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Stretching Armstrong: How the Eighth Circuit Incorrectly Applied Supreme Court Precedent in *Does v. Gillespie*

Lauren E. Pair
lauren.pair@slu.edu

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**STRETCHING ARMSTRONG: HOW THE EIGHTH CIRCUIT
INCORRECTLY APPLIED SUPREME COURT PRECEDENT IN
*DOES v. GILLESPIE***

ABSTRACT

*Medicaid serves as an important source of health insurance for millions of Americans. One of the Act's core tenants is the patient's freedom to choose from any qualified and willing provider. This "freedom of choice" provision was eventually codified, and subsequent protections were put in place to protect a patient's choice regarding family planning services. However, as states attempt to limit access to family planning services by severing their Medicaid contracts with Planned Parenthood, patients must rely on § 1983 to pursue relief in federal courts. Section 1983 provides a right of action for the violation of any federal right or law. Courts have routinely allowed Medicaid patients to use § 1983 to access federal court. In fact, five circuit courts of appeals have all held the freedom of choice provision creates a right that can be enforced in federal court. Unfortunately, however, the Eighth Circuit in *Does v. Gillespie* held otherwise by incorrectly applying Supreme Court precedent. This created a circuit split to position *Does* to be the case that gives the Supreme Court the opportunity to potentially close the door on all § 1983 private rights of action in Medicaid cases.*

I. INTRODUCTION

Medicaid was initially passed in 1965, and since then, it has been a staple of the American health care system.¹ One of the core tenets of Medicaid is the patient's freedom to choose from any qualified provider offering medical services.² In the first two years after its enactment, there was evidence that states were limiting beneficiaries' access to health care by funneling patients to certain government facilities and restricting payments to providers.³ This ran counter to Medicaid's goal of expanding access to health care.⁴ Accordingly, in 1967, Congress enacted a provision solidifying patients' ability to choose from any qualified and willing provider.⁵ Codified in 42 U.S.C. § 1396a(a)(23)(A), the provision has become known as the "free choice of provider" or "freedom of choice" provision.⁶

During the rise of Medicaid managed care plans, Congress authorized the Secretary of Health and Human Services (HHS) to waive the freedom of choice provision and allow states to utilize risk-based managed care plans for Medicaid beneficiaries.⁷ This proved problematic in relation to family planning services, because religious plans refused to include family planning services in their agreements and many traditional family planning providers were excluded from managed care networks.⁸ In response, Congress amended the statute to explicitly preserve patients' freedom of choice for family planning services.⁹

This additional protection of patient choice has been in place since 1986,¹⁰ though states have recently attempted to limit access to family planning services by removing funding from Planned Parenthood.¹¹ Several states have tried to cut

1. See Judith D. Moore & David G. Smith, *Legislating Medicaid: Considering Medicaid and Its Origins*, 27 HEALTH CARE FINANCING REV. 45, 45 (2005).

2. Laura Cartwright-Smith & Sarah Rosenbaum, *Medicaid's Free-Choice-of-Provider Protections in a Family Planning Context: Planned Parenthood Federation of Indiana v. Commissioner of the Indiana State Department of Health*, 127 PUB. HEALTH REP. 119, 120 (2012).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Sara Rosenbaum et al., *Medicaid Managed Care and the Family Planning Free-Choice Exemption: Beyond the Freedom to Choose*, 22 J. HEALTH POL., POL'Y AND L. 1191, 1193-94 (1997).

8. *Id.* at 1196.

9. 42 U.S.C. § 1396a(a)(23)(B) (2012); Rosenbaum et al., *supra* note 7, at 1196 (explaining how the Secretary of HHS was no longer able to use utilize freedom of choice waivers for family planning services in the managed care context).

10. Rosenbaum et al., *supra* note 7, at 1196.

11. Kinsey Hasstedt, *Understanding Planned Parenthood's Critical Role in the Nation's Family Planning Safety Net*, 20 GUTTMACHER POL'Y REV. 13, 13 (2017).

off state funding by ending their Medicaid contracts with the organization,¹² which is the predominant source of family planning services for many women.¹³ Accordingly, threats to funding for Planned Parenthood serve as direct threats to patient choice for women all across the U.S.

Enforcement of the freedom of choice provision, however, has proved difficult. The Secretary of HHS has limited enforcement authority to force states into compliance with the provision, and the Medicaid Act lacks sufficient administrative remedies to address violations of patient choice. That leaves Medicaid patients to seek redress in federal court for state violations of the freedom of choice provision. Fortunately, federal appellate courts have routinely held the freedom of choice provision provides an individual right that can be enforced in federal court under § 1983.¹⁴

In a recent decision, however, the Eighth Circuit held patients cannot use § 1983 to enforce the provision.¹⁵ Rather than follow the analysis of its sister courts, the Eighth Circuit relied on language from a rather curious Supreme Court case,¹⁶ one analyzing claims arising under the Supremacy Clause and not § 1983.¹⁷ The Eighth Circuit applied the incorrect rules of statutory interpretation for analyzing § 1983 claims, particularly in relation to Medicaid. In so doing, the court supplanted binding precedent with dicta. Accordingly, the court in *Does* wrongly held the Supreme Court overturned its own precedent, effectively re-writing well-established, long applied § 1983 analysis for Medicaid cases and setting up a circuit split to position *Does* to be the case that gives the Supreme Court the opportunity to potentially close the door on all §1983 private rights of action in Medicaid cases.

II. MEDICAID AND THE IMPORTANCE OF § 1983 PRIVATE RIGHTS OF ACTION

Medicaid is the nation's public health insurance program for people with low income, and it covers more than seventy million Americans.¹⁸ Program participants include children and their parents, pregnant woman, frail elderly

12. Jackie Calmes, *States Move to Cut Funds for Planned Parenthood*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/us/states-move-to-cut-funds-for-planned-parent-hood.html>.

13. See Hasstedt, *supra* note 11.

14. *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006); *Planned Parenthood of Ind., Inc. v. Ind. State Dep't Health*, 699 F.3d 962, 968 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018). *But see Does v. Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017).

15. *Does*, 867 F.3d at 1046.

16. *Id.*

17. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015).

18. KAISER FAM. FOUND., MEDICAID POCKET PRIMER 1 (2017), <http://files.kff.org/attachmentFact-Sheet-Medicaid-Pocket-Primer>.

individuals, and people with certain disabilities.¹⁹ Since its inception, Medicaid has evolved to reflect certain federal policy goals.²⁰ Once such goal was allowing Medicaid patients to choose their care, rather than requiring they use certain access points selected by state governments.²¹ Accordingly, Medicaid's "free choice of provider" or "freedom of choice" provision was added to the Act through an amendment in 1967.²²

Despite serving as an important protection for patients, forcing a state to comply with the freedom of choice provision is difficult. HHS has some enforcement power, but HHS remedies are limited and counterproductive. Further, although the Medicaid Act includes administrative appeals processes for patients, they are not adequate to address attacks on patients' freedom of choice. Accordingly, when a patient's choice has been restricted by the state, her only avenue is to seek redress in federal court. Thus, it is imperative for courts to keep their doors open to Medicaid patients seeking to enforce the right to the provider of their choice.

