No. 12-470

In the Supreme Court of the United States

GARY ALEXANDER, ET AL.,

Petitioners,

v.

ZACKERY D. LEWIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 1396p(d)(4), which addresses the extent to which funds contained in certain trusts, and income from such trusts, may be considered by States in determining an individual's eligibility for Medicaid benefits, creates a right that individuals receiving or seeking Medicaid benefits, as well as the trusts, may enforce in an action under 42 U.S.C. § 1983.

2. Whether, if an action under Section 1983 is not available, the individuals as well as the trusts may maintain an action under the Supremacy Clause for a declaratory judgment that a state law governing the consideration of trust assets and income in assessing Medicaid eligibility is preempted by Section 1396p(d)(4).

RULE 29.6 STATEMENT

Respondent ARC Community Trust of Pennsylvania is a non-profit corporation; it does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. The Family Trust is a not for profit corporation; it does not have a parent corporation and no publicly held corporation owns 10% of more of its stock.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioners frame this case as a vehicle to bring back before the Court the question regarding the availability of a cause of action under the Supremacy Clause that the Court declined to address in *Douglas* v. *Independent Living Center*, 132 S. Ct. 1204 (2012). Petitioners' *amici* echo the same theme.

There is one insuperable obstacle to petitioners' goal, however: the court of appeals' *multiple and independent* holdings that respondents had causes of action under 42 U.S.C. § 1983 to challenge Pennsylvania's law. Petitioners must establish that the court of appeals' Section 1983 holdings are both worthy of this Court's review and wrong in order to bring the Supremacy Clause issue before the Court.

That they cannot do. The court below rested its Section 1983 holdings on several independent grounds involving different subsections of the Medicaid statute that give rise to a cause of action under Section 1983. Most of these grounds are not even referenced in, much less challenged by, the petition. For that reason alone, review should be denied.

Nor is the one Section 1983 holding that the petition chooses to challenge worthy of review. Only three courts of appeals have addressed the issue, and the sole decision disagreeing with the holding below, rendered by a Tenth Circuit panel, rests on scant reasoning, has been described skeptically in a subsequent opinion in that circuit, and is in serious tension with another Tenth Circuit decision addressing the same issue. Given those developments, and the express rejection of the Tenth Circuit's approach in the subsequent decisions of the Eighth Circuit and

the court below, it is not at all clear that the Tenth Circuit will adhere to its view.

In sum, the Court should deny review because this case plainly is not a proper vehicle to consider either the Supremacy Clause issue or the Section 1983 issue. The ruling below relied on multiple, independent, and unchallenged grounds to allow a cause of action under Section 1983. The petition challenges just one of the multiple Section 1983 holdings, and even that does not present a genuine conflict of lower court authority. Review by this Court therefore is not warranted.

STATEMENT

A. The Federal Medicaid Act.

1. "Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Participation in the program is voluntary, but if a State chooses to participate, it must abide by federal statutory and regulatory requirements. All participating states must cover "categorically needy" individuals—those who qualify for public financial assistance through the Supplemental Security Income (SSI) program, or other programs. Pet. App. 5a.

Participating states may choose whether to cover the "medically needy"—those who are disabled but whose income and assets are substantial enough that they cannot qualify as categorically needy. States that choose to cover the medically needy are also bound by additional federal requirements. Pet. App. 5a-6a.

Section 1396a of Title 42 governs state Medicaid plans. Specifying what a "State plan for medical assistance *must*" do, the provision places many mandatory obligations on the states, but it also leaves some areas to the states' bounded discretion. 42 U.S.C. § 1396a (emphasis added).

For example, Section 1396a(a)(8) requires States to "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance *shall* be furnished with reasonable promptness to *all* eligible individuals" (emphasis added).

Section 1396a(a)(10)(A)(i) describes eight categories of individuals who must be covered under a State's plan, and paragraph (a)(10)(A)(ii) lists twenty-two categories of individuals who may be covered by a Medicaid plan "at the option of the State." See also 42 U.S.C. § 1396d(a) (defining the "medical assistance" that must be provided).

2. The underlying merits issue in this case is how funds that an individual has placed in a "special needs" trust should be assessed for purposes of determining the individual's eligibility for Medicaid benefits.

