸ After noting 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.⁷⁹ The Court then stated that the inquiry to determining whether a statutory provision creates a “federal right” under Section 1983

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

74. *Maine v. Thiboutot*, 448 U.S. 11, 12-13 (1980) (enforcing a Social Security Act provision).

75. *See Pennhurst*, 451 U.S. at 1.

76. *Id.* at 17, 28;

[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 Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously In 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 to the State.

Id.

77. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 106 (1989); *see also* *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit*, 493 U.S. at 106).

78. *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 503 (1990).

79. *Id.* at 508.

the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.⁸⁰

Applying this test, *Wilder* held that the Medicaid provision at issue created a right enforceable by hospitals under Section 1983.⁸¹

The Supreme Court has instructed courts to use the “traditional” enforcement test for determining whether Congress intended a federal statute to create rights under Section 1983.⁸² Specifically, courts must ascertain whether “each separate claim” satisfies the test.⁸³ The three-part enforcement test asks whether each of the provisions 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.⁸⁴ When the three-part test is met, “the right is presumptively enforceable.”⁸⁵ 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.⁸⁶ The *Wilder* Court held that Medicaid’s administrative process “to curtail federal funds to States whose plans are not in compliance with the Act [42 U.S.C. § 1396c] . . . cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983.”⁸⁷

In 2002, *Gonzaga University v. Doe* further clarified the Section 1983 enforcement test.⁸⁸ The case involved a provision of the Family Educational Rights and Privacy Act (FERPA), which is a Spending Clause enactment but

80. *Id.* at 509 (citations and internal quotations omitted).

81. *Id.* at 509-10.

82. *Blessing*, 520 U.S. at 340.

83. *Id.* at 342; *see also* *Suter v. Artist M.*, 503 U.S. 347, 358 n.8 (1992) (instructing that each federal statute “must be interpreted on its own terms”).

84. *Blessing*, 520 U.S. at 340-41; *Wilder*, 496 U.S. at 509.

85. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 274 (2002).

86. *Id.* at 284 n.4; *see also* *Blessing*, 520 U.S. at 330, 346 (stating this is a “difficult showing”). The Court has found enforcement under Section 1983 foreclosed in only a few cases: *see generally* *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113 (2005) (regarding Telecommunications Act); *Smith v. Robinson*, 468 U.S. 992 (1984) (regarding Education of the Handicapped Act); *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (regarding Water Pollution Control and Marine Protection, Research and Sanctuaries Acts).

87. *Wilder*, 496 U.S. at 521-22; *see also* *City of Rancho Palos Verdes, Cal.*, 544 U.S. at 121-22 (including *Wilder* and Medicaid in listing of previous cases and statutes where Section 1983 enforcement is not foreclosed by a statutory enforcement scheme); *Gonzaga Univ.*, 536 U.S. at 280 (noting *Wilder* held Medicaid Act contains “no sufficient administrative means of enforcing the requirement against [states] that failed to comply”).

88. *Gonzaga Univ.*, 536 U.S. at 280 (Gonzaga University was represented by now Chief Justice John G. Roberts, Jr.).

not a part of the Social Security Act.⁸⁹ The FERPA provision prohibited federal funding to any entity with a policy or practice of permitting the release of private records without written consent from the student or parent.⁹⁰ The Court refused to allow a student to enforce the provision.⁹¹ Citing *Pennhurst*, Chief Justice Rehnquist's opinion held the federal law could not be enforced under Section 1983 because Congress had not unambiguously manifested its intent to confer individual rights on the plaintiff.⁹² Specifically, to establish a federal right under Section 1983, a federal law must contain "rights- or duty-creating language" and have an individual rather than an "aggregate" focus.⁹³ At its heart, then, the stated *Gonzaga* test turns on the need to discern congressional intent.

B. The Social Security Act's Private Enforcement Provision

In *Suter v. Artist M.*, the Supreme Court held that plaintiffs could not use Section 1983 to enforce a provision of the Adoption Assistance and Child Welfare Act, which is part of the Social Security Act.⁹⁴ The *Suter* Court 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.⁹⁵ 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. Indeed, soon after *Suter* was decided, some courts began to hold that entire titles of the Social Security Act could not be enforced.⁹⁶

Congress reacted decisively to correct the *Suter* error and reestablish the private right of action as it existed previously in 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

89. *Id.* at 279-80.

90. *Id.* at 276 (citing 20 U.S.C. § 1232g (2000)).

91. *Id.*

92. *Id.* at 280 ("We made clear [in *Pennhurst*] that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 n.21 (1981))).

93. *Gonzaga Univ.*, 536 U.S. at 285, 288.

94. *Suter v. Artist M.*, 503 U.S. 347, 350 (1992).

95. *Id.* at 358.

96. *See, e.g.*, *Mason v. Bradley*, 789 F. Supp. 273, 277 (N.D. Ill. 1992) (refusing to allow plaintiff to enforce provisions of the Aid for Families with Dependent Children program).