A. *Medicaid is a Cooperative Federal-State Program*

Medicaid operates as a cooperative federal-state program; the federal government provides matching funds to states that agree to abide by the requirements of the Medicaid Act.²³ Essentially, the federal government promises federal funding to states in exchange for the states' promise to provide medical assistance to mandatory categories of people.²⁴

The freedom of choice provision was added to Medicaid in 1967 in response to states restricting beneficiaries' access to health care providers and facilities of the states' choosing.²⁵ Largely unchanged since it was first added, the freedom of choice provision states: "[A]ny individual eligible for medical assistance ... may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required who undertakes to provide him such services[.]"²⁶

As federal policy changed through the years and Medicaid evolved to cover more people and services, the freedom of choice provision automatically applied

19. MACPAC, REPORT TO CONGRESS ON MEDICAID AND CHIP 3 (2017), <https://www.macpac.gov/wp-content/uploads/2017/06/June-2017-Report-to-Congress-on-Medicaid-and-CHIP.pdf>.

20. *Id.*

21. Cartwright-Smith & Rosenbaum, *supra* note 2.

22. *Id.*

23. Nicole Huberfeld, *Where There Is a Right, There Must Be a Remedy - Even in Medicaid*, 102 KY. L.J. 327, 329 (2013).

24. Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 419-20 (2008).

25. Cartwright-Smith & Rosenbaum, *supra* note 2.

26. 42 U.S.C. § 1396a(a)(23)(A) (2012).

to these new services.²⁷ That freedom has only been limited in one context: Medicaid managed care.²⁸ Managed care plans allow a state to contract with a limited selection of health care providers to deliver care to plan enrollees.²⁹ Patients' freedom of choice must be limited to some degree for these programs to work.

Despite that limitation, Congress has explicitly preserved patients' freedom of choice in the context of family planning services.³⁰ Thus, Medicaid beneficiaries have the right to freely choose among qualified and willing family planning providers, even if participating in a Medicaid managed care plan, and that right cannot be altered by the state.³¹ This illustrates Congress's pledge to allow Medicaid beneficiaries unfettered access to the provider of their choice for sensitive services without fear of state intervention.³²

This protection, however, has been challenged by the recent trend of states terminating Medicaid provider agreements with Planned Parenthood.³³ It begs the question: how can Medicaid's freedom of choice provision be enforced against noncompliant states?

B. *HHS has Limited Enforcement Power*

Unfortunately, HHS is reluctant to use its enforcement power to force states to comply with Medicaid's freedom of choice provision. The Medicaid Act directly addresses what should happen if a state fails to adhere to its own plan.³⁴ It permits the Secretary of HHS to withdraw full or partial funding from states that fail to comply with the required provisions of the Act.³⁵ This remedy only comes into effect after the Secretary has given the state reasonable notice and opportunity for a hearing.³⁶

This enforcement mechanism, however, does nothing to help the Medicaid patient who has been denied access to the provider of her choice. In fact, the withdrawal of funding only serves to exacerbate her problem. Not only has her right to the provider of her choice been violated, but also now the state likely lacks the funds necessary to provide other needed services. The patient's

27. MACPAC, *supra* note 19; Cartwright-Smith & Rosenbaum, *supra* note 2.

28. Cartwright-Smith & Rosenbaum, *supra* note 2.

29. *Medicaid Managed Care Market Tracker*, KAISER FAM. FOUND., <https://www.kff.org/data-collection/medicaid-managed-care-market-tracker/> (last visited Feb. 26, 2018).

30. 42 U.S.C. § 1396a(a)(23)(B) (2012).

31. *See id.*

32. Cartwright-Smith & Rosenbaum, *supra* note 2.

33. *See* Roxana Hegeman, *Court: Kansas Can't Cut Medicaid Funds to Planned Parenthood*, ABC NEWS (Feb 21, 2018), <http://abcnews.go.com/US/wireStory/court-kansas-cut-medicaid-funds-planned-parenthood-53260383>.

34. Huberfeld, *supra* note 23, at 327.

35. 42 U.S.C. § 1396c (2012).

36. *Id.*

problem has doubled. She cannot choose her provider, nor can she obtain other necessary services. Accordingly, the withdrawal of funding has been deemed the “nuclear option” because of the harm it would cause to program enrollees, and HHS has never seriously considered employing it.³⁷

Although HHS has some authority to affect how states administer their Medicaid programs, it does not help those beneficiaries who have had their freedom of choice violated.

C. The Medicaid Statute Provides Limited Remedies for Patients and Providers

Furthermore, the Medicaid Act does not provide a sufficient remedy for patients within the statute itself.³⁸ Although it does provide administrative procedures for patients and providers in certain circumstances, they do not adequately address concerns arising from the violation of a patient’s freedom of choice.

The Act requires states to provide program beneficiaries with the opportunity for a fair hearing if their claim for medical assistance is denied or not acted upon with reasonable promptness.³⁹ This includes any action, or inaction, that affects the person’s eligibility during the initial application process or the termination of a particular medical service covered by the program.⁴⁰ The two main issues covered by these hearings include applicants appealing the denial of their eligibility and beneficiaries seeking review for the decision to deny or discontinue a particular service.⁴¹ HHS, however, has specified that states are not obligated to grant such a hearing where the only issue is a state law requiring an automatic change adversely affecting some or all beneficiaries.⁴² Thus, beneficiaries challenging a state amendment to its Medicaid plan are not entitled to a hearing at all if they fail to raise a factual dispute regarding their eligibility for coverage.⁴³ Accordingly, the fair hearing process does absolutely nothing to help the patient whose provider has been excluded from the Medicaid program.

For example, take a Medicaid patient who sees the same physician at a Planned Parenthood clinic for contraceptive counseling each year. Unbeknownst to her, the state decides to cancel its provider contract with the clinic, and she can no longer obtain the needed services from the provider of her choice. Her claim for contraceptive counseling from that provider will be denied. The patient

37. See Huberfeld, *supra* note 23, at 327.

38. See *id.* at 328.

39. 42 U.S.C. § 1396a(a)(3) (2018).

40. MaryBeth Musumeci, *A Guide to the Medicaid Appeals Process*, KAISER FAM. FOUND. 6 (2012), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8287.pdf>.

41. *Id.*

42. 42 C.F.R. § 431.220(b) (2018).

43. *Davis v. Shah*, 821 F.3d 231, 253 (2d Cir. 2016).

can attempt to appeal the denial, but she will be unsuccessful. Although the state amended its Medicaid plan, which adversely affected some beneficiaries, the patient's Medicaid eligibility has not been altered in any way. Thus, the state is not required to offer the patient a fair hearing at all.⁴⁴ If the patient is somehow able to secure a hearing, her appeal is still likely to fail. Her Medicaid eligibility is still intact, and the state did not terminate contraceptive counseling all together.⁴⁵ The patient still has access to the services she needs—so long as she obtains it from a different provider. This is exactly the type of result the freedom of choice provision was added to prevent. She has clearly lost her freedom to choose her health care provider, but none of the Act's administrative remedies help her regain that choice. Thus, the Medicaid program itself offers no recourse to patients trying to secure their right to choose.

