No. 06-415

In The Supreme Court of the United States

JOHN SELIG, in his official capacity as Director of the ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES; RAY HANLEY in his individual capacity as former Director of the DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES; and ROY JEFFUS, in his individual capacity and his official capacity as Director of the DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioners,

vs.

PEDIATRIC SPECIALTY CARE, INC.; CHILD AND YOUTH PEDIATRIC DAY CLINICS, INC.; FAMILY COUNSELING AND DIAGNOSTIC CLINIC; TOMORROW'S CHILD LEARNING CENTER LLC; D AND D FAMILY ENTERPRISES, INC.; JAMES SWINDLE and STACEY SWINDLE as parents and next best friends of JACOB and NOAH SWINDLE, minors; SUSANN CRESPINO, as parent and next best friend of MICHAEL CRESPINO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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PETITIONERS' RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

Pursuant to Rule 21.2(b) of the Rules of this Court, Petitioners respectfully request that the Court vacate the judgment of the United States Court of Appeals for the Eighth Circuit and remand the case to that court with directions to dismiss with prejudice Respondents' individual capacity and money damages claims against Petitioners Ray Hanley and Roy Jeffus.

Respondents filed a Suggestion of Mootness, in which they state that they no longer wish to pursue their individual capacity and money damages claims against Messrs. Hanley and Jeffus. Because the Petition for Writ of Certiorari arises from the Eighth Circuit's denial of qualified immunity to these individual defendants for those claims for relief, Respondents' voluntary withdrawal of these claims renders the petition moot. Respondents' unilateral action has denied Petitioners their opportunity for review of the judgment, which conflicts with decisions of this Court and of other courts of appeals, and which has significant adverse implications for the States' administration of the Medicaid program. *See* PETITION FOR WRIT OF CERTIORARI, pp. 8-30; BRIEF OF STATES AND STATE AGENCIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, pp. 8-19. Accordingly, this Court should vacate the court of appeals judgment and direct the court to dismiss with prejudice Respondents' individual and money damage claims against Messrs. Hanley and Jeffus. Vacatur with directions to dismiss with prejudice is the established practice when a civil case becomes moot pending the court's decision on the merits. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994).

The Eighth Circuit denied Messrs. Hanley and Jeffus qualified immunity from claims brought by Respondents

pursuant to 42 U.S.C. § 1983. Review was based upon the collateral order doctrine. *Johnson v. Jones*, 515 U.S. 304, 311 (1995) (collateral order doctrine allows a court to review a denial of summary judgment when the order is based upon a denial of qualified immunity). Petitioners seek review in this Court of the following two issues, which arise from the decision denying qualified immunity:

> 1. PRIVATE ENFORCEMENT: Does the statute defining the services that state Medicaid programs are authorized to cover create private rights that are enforceable under 42 U.S.C. § 1983? Does the statute that obligates states to safeguard against unnecessary Medicaid utilization create private rights that are enforceable under 42 U.S.C. § 1983?
>
> 2. QUALIFIED IMMUNITY: Are state Medicaid directors subject to personal monetary liability under § 1983 for: (a) Medical necessity decisions made by independent board-certified physicians engaged (but not employed) by a federally designated independent contractor of the state Medicaid program; or (b) Unauthorized conduct of a nurse employed by the federally designated independent contractor?

PETITION FOR WRIT OF CERTIORARI, page (i).

After briefing on the Petition for Writ of Certiorari was complete, during which the Respondents filed a brief in opposition, *Amici Curiae* of States and State Agencies filed a brief in support, and Petitioners filed a reply and supplemental brief, this Court invited the Office of the Solicitor General to file a brief expressing the views of the United States. Petitioners and Respondents subsequently met with representatives of the Solicitor General to discuss

the case. By letter dated May 18, 2007, Respondents notified Petitioners and the Solicitor General that they had decided to dismiss with prejudice their claims for money damages filed against Messrs. Jeffus and Hanley in their individual capacities. On June 1, 2007, Respondents filed a Suggestion of Mootness, in which they represent that they wish to permanently withdraw and dismiss with prejudice their individual capacity and money damages claims against Messrs. Hanley and Jeffus.