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.⁹⁷

The Conferees explained that:

The intent of this provision is to assure that individuals who have been injured by the 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.*⁹⁸

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).⁹⁹

The Committee also noted that:

Social Security Act Program 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 . . . *Suter v. Artist M.* could also result in the dismissal of many suits brought to enforce the State plan titles of the Social Security Act pending on or commenced after the date of the Court's decision in the case. Lower courts have already relied on the *Suter v. Artist M.* decision to dismiss lawsuits brought to enforce the program requirements¹⁰⁰

97. 42 U.S.C. §§ 1320a-2, 1320a-10 (2012). In addition to enacting 42 U.S.C. §§ 1320a-2, 1320a-10, Congress has evidenced its intent on other occasions. For example, in 1981, 1985, 1987, and 1996, Congress rejected bills that would have limited private enforcement under Section 1983. See S. 584, 97th Cong. § 1 (1981); S. 436, 99th Cong. § 1 (1985); S. 325, 100th Cong. § 1 (1987); H.R. 4314, 104th Cong. § 309(c) (1996). In *Maine v. Thiboutot*, the Court invited Congress to change the law if it thought the Court's interpretation of congressional intent was in error. 448 U.S. 1, 8 (1980). That Congress has not done so also evidences enforcement rights under Section 1983.

98. H.R. Rep. No. 103-761, at 926 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 2901, 3257.

99. REPORT OF THE COMM. ON WAYS & MEANS, H. R. DOC., NO. 102-631, at 364 (2d Sess. 1992).

100. *Id.* at 364-65.

Congress provided yet further evidence of its intent when it stated:

[W]hen the 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.¹⁰¹

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.”¹⁰² Thus, in 1994, Congress amended the Social Security Act expressly to recognize that provisions of the Social Security Act are not to be deemed unenforceable simply because they are included in a section specifying the provisions of a State plan; rather, courts are to decide enforcement questions by applying the grounds for enforcement recognized by the Supreme Court prior to 1994 (in cases such as *Wilder* and *Blessing*).¹⁰³

C. Medicaid Enforcement Under Section 1983

The Supreme Court has not decided a Medicaid Section 1983 enforcement case since *Gonzaga* was decided on June 20, 2002.¹⁰⁴ However, a number of lower courts have applied the *Gonzaga/Blessing* test in the Medicaid context. Of particular note are the forty-four cases filed against state Medicaid agencies that have been decided by the federal courts of appeals.¹⁰⁵ This activity is summarized in tables and discussion, below.

101. 139 CONG. REC. S3, 173, S3, 189 (daily ed. Mar. 18, 1993) (statement of Sen. Riegle).

102. 138 CONG. REC. S17689, S17689 (1992) (daily ed. Oct. 8, 1992) (statement of Sen. Riegle).

103. Social Security Act Amendments of 1994, Pub. L. No. 103-432, § 211, 108 Stat. 4398, 4460 (1994), (codified at 42 U.S.C. § 1320a-10 (2012)). For appellate opinions citing Sections 1320a-2, 1320a-10, see *Ball v. Rodgers*, 492 F.3d 1094, 1112 n.26 (9th Cir. 2007) (noting that “courts around the country have relied on [Section 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.”); see *Watson v. Weeks*, 436 F.3d 1152, 1158, 1160-61 (9th Cir. 2006); *Rabin v. Wilson-Coker*, 362 F.3d 190, 202 (2d Cir. 2004); *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004); *Harris v. James*, 127 F.3d 993, 1002 (11th Cir. 1997). *But c.f.* *Sanchez v. Johnson*, 416 F.3d 1051, 1058 n.42 (9th Cir. 2005) (refusing enforcement of a Medicaid provision, finding Section 1320a-2 “hardly a model of clarity” and concluding that it does not disturb the reasoning of *Pennhurst*). Judge O’Scannlain’s *Sanchez* reasoning ignores the fact that Congress enacted Section 1320a-2 specifically to preserve the long history of private enforcement of the Social Security Act and that *Pennhurst* is not a Social Security Act case.

104. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 273 (2002).

105. See Appendix.

Table 1 shows where the cases have occurred. As of April 8, 2016, eleven of the twelve federal circuits had reviewed at least one Section 1983 Medicaid case since *Gonzaga* was decided.¹⁰⁶ The Ninth Circuit has been the most active.¹⁰⁷ The D.C. Circuit is the only appellate court not to have decided a Medicaid Section 1983 case.¹⁰⁸

Table 1
Medicaid Section 1983 Circuit Court Cases Post *Gonzaga*
June 20, 2002-April 14, 2016¹⁰⁹