Furthermore, the Act requires states to provide an appeals process to those providers that have been excluded from a state's Medicaid program.⁴⁶ Thus, if a state terminates its provider agreement with a particular provider or group of providers, they have the right to appeal the decision.⁴⁷ This right to appeal, however, only extends to affected providers.⁴⁸ The patient cannot appeal the exclusion on behalf of her provider.⁴⁹ She is left hoping her provider appeals the exclusion and that the appeal is granted. There is no affirmative action she can take to ensure her freedom of choice is protected. Therefore again, this remedy is insufficient to address violations of a patient's freedom of choice.

Although there are two administrative mechanisms within the Medicaid Act patients and providers can utilize to challenge agency decisions, these processes do not adequately address those situations when a patient's freedom of choice has been violated.

D. The Supremacy Clause is not the Source of any Federal Right

Because HHS and the Medicaid Act offer no remedy for patients when their freedom of choice has been violated, federal court is the only forum where patients can seek relief. Private individuals have often gone to federal court to obtain relief when they are being harmed by state actions that are inconsistent with federal law.⁵⁰ Medicaid beneficiaries have enforced various provisions of the Medicaid Act against state violators in federal court under the Supremacy

44. 42 C.F.R. § 431.220(b) (2018).

45. *See* Musumeci, *supra* note 40.

46. 42 C.F.R. § 1002.213 (2018).

47. *Id.*

48. *See id.*

49. *See id.*

50. JANE PERKINS, UPDATE ON PRIVATE ENFORCEMENT OF THE MEDICAID ACT: THE SUPREMACY CLAUSE AND 42 U.S.C. § 1983, NAT'L HEALTH L. PROGRAM 1 (2014), <http://www.healthlaw.org/publications/browse-all-publications/Issue-brief-medicaid-supremacy-clause#.WdAdWRNSzok>

Clause or 42 U.S.C. § 1983 (§ 1983).⁵¹ Recently, however, the Supreme Court foreclosed the use of the Supremacy Clause to challenge state actions that conflict with federal law.⁵² Accordingly, Medicaid beneficiaries are left with only one option for federal enforcement when their freedom of choice has been violated: challenge the state action in federal court under § 1983. Access to federal court is vital for Medicaid patients, particularly when their freedom of choice has been violated by the state, and these types of fights are more suited for federal court.

Thus, a federal forum is more appropriate to resolve these disputes. As discussed below, many Medicaid provisions have been enforced through § 1983.

III. THE PATH TO A SUCCESSFUL CLAIM UNDER § 1983

Title 42, Section 1983 of the U.S. Code is one of America's oldest federal laws, dating back to the Reconstruction Era.⁵³ The statute provides:

Every 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 ...⁵⁴

It effectively offers an express cause of action to individuals when a state actor deprives them of rights guaranteed under federal law.⁵⁵ Many claimants file § 1983 lawsuits, including recipients of various public benefits.⁵⁶ There are a plethora of cases regarding disability benefits,⁵⁷ veterans' benefits,⁵⁸ retirement

51. Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act over Time*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 207, 208 (2016).

52. *Armstrong v. Exceptional Child Ctr, Inc.*, 135 S. Ct. 1378, 1383–84 (2015) (explaining the Supremacy Clause is not the “source” of any federal rights and “certainly” does not create a cause of action, as it only instructs courts how to deal with conflicting state and federal laws).

53. Huberfeld, *supra* note 23, at 331.

54. 42 U.S.C. § 1983 (2012) (2018).

55. Perkins, *supra* note 51, at 217.

56. Other claimants include alleged victims of police misconduct; prisoners; present and former public employees; and property owners. Martin A. Schwartz, *Section 1983 Litigation*, FED. JUD. CTR. 3 (2014), <https://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf>.

57. *See, e.g.*, *Miller v. Tex. Tech. Univ. Health Scis. Ctr.*, 421 F.3d 342, 352 n.3 (5th Cir. 2005) (alleging failure to provide reasonable accommodations to disabled students); *Cryder v. Oxendine*, 24 F.3d 175, 176 (11th Cir. 1994) (regarding termination of disability benefits in accordance with the state's worker's compensation law).

58. *See, e.g.*, *Mehrkins v. Blank*, 556 F.3d 865, 866–67 (8th Cir. 2009) (claiming the Department of Veteran's Affairs withheld treatment owed as part of veterans' benefits); *Mathes v. Hornbarger*, 821 F.2d 439, 440 (7th Cir. 1987) (regarding Veterans Affairs educational benefits).

benefits,⁵⁹ and unemployment compensation benefits.⁶⁰ These cases typically present in three ways: (1) an individual is denied certain federal benefits;⁶¹ (2) a state enacts a law limiting federal benefits to some degree;⁶² or (3) a state does not provide federal benefits in a manner consistent with federal law.⁶³ Historically, low-income individuals have greatly relied upon § 1983 to ensure federal rights enshrined by Congress are fully realized.⁶⁴ The enforcement of various provisions of the Medicaid Act has been no exception.⁶⁵

The Supreme Court has held patients may bring § 1983 actions to force states to comply with certain provisions of the Medicaid Act.⁶⁶ In *Maine v. Thiboutot*, the Court stated § 1983 applies to alleged violations of federal statutes, not just violations of the Constitution.⁶⁷ The phrase “and laws” in § 1983 was construed to cover any federal law, not merely civil rights or equal protection laws as had been previously assumed.⁶⁸ Shortly thereafter in *Wilder v. Virginia Hospital Association*, the Court concluded a provision of the Medicaid Act could be enforced in federal court through § 1983.⁶⁹ This decision effectively pushed open the courthouse doors to Medicaid litigation against states.⁷⁰

Subsequent jurisprudence has clarified the requirements for a successful § 1983 claim. First, a federal statute is only enforceable under § 1983 if the plaintiff asserts a violation of a federal right, not just a violation of a federal law.⁷¹ As noted by the Supreme Court in *Blessing v. Freestone*, the determination of whether a statutory provision creates a federal right turns on a three factors.⁷² Frequently referred to as the “*Blessing* test,” the provision must (1) be intended to benefit the plaintiff; (2) be written with sufficient clarity such that a court can enforce it; and (3) impose a binding obligation on states.⁷³ When

59. *See, e.g.*, *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 50 (1st Cir. 1999) (concerning retirement benefits awarded to retired Rhode Island legislators and their beneficiaries).

60. *See, e.g.*, *Zambrano v. Reinert*, 291 F.3d 964, 966 (7th Cir. 2002) (concerning an employee that had been denied unemployment compensation benefits in accordance with state law).

61. *See, e.g.*, *Mathes*, 821 F.2d at 440 (regarding Veterans Affairs educational benefits).