In light of these circumstances, Petitioners concur that if these claims of Respondents are dismissed with prejudice, the Petition for Writ of Certiorari is moot. However, because the mootness arises from the unilateral action of Respondents, which prevents Petitioners from obtaining review of an unfavorable judgment, Petitioners request that the Court vacate the judgment of the court of appeals and order that the individual capacity and money damages claims against Messrs. Hanley and Jeffus be dismissed with prejudice. That disposition will remove the precedential force of the Eighth Circuit's decision and will clear the path for future relitigation of the issues between the parties. Vacatur is appropriate because the "unilateral action of the party who prevailed in the lower court" has denied Petitioners the opportunity to obtain review of the court of appeals' judgment. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997) (quoting *U.S. Bancorp Mortg. Co.*, 513 U.S. at 23).

STATEMENT

1. This litigation dates back to December 6, 2001, but this case arises from the plaintiffs' Fifth Amended Complaint. In that complaint, the plaintiffs sought damages and

injunctive relief under 42 U.S.C. § 1396a(a)(30)(A) and 42 U.S.C. § 1396d(a)(13). They sued the Director of the Arkansas Department of Health and Human Services ("DHHS"), John Selig, in his official capacity, Ray Hanley, in his individual capacity as former Director of the Division of Medical Services of DHHS, and Roy Jeffus, in his individual capacity and his official capacity as Director of the Division of Medical Services of DHHS. Respondents alleged that DHHS's use of a prior authorization process for day treatment, a form of day care in which classroom teachers reinforce therapies such as speech therapy, occupational therapy, and physical therapy, resulted in a decrease in the number of hours approved for these services, and that this resulted in damages to the plaintiffs. They sought money damages, as well as declaratory and injunctive relief dictating a minimum amount of day treatment (six hours) that each reviewing physician must in the future determine to be medically necessary.

2. Petitioners moved for summary judgment, arguing that the Respondents had no privately enforceable rights under 42 U.S.C. § 1396a(a)(30)(A) and 42 U.S.C. § 1396d(a)(13) and that Ray Hanley and Roy Jeffus were entitled to qualified immunity. The district court denied Petitioners' motion for summary judgment, holding that (1) both federal statutes created rights enforceable by both providers and recipients, (2) Messrs. Hanley and Jeffus were not entitled to qualified immunity and thus could be held personally liable for money damages claimed by Respondents, and (3) DHHS was not entitled to Eleventh Amendment immunity (this was not specifically addressed in the order, but the summary judgment motion was denied in its entirety).

3. Petitioners appealed only the order denying qualified immunity to Messrs. Hanley and Jeffus and denying Eleventh Amendment immunity to DHHS to the Eighth Circuit Court of Appeals on March 8, 2005 pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. Petitioners argued that (1) 42 U.S.C. § 1396a(a)(30)(A)[1] does not give providers or recipients of Medicaid services enforceable rights under § 1983, (2) 42 U.S.C. § 1396d(a)(13)[2] does not give providers enforceable rights under § 1983, (3) the individual petitioners did not violate a federal statutory right by establishing a system of prior authorization review implemented by a federally-certified peer review organization, (4) a reasonable official would not know his conduct was unlawful where qualified physician reviewers determined that no more than 3.5 – 4 hours of core child health management services was medically necessary, and (5) DHHS, an agency of the State of Arkansas, was

[1] 42 U.S.C. § 1396a(a)(30)(A) requires state plans to: "[P]rovide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1902(i)(4) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."

[2] 42 U.S.C. § 1396d(a)(13) provides: (a) For purposes of this title the term "medical assistance" means payment of part or all of the cost of the following care and services . . . (13) other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services (provided in a facility, a home or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level."

entitled to immunity from suit in federal court under the Eleventh Amendment.

4. With respect to whether §§ 1396a(a)(30)(A) and 1396d(a)(13) provide enforceable private rights of action, Petitioners argued that *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) was controlling. Petitioners contended that the two federal statutes at issue do not contain the unambiguously conferred rights required by *Gonzaga*, and fail to identify a discrete class to whom the rights belong. On the issue of Messrs. Hanley and Jeffus' qualified immunity, Petitioners argued the implementation of a federally authorized peer review process violated no statutory rights. Further, even assuming that it did, no reasonable official would know his conduct was unlawful in light of the law allowing for federally-certified peer review and the conclusions of the qualified physician reviewers.