1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.
5	6	4	2	3	6	3	3	8	3	1	0

Consistent with the Supreme Court’s teaching, the appellate courts are reviewing enforceability on a provision-by-provision basis.¹¹⁰ Table 2 shows that, since *Gonzaga*, federal appellate courts have reviewed the enforceability of twenty-five Medicaid Act provisions.¹¹¹ These courts have allowed just over half of the provisions to be privately enforced by the plaintiffs.¹¹² The vast majority of the cases involve enforcement by Medicaid beneficiaries; however, five appellate courts (the First, Second, Third, Fourth, and Ninth Circuits) recognize the right of federally qualified health centers (FQHCs) to enforce 42 U.S.C. § 1396a(bb), a Medicaid provision that specifically addresses payment requirements for FQHCs.¹¹³

A few Medicaid provisions have received particular attention post-*Gonzaga*. Federal courts of appeals have consistently allowed Medicaid beneficiaries to enforce two provisions: 42 U.S.C. § 1396a(a)(8), which requires the state Medicaid agency to provide medical assistance to “all individuals” with reasonable promptness,¹¹⁴ and Section 1396a(a)(10)(A), requiring the state agency to provide medical assistance to “all individuals”

106. See Table 1; see also Appendix (referencing all forty-four cases).

107. See e.g., Ninth Circuit court cases cited in full in the Appendix: *Planned Parenthood of Ariz.*, 727 F.3d 960; *Clayworth*, 140 F. App’x 677; *AlohaCare*, 572 F.3d 740; *Cal. Ass’n of Rural Health*, 738 F.3d 1007; *Spry*, 487 F.3d 1272; *Ball*, 492 F.3d 1094; *Sanchez*, 416 F.3d 1051; *Watson*, 436 F.3d 1152.

108. See Table 1. The D.C. Circuit dismissed a Medicaid Section 1983 case as an improper interlocutory appeal. See generally *Salazar v. Dist. of Columbia*, 671 F.3d 1258 (D.C. Cir. 2012).

109. See Appendix (referencing all forty-four cases).

110. *Blessing v. Freestone*, 520 U.S. 329, 342 (1997) (“Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights.”)

111. See *infra* Table 2.

112. See *id.*

113. See *id.*

114. 42 U.S.C. § 1396a(a)(8) (2012).

who are described in the section's listing of covered populations (*e.g.*, individuals with disabilities, older adults, pregnant women, low-income children).¹¹⁵ The First and Third Circuit courts have also concluded that Medicaid beneficiaries can enforce certain provisions contained in a part of the Medicaid Act, called the Nursing Home Reform Act.¹¹⁶ By contrast, all six of the federal circuits to have reviewed the question (the First, Second, Fifth, Sixth, Ninth, and Tenth Circuits) have held the Medicaid equal access provision, Section 1396a(a)(30)(A), does not create an enforceable federal right.¹¹⁷

The vast majority of appeals court cases (thirty-eight of the forty-four cases) focus on the *first* prong of the enforcement test (whether the provision in question unambiguously manifests congressional intent to confer individual rights on the plaintiff).¹¹⁸ The courts have reached the same conclusion when assessing a Medicaid provision against the first prong, and there are no splits among the circuits.

The Tenth, Eighth, and Third Circuits have, however, reached different conclusions when applying the *third* prong of the enforcement test (whether the provision creates a binding obligation on the state).¹¹⁹ Their assessments

115. *Id.* § 1396(a)(10)(A).

116. *See* Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel, 570 F.3d 520, 524, 529 (3d Cir. 2009) (allowing plaintiffs to enforce 42 U.S.C. §§ 1396r(b)(1)(A), 1396r(b)(2)(A), 1396r(b)(3)(A), 1396r(b)(4)(A)(iv), 1396r(b)(2)(C), 1396r(b)(3)(C)(i)(1), 1396r(b)(3)(D), 1396r(b)(4)(A), 1396r(b)(4)(B), 1396r(b)(6)(C), and 1396r(b)(c) (2012) against county-operated nursing facilities, finding the provisions "replete with rights-creating language"); Rolland v. Romney, 318 F.3d 42, 46 (1st Cir. 2003) (allowing plaintiffs to enforce 42 U.S.C. §§ 1396r(b)(1)-3), 1396r(b)(3)(f), 1396r(b)(4)(a), 1396r(c)(1)(A, B), 1396r(e)(1, 3, 6), 1396r(e)(7)(A)(i), 1396r(e)(7)(B)(i), 1396r(e)(7)(C, D), 1396r(e)(7)(G)(iii) (2012) in suits against staff officials). In an earlier case, the Second Circuit dismissed a pro-se plaintiff's complaint, finding it "unintelligible and difficult to adjudicate" but including a sentence stating that "the Nursing Home Reform Act's provisions do not confer a right of action on [the plaintiff] that can be enforced against a private nursing home. . . ." Prince v. Dicker, 29 F. App'x 52, 54 (2d Cir. 2002). Noting the non-binding nature of this case, a New York district court subsequently held provisions of the nursing home reform act are enforceable. *See* Pantalone v. Cty. of Fulton, No. 6:10-CV-913 2011 WL 1457935, at *2-3 (discussing *Prince* and allowing plaintiffs to enforce 42 U.S.C. §§ 1396r(b)(1)(A), 1396r(b)(4)(A)(i) (2012) pursuant to Section 1983).