62. *See, e.g.*, *Zambrano*, 291 F.3d at 966 (concerning an employee that had been denied unemployment compensation benefits in accordance with state law).

63. *See, e.g.*, *Miller v. Tex. Tech. Univ. Health Scis. Ctr.*, 421 F.3d 342, 352 n.3 (5th Cir. 2005) (alleging failure to provide reasonable accommodations to disabled students).

64. *Perkins*, *supra* note 51, at 217.

65. *Id.*

66. *Id.* at 223.

67. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

68. *Id.* at 6.

69. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509–10 (1990) (holding the Boren Amendment gave health care providers an enforceable right to reasonable reimbursement rates).

70. *Huberfeld*, *supra* note 23, at 333.

71. *Schwartz*, *supra* note 56, at 75.

72. *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997).

73. *Id.*

all three factors are present, the right is presumed to be enforceable.⁷⁴ That presumption, however, can be overcome by demonstrating Congress expressly foreclosed a remedy under § 1983 in the statute itself or by creating an individual enforcement scheme that is incompatible with individual enforcement under § 1983.⁷⁵ This fairly straightforward analytical framework has been applied to Medicaid's various provisions with consistent results.⁷⁶

A. *Provision Must be Intended to Benefit the Plaintiff*

The first prong of the *Blessing* test requires the provision at issue be intended to benefit the plaintiff.⁷⁷ The key inquiry is whether a specific statutory provision, not the legislation as a whole, gives rise to rights.⁷⁸ Courts conduct a two-part analysis to determine whether this prong has been met.

First, as noted in *Gonzaga University v. Doe*, only “unambiguously conferred” rights can support a cause of action under § 1983.⁷⁹ Section 1983 provides a remedy for the deprivation of *rights* secured by the laws of the United States.⁸⁰ Therefore, it can only be used to enforce rights, not such broad or vague concepts as benefits or interests.⁸¹ For a right to be “unambiguously conferred,” the text and structure of a statute must indicate Congress intended to create new individual rights.⁸²

Second, the provision must have an individual rather than aggregate focus, because provisions with an aggregate focus cannot give rise to *individual* federal rights.⁸³ For example, statutory provisions mandating “substantial compliance” with federal legislation have an aggregate focus because they are typically only concerned with system-wide performance of a state's program.⁸⁴ Moreover, provisions speaking only in terms of institutional policy or practice also have an aggregate focus because they are not designed to address the needs of any particular person.⁸⁵

Following these principles, the Third Circuit held a Medicaid provision requiring state plans to provide medical assistance with “reasonable promptness to *all eligible individuals*” clearly satisfied the first prong of the *Blessing* test.⁸⁶

74. Perkins, *supra* note 51, at 219.

75. *Blessing*, 520 U.S. at 342; *see also* Perkins, *supra* note 51, at 219.

76. Perkins, *supra* note 51, at 222–24.

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

78. *Id.* at 342.

79. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

80. *Id.* (emphasis added).

81. *Id.*

82. *Id.* at 285.

83. *Blessing*, 520 U.S. at 343 (emphasis added).

84. *Id.*

85. *Gonzaga*, 520 U.S. at 288.

86. *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 189 (3d Cir. 2004) (emphasis added).

The provision was prefaced with mandatory language—a state plan “must” provide—which the court explained unambiguously conferred the rights asserted.⁸⁷ Further, the court explained the provision does not focus on the regulated entity; it focuses on the individuals protected.⁸⁸ It does not describe a type of policy goal, but rather it describes a specific requirement guaranteed to eligible individuals.⁸⁹ The court’s analysis regarding this Medicaid provision was made “without difficulty.”⁹⁰

Other courts have made similar conclusions without difficulty, as there are no splits among the circuits when determining whether a particular Medicaid provision confers rights to individuals.⁹¹ This bodes well for any future Medicaid beneficiaries hoping to seek redress in federal court.

B. Provision Must be Written with Sufficient Clarity that a Court can Enforce It

After it has been established the provision at issue does confer a right to the individual plaintiff, the court then turns to examine the characteristic of that right.⁹² The right protected by the provision cannot be so “vague and amorphous” that its enforcement would strain judicial competence.⁹³ In *Wilder*, the Supreme Court held a Medicaid provision requiring state plans to provide for payment of covered services at rates “reasonable and adequate” to meet the costs of such care was not too vague and amorphous to be judicially enforceable.⁹⁴ Although states had significant flexibility to calculate the rates, the Court explained such flexibility did not render the provision unenforceable by a court.⁹⁵ It merely affects the standard under which a court would review whether the rates are in compliance with the provision.⁹⁶

On the other hand, the Ninth Circuit concluded a Medicaid provision requiring state plans to include “reasonable standards” for determining eligibility and the extent of medical assistance was too vague and amorphous.⁹⁷ The provision did not provide any instruction for how to interpret or implement those reasonable standards.⁹⁸ Therefore, such a right would require a court to

87. *Id.* at 190.

88. *Id.*

89. *See id.*

90. *Id.* at 189.

91. *See Perkins, supra* note 51, at 224.

92. *Id.* at 219.

93. *Blessing v. Freestone*, 520 U.S. 329, 340–41 (2002) (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 432 (1987)).

94. *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502–03, 519 (1990).

95. *Id.* at 519.

96. *Id.*

97. *Watson v. Weeks*, 436 F.3d 1152, 1162 (9th Cir. 2006).

98. *Id.* at 1162–63.

delve into the medical necessity of particular types of care, which is exactly the type of judicially unenforceable rights contemplated by *Blessing*.⁹⁹

Accordingly, Medicaid provisions granting substantial discretion to states are not too vague and amorphous so long as they create standards the court can analyze. The standard can be created by the state or some other agency, but it is necessary to allow a court to enforce the right guaranteed by the provision at issue. Thus, to build a successful Medicaid claim under § 1983, the plaintiff must start by asserting an unambiguously conferred right that is not too vague and amorphous for a court to enforce it.

C. *Provision Imposes a Binding Obligation on the State*

Finally, for a statutory provision to enjoy the presumption of enforceability under § 1983, it must also impose a binding obligation on the states.¹⁰⁰ The provision giving rise to the asserted right must be couched in *mandatory* rather than *precatory* terms.¹⁰¹

In *Pennhurst*, the Supreme Court concluded a particular provision of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 merely expressed a congressional preference for certain kinds of treatment rather than a binding obligation.¹⁰² The provision at issue was not included in the list of conditions for the receipt of federal funds under the Act.¹⁰³ Instead, the provision was included in a list of congressional findings that persons with developmental disabilities have a right to “appropriate treatment” in the “least restrictive” environment.¹⁰⁴ The Court explained Congress often uses legislation to indicate preferences that serve to nudge states in a preferred direction.¹⁰⁵ Thus, the provision was merely the expression of a policy goal to provide developmentally disabled citizens with better care.¹⁰⁶

Conversely, in *Wilder*, the Supreme Court held a Medicaid provision requiring that state plans “must” provide for payment of hospital services according to reasonable rates was enforceable.¹⁰⁷ The Court compared this language to that of the provision at issue in *Pennhurst* and concluded it succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere policy suggestion or nudge.¹⁰⁸ Furthermore, the Secretary of HHS

99. *See id.* at 1163.