5. The Eighth Circuit Court of Appeals issued its decision on Petitioners' appeal on April 17, 2006. It upheld the district court's order denying Messrs. Hanley and Jeffus qualified immunity and allowing causes of action based upon §§ 1396a(a)(30)(A) and 1396d(a)(13). Rehearing and Rehearing En Banc were denied on June 22, 2006.

6. Petitioners timely filed their Petition for Writ of Certiorari on September 20, 2006. Briefing concluded on January 25, 2007, and this Court invited the Solicitor General to file a brief expressing the views of the United States on February 20, 2007.

7. The Petition for Writ of Certiorari explained that an exercise of this Court's certiorari jurisdiction was warranted because the Eighth Circuit's decision that 42 U.S.C. § 1396a(a)(30)(A) creates privately enforceable rights conflicts with decisions of other courts of appeals. In

addition, conflicts among the circuits exist not only with respect to 42 U.S.C. § 1396a(a)(30)(A), but also as to the scope of the rights created by 42 U.S.C. § 1396d(r). Since this Court's decision in *Gonzaga,* the following courts have held that § 1396a(a)(30)(A) creates no privately enforceable rights. *Westside Mothers v. Olszewski*, 454 F.3d 532, 542 (6th Cir. 2006) (holding no private enforcement); *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004) (holding no provider enforcement); *Sanchez v. Johnson*, 426 F.3d 1051, 1062 (9th Cir. 2005) (holding no individual rights created); *Oklahoma Chapter of the American Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208 (10th Cir. 2007) (holding no private enforceable rights). Only the Eighth Circuit has refused to follow *Gonzaga*, which held that Congress confers enforceable rights only when it uses "rights-creating" language. *Gonzaga*, 536 U.S. at 287.

8. With respect to the scope of the rights contained in 42 U.S.C. § 1396d(r) (the definition of Early and Periodic Diagnosis, Screening, and Treatment ("EPSDT") services, which are Medicaid services provided to persons under age 21), the Ninth Circuit Court of Appeals defines the rights privately enforceable under EPSDT as the right to compel state Medicaid plans to pay for all of the component services listed in § 1396d. *Katie A. v. Los Angeles Co.*, 481 F.3d 1150 (2007) (also holding there is no enforceable right to services in particular bundles or in accordance with particular principles); *see also Fogarty*, 472 F.3d at 1215 (holding that a state only is required to cover EPSDT services and not to provide them). These decisions conflict with the Eighth Circuit's decision, which is that there is an enforceable right to a particular services bundle, and

also an enforceable right to define that bundle in accordance with particular principles (six hours of care). Petitioners also contend that the case is worthy of certiorari because of its potential to impede a state's ability to utilize peer review organizations to review medical necessity decisions.

9. The case also is worthy of certiorari because the qualified immunity decision cannot be reconciled with precedent that only removes qualified immunity for violations of clearly established rights, and refuses to remove qualified immunity based upon *respondeat superior* or vicarious liability. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658 (1978). The Eighth Circuit's holding on qualified immunity would impose liability upon government officials based upon the actions of a governmental agency contractor's employees, which directly conflicts with the rule against liability based upon *respondeat superior* or vicarious liability. In addition, the Eighth Circuit found that the mere implementation of a prior authorization process that reduced the scope and duration of services could remove qualified immunity, despite a federal statute allowing and encouraging states to implement utilization controls.

10. Fourteen states and state agencies filed a brief as *Amici Curiae* supporting the Petition for Writ of Certiorari. That brief explained that if the decision is allowed to stand, it will "materially impede States' efforts to deal with the growing cost of the Medicaid program, threatening state officials with personal liability for implementing policies designed to control costs." *Amici Curiae* Brief, p. 1.

Amici Curiae agree that there is no federal right, much less a clearly established one, to Medicaid services free of prior authorization. *Id*. at p. 12.

11. On May 18, 2007, Respondents sent a letter to Petitioners and to the Solicitor General stating that they planned on dismissing their claims against Messrs. Hanley and Jeffus. On June 1, 2007, Respondents filed a Suggestion of Mootness with this Court, in which they represent that they no longer want to pursue their personal capacity and money damages claims against Ray Hanley and Roy Jeffus and will dismiss these claims with prejudice. Given that the petition is based upon a denial of qualified immunity, the representations moot the petition because the qualified immunity issue is no longer justiciable under Article III of the U.S. Constitution. However, because the mootness was caused by the unilateral action of Respondents, vacatur of the decision below with directions to dismiss these claims with prejudice is appropriate because Respondents' actions have denied Petitioners their right to review in this Court of an unfavorable decision.