117. *See infra* Table 2. A decision from the Eighth Circuit that allowed private enforcement of 42 U.S.C. § 1396(a)(30)(A) (2012) based on previously controlling circuit precedent was vacated by the Supreme Court. *See* Pediatric Specialty Care v. Ark. Dep't of Human Servs., 443 F.3d 1005, 1015 (8th Cir. 2006); *vacated on other grounds by* Selig v. Pediatric Specialty Care, 551 U.S. 1142 (2007). A decision from the Third Circuit came slightly ahead of *Gonzaga*, applying an analysis that is remarkably similar to what *Gonzaga* would eventually hold. *See* Pa. Pharm. Ass'n v. Houstoun, 283 F.3d 531, 555 (3d Cir. 2002).

118. *See* Appendix (cases numbered one through thirty-eight).

119. *See* Hobbs v. Zenderman, 579 F.3d 1171, 1179 (10th Cir. 2009); *see also* Lewis v. Alexander, 685 F.3d 325, 333-34, 342 (3d Cir. 2012); *see also* Ctr. for Special Needs Tr. Admin. v. Olson, 676 F.3d 688, 700 (8th Cir. 2012).

pertain to subsections of 42 U.S.C. § 1396p(d)(4), a Medicaid provision that addresses eligibility when a Medicaid applicant has a trust.¹²⁰ In *Hobbs v. Zenderman*, the Tenth Circuit held Section 1396p(d)(4)(A) does not impose an unambiguous, binding obligation on the state.¹²¹ That conclusion is based on an earlier Tenth Circuit case that did not discuss private enforcement under Section 1983 but held that Section 1396p(d)(4)(A) left the states free to decide whether and under what conditions to count trusts for Medicaid eligibility purposes.¹²² While acknowledging that “the statute might have been read in the first instance to require States to exempt special needs trusts,” *Hobbs* held that construction was foreclosed by the earlier case absent *en banc* reconsideration or a contrary decision from the Supreme Court.¹²³

By contrast, the other two circuits have allowed a Medicaid applicant to enforce other subsections of Section 1396p(d)(4).¹²⁴ In *Center for Special Needs Trust Administration v. Olson*, the Eighth Circuit acknowledged *Hobbs* but pointed out that *Hobbs* concerned paragraph (A) while the case before it raised a claim under paragraph (C).¹²⁵ The court declined to apply *Hobbs*, finding paragraph (C) contains the mandatory language “shall not” when describing the obligation imposed on the state and, thus, creates a binding obligation on the state.¹²⁶ More recently, the Third Circuit concluded, in *Lewis v. Alexander*, that paragraph (C) imposes mandatory obligations on the state and can be enforced under Section 1983.¹²⁷ The Supreme Court denied certiorari in *Lewis*.¹²⁸

120. 42 U.S.C. § 1396p(d)(4) (2012).

121. See *Hobbs*, 579 F.3d at 1179.

122. *Id.* at 1180 (citing *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000)).

123. *Id.*

124. *Lewis*, 685 F.3d at 333-34, 342; *Ctr. for Special Needs Tr. Admin.*, 676 F.3d at 700.

125. *Ctr. For Specials Needs Tr. Admin.*, 676 F.3d at 700 n.2.

126. *Id.*

127. *Lewis*, 685 F.3d 325, 333, 342; *id.* at 344 (acknowledging *Rizzuto* and *Hobbs* but stating, “[h]ere, Congress has not only provided a comprehensive system of asset-counting rules, it has actually legislated on this precise class of asset” and required states to exempt any trust meeting the provision of 42 U.S.C. § 1396p(d)(4) (2012)).

128. *Alexander v. Lewis*, 133 S. Ct. 933 (2013).

Table 2
 Post-Gonzaga Circuit Enforcement of Medicaid Provisions
 June 20, 2002-April 14, 2016

Medicaid Provision (42 U.S.C. § 1396)	Held Enforceable	Held Unenforceable
a(a)(3)-fair hearing	2d (2015, 2012), ¹²⁹ 6th (2003) ¹³⁰	
a(a)(8)-reasonable promptness	1st (2002), ¹³¹ 3d (2004), ¹³² 4th (2011, 2007), ¹³³ 5th (2013), ¹³⁴ 6th (2006) ¹³⁵	
a(a)(10)(A)-eligibility for medical assistance	3d (2004), ¹³⁶ 5th (2004), ¹³⁷ 6th (2006), ¹³⁸ 7th (2012), ¹³⁹ 9th (2006) ¹⁴⁰	
a(a)(10)(B)-comparability	2d (2015) ¹⁴¹	
a(a)(10)(C)-medically needy		10th (2009) ¹⁴²
a(a)(10)(D)-mandatory home health services	2d (2015) ¹⁴³	

129. *Davis v. Shah*, No. 14-543-CV, 2016 WL 1138768, at *16 n.11 (2d Cir. 2016); *Shakhnes v. Berlin*, 689 F.3d 244, 254 (2d Cir. 2012).