100. *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

101. *Id.* (emphasis added).

102. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 5, 19 (1981).

103. *Id.* at 13.

104. *Id.*

105. *Id.* at 20.

106. *Id.* at 22–23.

107. *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 512 (1990).

108. *Id.*

could withhold funds if the state did not comply with the provision.¹⁰⁹ Thus, the provision was indeed cast in mandatory rather than precatory terms.¹¹⁰

Taken together, Medicaid provisions can be enforced under § 1983 so long as the claim asserts unambiguously conferred rights that are not too vague and amorphous and impose a binding obligation on the state. Once those three things have been established, the federal right is presumptively enforceable.¹¹¹

D. Presumption can be Overcome by the Presence of a Comprehensive Enforcement Scheme

The final hurdle Medicaid beneficiaries must overcome to enforce violations of the Act comes in the form of a statutory defense. Even if all three parts of the *Blessing* test are met, enforcement through § 1983 may still be foreclosed if the statute containing the specific provision creates a comprehensive enforcement scheme that is incompatible with individual enforcement.¹¹²

The Supreme Court has only found a comprehensive administrative scheme to preclude enforceability in three cases.¹¹³ In those cases, the Court explained the statutes at issue contained more restrictive remedies than § 1983 and contained private judicial remedies for the rights violated.¹¹⁴ Therefore, in those situations, the Court concluded Congress did not intend to leave open a more expansive remedy under § 1983.¹¹⁵

For Medicaid, however, the Court held in *Wilder* that the Act does not have a comprehensive enforcement scheme that would foreclose reliance on § 1983.¹¹⁶ The Act authorizes the Secretary of HHS to withhold approval of state plans or to withhold funds from states not in compliance with federal requirements.¹¹⁷ Further, the Act requires states to implement administrative procedures whereby individuals can obtain review of state actions affecting Medicaid.¹¹⁸ The Court explained neither the Secretary's authority nor the states' administrative procedures are sufficiently comprehensive to suggest individuals cannot rely on § 1983 to enforce various provisions of the Medicaid Act.¹¹⁹ The Secretary's powers are too generalized and state administrative

109. *Id.*

110. *Id.*

111. *See* *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

112. *Id.*

113. *Schwartz*, *supra* note 56, at 78–80.

114. *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005).

115. *Id.*

116. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521 (1990).

117. *Id.*

118. *See id.* at 523.

119. *Id.* at 522–23.

procedures too limited to conclude Congress intended to remove the availability of private enforcement in federal court.¹²⁰

Therefore, it is clear that Medicaid cases making it to this final part of the § 1983 analysis are likely to succeed. Between 2002 and 2006, twenty-five different Medicaid provisions were reviewed by federal courts, and over half were found to be enforceable.¹²¹ This is particularly encouraging for Medicaid beneficiaries as states continue tinkering with state plans to get around various federal requirements.¹²²

IV. FREEDOM OF CHOICE PROVISION AND § 1983

Federal courts have applied the *Blessing* test to § 1983 claims in the Medicaid context on numerous occasions.¹²³ Consistent with the Supreme Court's teaching, appellate courts review § 1983 enforceability on a "provision-by-provision basis."¹²⁴

Six circuit courts of appeals have examined Medicaid's freedom of choice provision, which states: "[A]ny individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required who undertakes to provide him such services[.]"¹²⁵

All but the *Does* court from the Eighth Circuit found the provision affords Medicaid patients a private right of action under § 1983.¹²⁶ The other five courts of appeals utilized the *Blessing* test for assessing the § 1983 claims, emphasizing different parts of the test to reach their conclusions.

A. *Provision Must Benefit the Plaintiff*

Only those provisions that confer a federal right to the plaintiff can be enforced under § 1983.¹²⁷ First, Medicaid patients are the obvious intended beneficiaries of the freedom of choice provision.¹²⁸ The provision states any

120. *Id.*

121. Perkins, *supra* note 51, at 223.

122. See generally Harris Meyer, *Judge Blocks Kentucky's Medicaid Work Requirement*, MOD. HEALTHCARE (June 29, 2018), <http://www.modernhealthcare.com/article/20180629/NEWS/180629902/judge-blocks-kentuckys-medicaid-work-requirement>.

123. Perkins, *supra* note 51, at 222.

124. *Id.* at 223 (citing *Blessing v. Freestone*, 520 U.S. 329, 342 (1997)).

125. 42 U.S.C. § 1396a(a)(23)(A) (2012).

126. *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006); *Planned Parenthood of Ind., Inc. v. Ind. State Dep't Health*, 699 F.3d 962, 968 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018). *But see Does v. Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017).

127. See discussion *infra* Section III.A.

128. *Planned Parenthood of Ind., Inc.*, 699 F.3d at 975.

Medicaid eligible person may obtain medical assistance from any institution, agency, or person qualified to perform that service.¹²⁹ Further, as noted by the Tenth Circuit, Congress enacted another statute that insulates family planning services from Medicaid managed care programs, which assures covered patients have an unfettered choice of provider for family planning services.¹³⁰ Thus, Congress clearly intended to grant a specific class of beneficiaries—Medicaid-eligible patients—a right to obtain medical care from the qualified provider of their choice.¹³¹

Second, the statute gives any individual eligible for medical assistance a free choice of provider for that assistance.¹³² As explained by the Sixth Circuit, this is the kind of individually focused terminology that unambiguously confers an individual entitlement under the law.¹³³

Finally, the individualized language of the provision does not create an aggregate plan requirement.¹³⁴ Instead, it establishes a personal right to which all Medicaid patients are entitled.¹³⁵ The provision is unmistakably phrased in terms of the persons benefited.¹³⁶

Taken together, Medicaid's freedom of choice provision clearly meets the first prong of the three-part test used for assessing claims under § 1983.

B. Provision Must be Written with Sufficient Clarity for a Court to Enforce It

Once it has been established Medicaid's freedom of choice provision does confer rights to Medicaid patients, courts must determine whether that right is judicially administrable.¹³⁷ The Ninth Circuit focused its analysis on this part of the test and concluded the provision does supply concrete and objective standards of enforcement.¹³⁸ Any Medicaid recipient is free to choose any provider as long as two criteria are met: (1) the provider is qualified to perform the requested services, and (2) the provider agrees to provide such services.¹³⁹ The court explained these are objective criteria that are *well* within the judicial competence to apply.¹⁴⁰ They do not require courts to engage in any balancing of competing concerns or subjective policy arguments.¹⁴¹ Courts must only

129. *Id.*

130. *Andersen*, 882 F.3d at 1226.

131. *Id.*; *Planned Parenthood of Ind., Inc.*, 699 F.3d at 975.

132. *Harris v. Olszewski*, 442 F.3d 456, 461 (2006).