ARGUMENT

The Respondents' representations that they no longer wish to pursue their individual capacity and money damages claims against Ray Hanley and Roy Jeffus and that they will dismiss these claims with prejudice render this case moot. That unilateral action by Respondents has deprived Petitioners of the opportunity to obtain this Court's review of the Eighth Circuit's decision, and its adverse implications for the administration of State

Medicaid programs. *See* PETITION FOR WRIT OF CERTIORARI, pp. 28-30; *Amici Curiae* Brief, pp. 8-12.

If a case becomes moot pending review, "this Court may consider its merits, but may make such disposition of the whole case as justice may require." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 21. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot . . . pending [the Court's] decision on the merits is to vacate the judgment below and remand with a direction to dismiss." *Id*. at 22 (quoting *United States v. Munsingwear, Inc.*, 341 U.S. 36, 39 (1950)). In these circumstances, vacatur "clears the path for future litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40; *see also Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) (stating that when a claim is rendered moot while awaiting review by the Supreme Court, "the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint.").

Respondents' representation concerning their abandonment of their claims for damages relief against Messrs. Hanley and Jeffus provide a proper basis for vacatur. In *Deakins*, the respondents represented through counsel that they did not want to pursue claims for equitable relief in the federal court. They stated that they wanted to seek such relief in another forum. *Deakins*, 484 U.S. at 198. The Court stated that for the purpose of Article III's case or controversy requirement, it is not enough that a "controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals." *Id*. at 199 (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). The Court held:

> In the case now before us, respondents state that they no longer seek any equitable relief in federal court. Because there no longer is a live controversy between the parties over whether a federal court can hear respondents' equitable claims, the first question on which certiorari was granted is moot.

Deakins, 484 U.S. at 199.

Indeed, this Court has held in a series of decisions that vacatur is appropriate when the party who prevailed in the lower court renders the case moot by receding from its position. For example, in *Frank v. Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989) (per curiam), in light of a concession by the appellant government officials, the plaintiff-appellee in this Court "state[d] its willingness to forgo any further claim to the . . . relief sought in its complaint." *Id*. at 227. Concluding that the case was moot, the Court vacated the judgment below and remanded with directions to dismiss. *Ibid*. (citing *Munsingwear*). See also *Webster v. Reproductive Health Services*, 492 U.S. 490, 512-513 (1989) (*Munsingwear* treatment in response to withdrawal by plaintiffs/appellees of request for relief in light of appellant's legal position); *Gray v. Board of Trustees of the Univ. of Tennessee*, 342 U.S. 517, 518 (1952) (per curiam) (similar treatment where action of appellee mooted controversy); *Commercial Cable Co. v. Burleson*, 250 U.S. 360, 362 (1919) (same); *Board of Governors of Federal Reserve Sys. v. Security Bancorp*, 454 U.S. 1118 (1981) (*Munsingwear* treatment where respondent's actions mooted application for permission to acquire bank); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam) (vacating judgment of state supreme court after case was rendered moot by action of respondent).

Vacatur is likewise appropriate in this case because the unilateral action of the party who prevailed in the

lower court has denied Petitioners the opportunity to seek review of the Eighth Circuit's judgment and thus to prevent the continuing adverse effects on the administration of the Medicaid program that have arisen from that Court's holding that Medicaid officials can be liable for millions of dollars in their individual capacities. Absent vacatur, Petitioners would otherwise object to a dismissal of the Petition for Writ of Certiorari without an accompanying order vacating the court of appeals decision and directing a dismissal with prejudice of the money damages and individual capacity claims against Messrs. Hanley and Jeffus. Having been deprived of the opportunity for this Court's review, Petitioners and the *Amici* states and state agencies should not be forced to endure that decision's continuing adverse implications. Petitioners should not be saddled with an unfavorable decision when they have been denied the opportunity to obtain review in this Court.

For the foregoing reasons, the Court should vacate the judgment of the United States Court of Appeals for the Eighth Circuit and remand the case to that court with directions to order the vacation of the judgment of the district court and the dismissal of the Respondents' money damages and individual capacity claims against Messrs. Hanley and Jeffus with prejudice.

Respectfully submitted,

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