130. *Gean v. Hattaway*, 330 F.3d 758, 772-73 (6th Cir. 2003).

131. *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002).

132. *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 183 (3d Cir. 2004).

133. *Doe v. Kidd*, 419 F. App'x 411, 415 (4th Cir. 2011), *reaffirming*, 501 F.3d 348, 356 (4th Cir. 2007).

134. *Romano v. Greenstein*, 721 F.3d 373, 379 (5th Cir. 2013).

135. *Westside Mothers v. Olszewski*, 454 F.3d 532, 544 (6th Cir. 2006).

136. *Sabree*, 367 F.3d at 183.

137. *S.D. ex rel. Dickinson v. Hood*, 391 F.3d 581, 607 (5th Cir. 2004).

138. *Westside Mothers*, 454 F.3d at 544.

139. *Bontrager v. Ind. Fam. & Soc. Servs. Admin.*, 697 F.3d 604, 607 (7th Cir. 2012).

140. *Watson v. Weeks*, 436 F.3d 1152, 1155 (9th Cir. 2006).

141. *Davis v. Shah*, No. 14-543-CV, 2016 WL 1138768, at *18 n.12 (2d Cir. 2016).

142. *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1183 (10th Cir. 2009).

143. *Davis*, 2016 WL 1138768, at *10 n.6.

a(a)(10)(E)–cost-sharing for qualified Medicare beneficiaries (QMBs)	6th (2015) ¹⁴⁴	
a(a)(13)(A)–institutional payment rates; notice process		2d (2006) ¹⁴⁵
a(a)(17)–reasonable standards		8th (2006), ¹⁴⁶ 9th (2006), ¹⁴⁷ 10th (2009) ¹⁴⁸
a(a)(18)–trusts	3d (2012) ¹⁴⁹	
a(a)(19)–best interests		2d (2015), ¹⁵⁰ 7th (2003) ¹⁵¹
a(a)(23)(A)–free choice of provider	6th (2006), ¹⁵² 7th (2012), ¹⁵³ 9th (2013) ¹⁵⁴	
a(a)(25)–third party liability		11th (2012) ¹⁵⁵

144. *Wheaton v. McCarthy*, 800 F.3d 282, 286 (6th Cir. 2015).

145. *N.Y. Ass’n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 147, 148 (2d Cir. 2006).

146. *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006).

147. *Watson v. Weeks*, 436 F.3d 1152, 1155 (9th Cir. 2006).

148. *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1183 (10th Cir. 2009).

149. *Lewis v. Alexander*, 685 F.3d 325, 345 (3d Cir. 2012).

150. *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344–45 (2d Cir. 2015).

151. *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003).

152. *Harris v. Olszewski*, 442 F.3d 456, 464–65 (6th Cir. 2006).

153. *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 699 F.3d 962, 974 (7th Cir. 2012).

154. *Planned Parenthood of Ariz., Inc. v. Betlach*, 727 F.3d 960, 966 (9th Cir. 2013).

155. *Martes v. Chief Exec. Officer of S. Broward Hosp. Dist.*, 683 F.3d 1323, 1330 (11th Cir. 2012).

a(a)(30)(A)-provider payments ¹⁵⁶		1st (2004), ¹⁵⁷ 2d (2006), ¹⁵⁸ 5th (2007), ¹⁵⁹ 6th (2010, 2006), ¹⁶⁰ 9th (2007, 2005, 2005), ¹⁶¹ 10th (2007, 2006) ¹⁶²
a(a)(43)-EPSDT	6th (2010, 2006) ¹⁶³	
a(bb)-FQHC payment	1st (2008, 2005), ¹⁶⁴ 2d (2014), ¹⁶⁵ 3d (2013), ¹⁶⁶ 4th (2007), ¹⁶⁷ 9th (2013) ¹⁶⁸	
b(m)-managed care		9th (2009) ¹⁶⁹

156. Soon after *Gonzaga*, the Eighth Circuit allowed enforcement of Section (30)(A) in a law-of-the-case decision that was subsequently vacated. *Pediatric Specialty Care v. Ark. Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), *vacated*, *Selig v. Pediatric Specialty Care*, 551 U.S. 1142 (2007). *See* *Minn. Pharm. Ass'n v. Pawlenty*, 690 F. Supp. 2d 809, 820 n.8, 820 n.9 (D. Minn. 2010) (discussing *Gonzaga*, *Pediatric Specialty Care*, and other Eighth Circuit precedent and holding Section (30)(A) does not create enforceable rights under Section 1983).

157. *Long Term Care Pharm. All. v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004).

158. *N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 147, 148 (2d Cir. 2006).

159. *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 703 (5th Cir. 2007).

160. *John B. v. Goetz*, 626 F.3d 356, 363 (6th Cir. 2010); *Westside Mothers v. Olszewski*, 454 F.3d 532, 543 (6th Cir. 2006).