133. *Id.*

134. *Planned Parenthood of Ind., Inc.*, 699 F.3d at 974.

135. *Id.*

136. *Id.*

137. *See* discussion *infra* Section III.B.

138. *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 967 (9th Cir. 2013).

139. *Id.*

140. *Id.* (emphasis added).

141. *Id.*

inquire whether an individual was denied the choice of a qualified and willing provider, and the answer to this question is likely to be readily apparent.¹⁴²

Determining whether a provider is qualified may require more factual development, but the term ‘qualified’ is tethered to an objective benchmark: qualified to perform the requested services.¹⁴³ Courts can make that determination by drawing on descriptions of the requested services; state licensing requirements; the provider’s credentials, licenses, and experience; and expert testimony regarding such appropriate credentials.¹⁴⁴ This is no different from the sorts of qualification or expertise assessments courts routinely make in other contexts.¹⁴⁵ Thus, the freedom of choice provision is not so “vague and amorphous” that its enforcement would strain judicial competence.¹⁴⁶

C. *Provision Imposes a Binding Obligation on the State*

Finally, the freedom of choice provision must impose a binding obligation on the state.¹⁴⁷ The freedom of choice provision is plainly couched in mandatory terms.¹⁴⁸ It says all states “must provide” in their Medicaid plans that beneficiaries may obtain medical care from any qualified and willing provider.¹⁴⁹ The statute is not merely a directive to a federal agency.¹⁵⁰ Rather, it requires state plans to allow Medicaid eligible individuals to obtain reimbursable medical services from the provider of their choice.¹⁵¹

D. *Presumption can be Overcome by the Presence of a Comprehensive Enforcement Scheme*

If all three parts of the test are met, the federal right is presumed to be enforceable through § 1983.¹⁵² Yet, enforcement through § 1983 may still be foreclosed if the statute creates a comprehensive enforcement scheme incompatible with individual enforcement.¹⁵³ The Seventh Circuit explained nothing in the Medicaid Act suggests Congress specifically foreclosed a remedy

142. *Id.* (quoting *Harris v. Olszewski*, 442, F.3d 456, 462 (6th Cir. 2006)).

143. *Betlach*, 727 F.3d at 967. *Compare* *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 461 (5th Cir. 2017) (explaining patients do not have a right to choose from unqualified providers).

144. *Betlach*, 727 F.3d at 968.

145. *Id.*

146. *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1226–27 (10th Cir. 2018).

147. *See* discussion *infra* Section III.C.

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

149. *Id.*

150. *Andersen*, 882 F.3d at 1228.

151. *Id.*

152. *See* discussion *infra* Section III.D.

153. *Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006).

under § 1983.¹⁵⁴ Although the Secretary of HHS can shut off state funding, that is not a comprehensive enforcement scheme.¹⁵⁵ The administrative approval process for plan amendments does not provide an avenue for beneficiaries to vindicate their freedom of choice rights.¹⁵⁶ Moreover, Congress did not provide a means of private redress within the Medicaid Act, and private enforcement under § 1983 in no way interferes with the Secretary's prerogative to enforce compliance with particular provisions using her administrative authority.¹⁵⁷ Thus, based on Supreme Court precedent, the Medicaid Act's administrative scheme is not sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy under § 1983.¹⁵⁸

Accordingly, together, a majority of circuit courts that have analyzed whether Medicaid's freedom of choice provision confers a right enforceable under § 1983 have found that it does.¹⁵⁹

V. *DOES V. GILLESPIE*

In 2017, the Eighth Circuit addressed whether the freedom of choice provision conferred a private right enforceable under § 1983.¹⁶⁰ In 2015, the Governor of Arkansas directed the Arkansas Department of Human Services to terminate its Medicaid provider agreements with Planned Parenthood.¹⁶¹ The Governor's directive came on the heels of the publication of videos purporting to show Planned Parenthood employees discussing the sale of fetal tissue for profit.¹⁶²

Planned Parenthood declined to file an administrative appeal with the state.¹⁶³ Rather, Planned Parenthood identified three affected patients, and those patients sued the Department's Director seeking a preliminary injunction to prevent the termination of the provider agreements.¹⁶⁴ The plaintiffs claimed the Department violated Medicaid's freedom of choice provision when it excluded Planned Parenthood from its Medicaid program for reasons unrelated to its

154. *Planned Parenthood of Ind., Inc. v. Ind. State Dep't Health*, 699 F.3d 962, 974 (7th Cir. 2012).

155. *Id.*

156. *Id.* at 975.

157. *Id.*

158. *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1228–29 (10th Cir. 2018) (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 522 (1990)).

159. *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006); *Planned Parenthood of Ind., Inc.*, 699 F.3d at 968; *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017); *Andersen*, 882 F.3d at 1224. *But see Does v. Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017).

160. *Does*, 867 F.3d at 1037.

161. *Id.* at 1038.

162. *Id.*

163. *Id.*

164. *Id.*

fitness to provide medical services.¹⁶⁵ The plaintiffs claimed the freedom of choice provision creates a judicially enforceable right that can be enforced under § 1983.¹⁶⁶ The district court granted the preliminary injunction, concluding the free choice of provider provision did create a private right enforceable under § 1983.¹⁶⁷ The Department appealed the decision to the Eighth Circuit.¹⁶⁸

Ultimately, the Eighth Circuit found the freedom of choice provision does not create an unambiguously conferred right and Medicaid has a comprehensive enforcement scheme that forecloses enforcement through § 1983.¹⁶⁹

A. *Provision Must Benefit the Plaintiff*

Rather than assess the freedom of choice provision in isolation to determine if it creates an enforceable right, the Eighth Circuit broke with Supreme Court precedent and analyzed the entire statutory scheme as a whole.¹⁷⁰ The court explained the focus of the Medicaid Act is two steps removed from the interests of the patients seeking services from a Medicaid provider.¹⁷¹ The Secretary of HHS approves state plans that fulfill “conditions specified in subsection (a),” which includes some eighty-three conditions—including the freedom of choice provision.¹⁷² Thus, the statute—as a whole—is phrased as a directive to the federal agency charged with approving state Medicaid plans.¹⁷³ The court reasoned it is not a conferral of rights upon the beneficiaries, because it does not focus on particular individuals.¹⁷⁴ Although a subsidiary provision ultimately benefits particular individuals, the court explained statutes phrased as directives to federal agencies typically do not confer enforceable rights on the individuals.¹⁷⁵

Furthermore, the court concluded the provision has an aggregate focus.¹⁷⁶ The Secretary is directed to discontinue payments to a state if she finds the failure to comply substantially with the conditions specified in subsection (a).¹⁷⁷ The Eighth Circuit previously held statutes that link funding to “substantial” compliance with its conditions counsels against the creation of individual

165. *Does*, 867 F.3d at 1038.

166. *Id.* In reaching its decision, the District Court relied on those opinions from the other circuit courts of appeals. *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-CV-00566-KGB, 2015 WL 13307022, at *6 (E.D. Ark. Oct. 2, 2015).