161. *Ball v. Rodgers*, 492 F.3d 1094, 1119, 1120 (9th Cir. 2007); *Sanchez v. Johnson*, 416 F.3d 1051, 1068 (9th Cir. 2005); *Clayworth v. Bonta*, 140 F. App'x 677 (9th Cir. 2005).

162. *Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1215 (10th Cir. 2007); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006).

163. *John B.*, 626 F.3d at 362; *Westside Mothers*, 454 F.3d at 537. In *John B. v. Emkes*, 710 F.3d 394, 405 (6th Cir. 2013), the Sixth Circuit affirmed a district court decision that held Sections 1396a(a)(43)(B) and (C) to be privately enforceable but not an implementing regulation. 42 C.F.R. § 441.61(c) (2015) (requiring the state to work with other entities to implement Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) fully).

164. *Concilio De Salud Integral De Loiza v. Pérez-Perdomo*, 551 F.3d 10, 19 (1st Cir. 2008); *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 60 (1st Cir. 2005).

165. *Cmty. Health Care Ass'n of N.Y. v. Shah*, 770 F.3d 129, 134 (2d Cir. 2014).

166. *N.J. Primary Care Ass'n v. N.J. Dep't of Human Servs.*, 722 F.3d 527, 542 (3d Cir. 2013).

167. *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007).

168. *Cal. Ass'n of Rural Health Ctrs. v. Douglas*, 738 F.3d 1007, 1013 (9th Cir. 2013).

169. *AlohaCare v. Haw. Dep't of Human Servs.*, 572 F.3d 740, 747 (9th Cir. 2009).

d(a)-medical assistance services	3d (2004), ¹⁷⁰ 6th (2006), ¹⁷¹	
d(p)-cost-sharing for QMBs	6th (2015) ¹⁷²	
n(c)(2)(C) n(d)(2)(D)-home & community waiver informing	9th (2007) ¹⁷³	
p(d)(4)(A)-trust remainders		10th (2009) ¹⁷⁴
p(d)(4)(C)-special needs trusts exclusion	3d (2012), ¹⁷⁵ 8th (2012) ¹⁷⁶	
r-nursing home reform act provisions	1st (2003), ¹⁷⁷ 3d (2009) ¹⁷⁸	
r-6-transitional Medicaid	2d (2004) ¹⁷⁹	

Finally, federal statutory provisions are the focus of the Section 1983 inquiry. Circuit courts are consistently finding that federal regulations do not independently create privately enforceable rights under Section 1983.¹⁸⁰ However, a regulation can define or flesh out the content of a federal statute that is itself privately enforceable. For example, in *Shakhnes v. Berlin*, the Second Circuit held the Medicaid fair hearing statute, 42 U.S.C. § 1396a(a)(3),

170. Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 183 (3d Cir. 2004).

171. Westside Mothers v. Olszewski, 454 F.3d 532, 543 (6th Cir. 2006).

172. Wheaton v. McCarthy, 800 F.3d 282, 286 (6th Cir. 2015).

173. Ball v. Rodgers, 492 F.3d 1094, 1119-20 (9th Cir. 2007).

174. Hobbs *ex rel.* Hobbs v. Zenderman, 579 F.3d 1171, 1183 (10th Cir. 2009).

175. Lewis v. Alexander, 685 F.3d 325, 343 (3d Cir. 2012).

176. Ctr. For Special Needs Tr. Admin. Inc. v. Olson, 676 F.3d 688, 699 (8th Cir. 2012).

177. Rolland v. Romney, 318 F.3d 42, 56 (1st Cir. 2003).

178. Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel, 570 F.3d 520, 532 (3d Cir. 2009).

179. Rabin v. Wilson-Coker, 362 F.3d 190, 202 (2d Cir. 2004).

180. Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) and another decision, Alexander v. Sandoval, 532 U.S. 275 (2001), caused lower courts to revisit the question of whether federal regulations can independently create rights under Section 1983, and the clear trend is that they cannot. *See, e.g.*, Price v. Stockton, 390 F.3d 1105, 1112 n.6 (9th Cir. 2004) (“It is now well settled that regulations alone cannot create rights . . . however, that regulations ‘may be relevant in determining the scope of the right conferred by Congress’ and ‘therefore may be considered in applying the three-prong Blessing test.’”) (citation omitted); Johnson v. Detroit, 446 F.3d 614, 629 (6th Cir. 2006); S. Camden Citizens v. N.J. Dep’t of Env’tl. Prot., 274 F.3d 771, 790 (3d Cir. 2001); Harris v. James, 127 F.3d 993, 1012 (11th Cir. 1997); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987).

as construed by the timeframe regulation, 42 C.F.R. § 431.244(f), “creates a right, enforceable under § 1983, to receive a fair hearing and a fair hearing decision ‘[o]rordinarily, within 90 days’ of a fair hearing request.”¹⁸¹

D. *Armstrong and Section 1983*

Armstrong v. Exceptional Child Care, discussed above, expressly acknowledges that the case does not concern Section 1983.¹⁸² The health care providers in *Armstrong* brought their claim directly under the Supremacy Clause.¹⁸³ Nevertheless, a few state attorneys have already sought to extend *Armstrong* to bar enforcement of Medicaid Act provisions pursuant to Section 1983.¹⁸⁴ So far, courts have rejected these efforts in cases where Medicaid beneficiaries, consistent with the traditional Section 1983 enforcement test, have targeted their complaints to specific Medicaid provisions.¹⁸⁵ In the only appellate court decisions to date, the Second Circuit Court of Appeals has rejected the state’s argument that *Armstrong* precludes enforcement of Medicaid provisions pursuant to Section 1983.¹⁸⁶

181. *Shakhnes v. Berlin*, 689 F.3d 244, 254 (2d Cir. 2012).

182. The *Armstrong* majority addressed *Wilder* in a footnote as follows:

Respondents do not claim that *Wilder* establishes precedent for a private cause of action in this case. They do not assert a § 1983 action, since our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (expressly “reject[ing] the notion,” implicit in *Wilder*, “that our cases permit anything short of an unambiguously conferred right to support a cause of action under § 1983.”).

Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1396 n.*.

183. *Id.* at 1384.

184. The federal government has taken the position that “many provisions of the Medicaid statute . . . are enforceable through individual lawsuits under § 1983.” Statement of Interest of the United States at 5, *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 3:15CV00565 (M.D. La. Aug. 31, 2015).

185. In *Providence Pediatric Medical DayCare, Inc. v. Alaigh*, a New Jersey court considered a complaint that cited a “litany of Medicaid statutory provisions and regulations that were purportedly violated by Defendants.” *Providence Pediatric Med. DayCare v. Alaigh*, 112 F. Supp. 3d 234, 250 (D.N.J. 2015). The court entered judgment for the defendant on nine of the twelve claims because the “Plaintiffs do not even attempt to articulate, let alone meet their burden of demonstrating,” that they have a federal right under Section 1983. *Id.* at 251. Citing the part of *Armstrong* that was joined by only four justices, the court noted that the plaintiff had provided no authority to support the right of a medical provider, rather than a beneficiary, to assert any claims under the Medicaid Act. *Id.* (quoting *Armstrong*, 135 S. Ct. at 1387).

186. *See Davis v. Shah*, No. 14-543-CV, 2016 WL 1138768 (2d Cir. 2016) (regarding 42 U.S.C. §§ 1396a(a)(3), fair hearing requirement, Section 1396a(a)(10)(B), comparability requirement, and Section 1396a(a)(10), mandatory home health services requirement); *Fishman v. Paolucci*, 628 F. App’x 797, 798 (2d Cir. 2015) (regarding 42 U.S.C. § 1396a(a)(3), fair hearing requirement); *see also, e.g., Planned Parenthood Se., Inc. v. Bentley*, No. 2:15cv620, 2015 WL 6517875, at *6 (M.D. Ala. Oct. 28, 2015) (“*Armstrong* does not cast significant doubt on this now-well-established proposition” that the freedom of choice of provider provision, 42 U.S.C. §

IV. CONCLUSION

When Congress added Medicaid to the Social Security Act in 1965, it did not include a private cause of action. The courts allowed private enforcement under 42 U.S.C. § 1983 and, to a lesser extent, the Supremacy Clause because they understood that individuals could obtain judicial relief when they were being harmed by a violation of the law. Beginning with the Rehnquist Court, these assumptions were undermined in cases such as *Pennhusrt* and *Suter*. In 1994, Congress responded to the Supreme Court, enacting 42 U.S.C. §§ 1320a-2, 1320a-10 to ensure that beneficiaries can enforce provisions of the Social Security Act that create federal rights as determined by the traditional test announced in cases such as *Wilder* and *Blessing*.¹⁸⁷ The Court's most recent decision, *Armstrong*, should not disturb this unambiguous congressional intent because *Armstrong* concerned Supremacy Clause, not Section 1983, enforcement.

For more than a decade, the courts of appeals have consistently applied the Section 1983 enforcement test in Medicaid cases. Consistent with *Blessing*, Medicaid enforcement questions are being decided on a provision-by-provision basis when complaints are pled in “manageable analytic bites.”¹⁸⁸ Medicaid Act provisions are being assessed against all three prongs of the traditional enforcement test, and Medicaid beneficiaries are continuing to enforce provisions that speak in terms of the “individual,” using words like “must” and “shall.” In sum, while private enforcement of federal law has come to resemble the game of pin the tail on the donkey, unambiguous congressional intent and a strong, consistent appellate court track record of enforcement should allow Medicaid beneficiaries to peek from under the blindfold and obtain judicial relief through Section 1983 when their federal rights are being violated.