167. *Does*, 867 F.3d at 1038.

168. *Id.* at 1039.

169. *Id.* at 1041–42.

170. *Id.* at 1040.

171. *Id.* at 1041.

172. 42 U.S.C. § 1396a(b) (2012); *Does*, 867 F.3d at 1040.

173. *Does*, 867 F.3d at 1041.

174. *Id.*

175. *Id.* at 1042.

176. *Id.*

177. *Id.*

rights.¹⁷⁸ Focusing on substantial compliance is tantamount to focusing on the aggregate practices of the funding recipient.¹⁷⁹ Thus, the court concluded the freedom of choice provision was part of a substantial compliance funding condition, which suggested it had an aggregate focus.¹⁸⁰

Taken together, the court concluded Medicaid's freedom of choice provision does not create an enforceable federal right under § 1983.¹⁸¹

B. Presumption can be Overcome by the Presence of a Comprehensive Enforcement Scheme

Although the inquiry could have ended there, the court goes on to analyze whether the Medicaid Act has a comprehensive enforcement scheme incompatible with individual enforcement through § 1983.¹⁸² The court noted Congress expressly conferred another means of enforcing compliance with the freedom of choice provision—the withholding of federal funds by the Secretary.¹⁸³ Further, providers have the right to appeal an exclusion from the Medicaid program.¹⁸⁴ Because other sections of the Medicaid Act provide mechanisms to enforce the provision at issue, it is reasonable to conclude Congress did not intend to create an enforceable right for individual patients under § 1983.¹⁸⁵ Additionally, the court explained it would “result in a curious system” if a patient could litigate the qualifications of a provider in federal court at the same time the provider is going through the administrative appeals process.¹⁸⁶ It could result in parallel litigation and inconsistent results, providing further support for the court's conclusion that the Medicaid Act had foreclosed private enforcement through § 1983.¹⁸⁷

Accordingly, the Eighth Circuit became the first appellate court to hold Medicaid's freedom of choice provision does not confer an individual federal right enforceable under § 1983.¹⁸⁸

178. *Does*, 867 F.3d at 1042 (citing *Midwest Foster Case & Adoption Ass'n v. Kincaid*, 712 F.3d 1190 (8th Cir. 2013)).

179. *Id.*

180. *Id.* at 1042–43.

181. *Id.* at 1041.

182. *Id.* at 1041–42.

183. 42 U.S.C. § 1396c (2018); *Does*, 867 F.3d at 1041.

184. *Does*, 867 F.3d at 1041.

185. *Id.*

186. *Id.*

187. *See id.* at 1037.

188. *Id.* at 1041.

IV. THE EIGHTH CIRCUIT IGNORED BINDING SUPREME COURT PRECEDENT TO REACH ITS CONCLUSION IN *DOES V. GILLESPIE*

The Eighth Circuit's opinion and analysis is concerning for a couple reasons. First, the court ignored established Supreme Court precedent as to how the *Blessing* test must be applied. Second, the court heavily relied on dicta from the Supreme Court to reach its conclusion. Accordingly, the court in *Does* relied on dicta from the Supreme Court to re-write well-established, long applied § 1983 analysis for Medicaid cases, setting up a circuit split and positioning *Does* to be the case that gives the Supreme Court the opportunity to potentially close the door on all §1983 private rights of action in Medicaid cases.

A. *The Supreme Court's Analysis of § 1983 in Wilder is Still Binding Precedent*

In concluding the freedom of choice provision does not create an enforceable right under § 1983, the Eighth Circuit heavily relied on dicta from a recent case from the Supreme Court—*Armstrong v. Exceptional Child Center*.¹⁸⁹ There, the plaintiffs sued under the Supremacy Clause, not § 1983, and the Court ultimately determined the Supremacy Clause did not grant them a private right of action.¹⁹⁰ The Court goes on to examine the claim under the § 1983 framework, and, as the Court noted, the assertion of rights under § 1983 was not at issue in the case.¹⁹¹ Because the Court's discussion of § 1983 was not necessary to the result regarding the Supremacy Clause, it is considered dicta.¹⁹²

This distinction bears great importance, as holdings set binding precedent, influencing future decisions of lower courts, while dicta has no similar precedential value.¹⁹³ The reliance on holdings rather than dicta serves as the backbone of the U.S. judicial system, as courts rely on holdings to resolve cases and make law.¹⁹⁴ By promulgating law through dicta that looks like a holding, judges exercise lawmaking power they do not possess.¹⁹⁵ Further, by accepting dicta as binding law, judges fail to discharge their responsibility to resolve cases based on the precise question at hand.¹⁹⁶

189. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct 1378, 1383 (2015).

190. *Id.* at 1384.

191. *Id.* at 1387.

192. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 223 (2010).

193. James Khun et al., *Holding versus Dicta: Divided Control of Opinion Content on the U.S. Supreme Court*, 70 POL. RES. Q. 257, 259 (2017).

194. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 956 (2005).

195. Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

196. *Id.*

Accordingly, the Supreme Court's discussion of § 1983 in *Armstrong* does not constitute binding precedent. Still, the Eighth Circuit opted to ignore actual binding precedent set forth in *Wilder* and relied on the assertions from *Armstrong* anyway.

First, in assessing the intended beneficiary of the freedom of choice provision, the Eighth Circuit stated the focus of the Medicaid Act is two steps removed from the interests of patients seeking services from Medicaid providers.¹⁹⁷ The court quoted directly from *Armstrong*'s discussion of § 1983 and concluded "[i]t is phrased as a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid."¹⁹⁸

As previously explained, this language from *Armstrong* is dicta and does not constitute precedent that must be followed by lower courts. Further, and potentially more important, the § 1983 discussion in *Armstrong* is not signed on by a majority of the justices.¹⁹⁹ Justice Scalia penned the *Armstrong* opinion, but only Justices Alito, Roberts, and Thomas joined his discussion of Medicaid claims arising under § 1983.²⁰⁰ Justice Breyer joined the majority regarding *Armstrong*'s actual holding, but he declined to so join the discussion regarding § 1983.²⁰¹ Not only is this discussion considered dicta, Justice Scalia was unable to obtain a majority of justices to agree with his stance regarding § 1983 and Medicaid. Accordingly, it is far from the type of binding precedent the Eighth Circuit would be obligated to follow.

Second, the Eighth Circuit held the freedom of choice provision had an aggregate rather than individual focus, because it is merely part of a substantial compliance regime.²⁰² As noted by the Supreme Court in *Blessing* and many decisions since, courts are required to assess the Medicaid provision at issue in isolation.²⁰³ The Eighth Circuit ignored this axiom and opted instead to assess the entire statutory scheme as a whole.²⁰⁴ The court emphasized the Secretary can discontinue payments to states if he finds a state fails to comply substantially with all the provisions listed in § 1396a, which includes the freedom of choice provision.²⁰⁵ In *Wilder*, the Supreme Court held a substantial compliance regime—on its own—could not suggest an aggregate focus.²⁰⁶ The Court in its discussion of § 1983 in *Armstrong* stated the broad application of *Wilder* should

197. *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017).

198. *Id.* (quoting *Armstrong v. Exceptional Child Ctr. Inc.*, 135 S. Ct. 1378, 1387 (2015)).

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

200. *See generally id.* at 1378.

201. *Id.* at 1387–88.

202. *Does*, 867 F.3d at 1042.

203. *Blessing v. Freestone*, 520 U.S. 329, 342 (1997); *see also Perkins*, *supra* note 51, at 223.

204. *Does*, 867 F.3d at 1041.

205. *Id.* at 1042–43.

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

be narrowed to cover only those ambiguously conferred rights, but it did not overturn *Wilder* nor did it express disagreement with its conclusion regarding substantial compliance regimes.²⁰⁷ It merely clarified exactly when the *Wilder* test should be applied.²⁰⁸ In fact, the Supreme Court has routinely relied on the principles established in *Wilder* in its subsequent decisions applying the *Blessing* test.²⁰⁹

The Eighth Circuit, however, interpreted *Armstrong*'s narrowing language as overruling *Wilder*.²¹⁰ Accordingly, the Eighth Circuit completely ignored *Wilder* in light of *Armstrong* and held Medicaid's substantial compliance regime—alone—suggested it has an aggregate focus.²¹¹ Yet again, the Eighth Circuit treated dicta as binding precedent. On this issue, however, it went further by replacing actual binding precedent with dicta. In so doing, the Eighth Circuit exercised lawmaking power it does not possess and created bad, flawed law regarding Medicaid claims arising under § 1983.²¹²

B. The Eighth Circuit Ignored Settled Principles of Statutory Interpretation Regarding § 1983 Claims

As established by the Supreme Court, § 1983 claims must be broken down into “manageable analytic bites” in order to be properly assessed.²¹³ Between 2002 and 2016, federal courts have reviewed twenty-five Medicaid provisions, and they were all assessed on a provision-by-provision basis.²¹⁴ In *Does*, however, the Eighth Circuit ignored this analytical framework and chose to look at the Medicaid Act as a whole.²¹⁵ Although statutes are normally interpreted as a whole,²¹⁶ § 1983 claims require courts to focus on the specific statutory provision at issue.²¹⁷ Thus, the Eighth Circuit ignored binding precedent—again—and applied the wrong test for statutory interpretation of § 1983 claims.

C. Implications of the Does v. Gillespie Opinion

The Eighth Circuit's holding in *Does v. Gillespie* is certainly concerning for Medicaid patients hoping to enforce the freedom of choice provision through § 1983. Potentially more concerning, however, is the way in which the court reached its conclusion. The court misinterpreted and ignored binding precedent.

207. *Armstrong v. Exceptional Child Ctr. Inc.*, 135 S. Ct. 1378, 1396 n.* (2015).

208. *See id.*

209. *See Huberfeld, supra* note 23, at 336.

210. *Does*, 867 F.3d at 1040.

211. *Id.* at 1042.

212. *See Leval, supra* note 195 at 1250, 1255.

213. *Blessing v. Freestone*, 520 U.S. 329, 342 (1997).

214. *Perkins, supra* note 51, at 223 (citing *Blessing*, 520 U.S. at 342).

215. *Does*, 867 F.3d at 1043.

216. *Id.*

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

When faced with as much § 1983 precedent as currently exists, the Eighth Circuit managed to miss the forest for the trees. It latched on to dicta from the Supreme Court, ultimately leading it to be the only appellate court to hold Medicaid's freedom of choice provision does not confer an individual right enforceable under § 1983. Thus, a circuit split was born.

The biggest concern for Medicaid advocates moving forward is the potential for the Supreme Court to resolve this circuit split against Medicaid patients seeking to enforce the freedom of choice provision. Although *Does* relied on dicta, the language still represents views held by some of the Supreme Court justices. We do not know when or if those views will come to represent a majority on the Court, but it may happen sooner than anticipated now that Justices Gorsuch and Kavanaugh have joined the bench.²¹⁸ The Supreme Court could remove the ability for *any* Medicaid recipients to enforce various provisions of the Act through § 1983, thereby removing the one avenue for recourse currently available to Medicaid recipients.

Recently, however, the Supreme Court declined to resolve the split among the circuit courts.²¹⁹ Rather than expressly disavow the Eighth Circuit's improper analysis and conclusions, the opinion remains undisturbed. For now, claimants can still rely on § 1983 to secure their freedom of choice—so long as they are outside the reach of the Eighth Circuit's jurisdiction. It is unclear how long the Supreme Court will allow this divergence in the law to exist, but hopefully it can and will be resolved in favor of Medicaid recipients. The right to choose the provider of your choice is vital, and federal courts are the only forum in which to have that right protected.

VII. CONCLUSION

Medicaid has been in place for more than fifty years, and the Act provides much needed health care benefits to the indigent and categorically needy.²²⁰ Over the years, Congress has ensured Medicaid recipients have the freedom to choose providers of their choice.²²¹ As states have attempted to threaten that choice, federal courts have stepped in to protect patients.²²² The ability for Medicaid patients to seek redress in federal court is particularly important in

218. Meghan Keneally, *Meet All of the Sitting Supreme Court Justices Ahead of the New Term*, ABC NEWS (Nov. 30, 2018), <https://abcnews.go.com/Politics/meet-sitting-supreme-court-justices/story?id=37229761>.

219. *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 586 U.S. ____ (2018).

220. *Moore & Smith*, *supra* note 1.

221. *Cartwright-Smith & Rosenbaum*, *supra* note 2.

222. *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006); *Planned Parenthood of Ind., Inc. v. Ind. State Dep't Health*, 699 F.3d 962, 968 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018). *But see Does v. Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017).

light of HHS's limited enforcement authority and the inadequate administrative remedies included in the Medicaid Act itself.

The recent decision from the Eighth Circuit is particularly concerning because it seems to limit patients' ability to utilize federal courts as a means of redress when states are not acting in compliance with protections afforded by federal law.²²³ In setting up a circuit split, the Eighth Circuit opened a path to allowing the Supreme Court to close courthouse doors to all § 1983 claims in Medicaid cases. The Eighth Circuit's, decision, however, was misguided. It did not rely on binding precedent and misapplied proper § 1983 rules of analysis.

As these cases continue rising up through federal courts, Medicaid advocates are left hoping the Supreme Court either expressly repudiates the Eighth Circuit for its faulty analysis. Either way, a lot is at stake for Medicaid beneficiaries' ability to secure their freedom of choice.

LAUREN E. PAIR*

223. See Huberfeld, *supra* note 23, at 346.

* Juris Doctor, Saint Louis University School of Law (anticipated May 2019); Master of Public Health, University of Alabama at Birmingham; Bachelor of Science, University of Alabama. I would like to thank Professor Sidney Watson for her support and encouragement throughout the research and writing process. I would also like to thank my family and friends for their support, as well as the Editorial Staff of Volume 12 for their hard work and dedication.