1396a(a)(23) (2012), creates a federal right under Section 1983); *Planned Parenthood Gulf Coast v. Kleibert*, No. 3:15-cv-00565, 2015 WL 6551836 (M.D. La. Oct. 9, 2015) (holding plaintiffs could enforce free choice of provider provision, even after *Armstrong*); *J.E. v. Wong*, 125 F. Supp. 3d 1099 (D. Haw. 2015) (recognizing plaintiffs' rights after *Armstrong* to enforce the Medicaid availability (Section (a)(10)) and child screening and treatment (Section (a)(43)) provisions in a case seeking coverage of behavioral health therapy services); *Emma C. v. Eastin*, No. 96-cv-04179, 2015 WL 1737672 (N.D. Cal. Aug. 25, 2015) (distinguishing *Armstrong* as “a Medicaid case wherein the Court considered whether there was an implied right of action under the Supremacy Clause”); *Fla. Pediatric Soc’y v. Dudek*, No. 05-23037-CIV-JORDAN/O’SULLIVAN, 2015 BL 130043 (S.D. Fla. April 30, 2015) (“*Armstrong*, 135 S. Ct. at 1386 n. *, confirmed that Gonzaga sets out the appropriate standard for determining whether a statute creates privately enforceable rights.”)

187. *Mark G. v. Sabol*, No. 06294, slip op. at 22, 23 (N.Y. Ct. App. 1998); *Blessing v. Freestone*, 520 U.S. 329, 342 (1997).

188. *Blessing*, 520 U.S. at 342.

APPENDIX

1. Backer ex rel. Freedman v. Shah, 788 F.3d 906 (2d Cir. 2015);
2. Wheaton v. McCarthy, 800 F.3d 282 (6th Cir. 2015);
3. Cal. Ass'n of Rural Health Ctrs. v. Douglas, 738 F.3d 1007 (9th Cir. 2013);
4. N.J. Primary Care Ass'n v. N.J. Dep't of Human Servs., 722 F.3d 527 (3d Cir. 2013);
5. Romano v. Greenstein, 721 F.3d 373 (5th Cir. 2013);
6. Planned Parenthood of Ariz. Inc. v. Betlach, 727 F.3d 960 (9th Cir. 2013);
7. Ctr. for Special Needs Tr. Admin., Inc. v. Olson, 676 F.3d 688 (8th Cir. 2012);
8. Shakhnes v. Berlin, 689 F.3d 244 (2d Cir. 2012) (discussing 42 C.F.R. § 431.244(f)(1)(ii) (2012));
9. Bontrager v. Ind. Family & Soc. Servs. Admin., 697 F.3d 604 (7th Cir. 2012);
10. Martes v. Chief Exec. Officer of S. Broward Hosp. Dist., 683 F.3d 1323 (11th Cir. 2012);
11. Planned Parenthood of Ind., Inc. v. Comm'r of Ind., 699 F.3d 962 (7th Cir. 2012);
12. Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012);
13. Doe v. Kidd, 501 F.3d 348 (4th Cir. 2007);
14. John B. v. Goetz, 626 F.3d 356 (6th Cir. 2010);
15. Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171 (10th Cir. 2009);
16. AlohaCare v. Haw. Dep't of Human Servs., 572 F.3d 740 (9th Cir. 2009);
17. Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel, 570 F.3d 520 (3d Cir. 2009);
18. S.D. ex rel. Dickinson v. Hood, 391 F.3d 581 (5th Cir. 2004);
19. Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204 (4th Cir. 2007);
20. Spry v. Thompson, 487 F.3d 1272 (9th Cir. 2007);
21. Equal Access for El Paso, Inc. v. Hawkins, 509 F.3d 697 (5th Cir. 2007);
22. Ball v. Rodgers, 492 F.3d 1094 (9th Cir. 2007);
23. Mandy R. ex rel. Mr. & Mrs R. v. Owens, 464 F.3d 1139 (10th Cir. 2006);
24. Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006);
25. Watson v. Weeks, 436 F.3d 1152 (9th Cir. 2006);
26. Pediatric Specialty Care v. Ark. Dep't of Human Servs., 443 F.3d 1005 (8th Cir. 2006);

27. *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006);
28. *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006);
29. *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56 (1st Cir. 2005);
30. *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005);
31. *Long Term Care Pharm. All. v. Ferguson*, 362 F.3d 50 (1st Cir. 2004);
32. *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004);
33. *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004);
34. *Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003);
35. *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003);
36. *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002) (noting that 42 U.S.C. 1396k(b) (2000) and implementing regulation 42 C.F.R. § 433.154 (2000) do not create enforceable rights);
37. *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002);
38. *Clayworth v. Bonta*, 140 F. App'x 677 (9th Cir. 2005);
39. *Cmty. Health Care Ass'n of N.Y. v. Shah*, 770 F.3d 129 (2d Cir. 2014);
40. *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003);
41. *N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 147 (2d Cir. 2006);
42. *Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208 (10th Cir. 2007);
43. *Concilio De Salud Integral De Loiza v. Pérez-Perdomo*, 551 F.3d 10 (1st Cir. 2008);
44. *Davis v. Shah*, No. 14-543-CV, 2016 WL 1138768 (2d Cir. 2016).