In addressing this issue, Congress has focused on two concerns. The first is to eliminate abusive practices under which "[i]ndividuals have gained access to taxpayer-funded healthcare while retaining the benefit of their wealth and the ability to pass that wealth on to their heirs." Pet. App. 7a. The second is to enable severely and chronically ill individuals to provide for appropriate expenses that Medicaid does not cover. "These expenses—books, television, Internet, travel, and even such necessities as clothing and

toiletries—would rarely be considered extravagant." *Id*. at 8a.

The statute that Congress adopted is codified at 42 U.S.C. § 1396p(d). Paragraph (d)(1) states:

> For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

Paragraph (d)(3), in turn, establishes "a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility." Pet. App. 7a.

Paragraph (d)(4) addresses a subcategory of trusts termed "special needs" or "supplementary needs" trusts. "A supplemental needs trust is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability and is intended to provide for expenses that assistance programs such as Medicaid do not cover." Pet. App. 7a-8a.

Although a special needs trust can be established for the benefit of a single individual, pooled special needs trusts are frequently utilized. "'A pooled trust' is a special arrangement with a nonprofit organization that serves as trustee to manage assets belonging to many disabled individuals." Pet. App. 8a. The pooling arrangement benefits "individuals with a relatively small amount of money. By pooling these small accounts for investment and management purposes, overhead and expenses are reduced and more money is available to the beneficiary." *Ibid*.

Paragraph (d)(4)'s introductory language states "[t]his subsection shall not apply to any of the following trusts." 42 U.S.C. § 1396p(d)(4). Paragraph (d)-(4)(C) specifies four requirements for pooled trusts:

- "The trust is established and managed by a nonprofit association." *Id.* § 1396p(d)(4)(C)(i).
- "A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts." *Id.* § 1396p(d)(4)-(C)(ii).
- "Accounts in the trust are established solely for the benefit of individuals who are disabled * * * by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court." *Id.* § 1396p(d)(4)-(C)(iii).
- "To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter." *Id.* § 1396p(d)-(4)(C)(iv).

Together, these requirements prevent a special needs trust from being used for intergenerational wealth transfers unless the State is fully reimbursed, but they allow a nonprofit trustee—upon the death of the Medicaid beneficiary—to retain the trust corpus for the benefit of other disabled individuals or to cover overhead expenses. By contrast, an individual trust *must* reimburse the State for Medicaid expenditures

out of any funds remaining after the grantor's death. *Id.* § 1396p(d)(4)(A).

Implementing these obligations, Section 1396a-(a)(18) requires a State to "comply with the provisions of section 1396p of this title with respect to * * * treatment of certain trusts."

3. The Secretary of Health and Human Services, through the Centers for Medicare and Medicaid, has issued the State Medicaid Manual ("SMM"), a compendium of informal interpretations of the federal Medicaid law.[1] The relevant portion of the Manual provides that assets placed in trusts that satisfy the requirements of paragraph (d)(4) "[b]eginning with the month the resources are placed in the trust, * * * are exempt from being counted as resources to the individual." SMM § 3259.7(B)(2); see also *id.* § 3259.7 (rules set forth in paragraph (d)(3) "do not apply to" trusts described in paragraph (d)(4), which "are treated differently in determining eligibility for Medicaid"). As the Second Circuit has explained, the Manual makes clear that assets in a special needs trust are "not considered in" determining the indi-

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[1] The SMM is available at http://tiny.cc/CMSReg. Although not the product of formal rulemaking, the courts of appeals accord these interpretations considerable persuasive deference. See, *e.g.*, *Wong* v. *Doar*, 571 F.3d 247, 258 (2d Cir. 2009); *S.D. ex rel. Dickson* v. *Hood*, 391 F.3d 581, 590 & n.6 (5th Cir. 2004) ("[R]elatively informal CMS interpretations of the Medicaid Act, such as the State Medicaid Manual, are entitled to respectful consideration in light of the agency's significant expertise, the technical complexity of the Medicaid program, and the exceptionally broad statutory authority conferred upon the Secretary under the Act."))..

vidual's eligibility for Medicaid. *Wong* v. *Doar*, 571 F.3d 247, 253 (2d Cir. 2009).[2]

B. The Pennsylvania Law.

Pennsylvania in 2005 enacted a law establishing several requirements for special needs trusts. 62 Pa. Cons. Stat. § 1414. That statute:

- Limits to 50% the amount that a pooled trust may retain of the assets held for an individual upon that individual's death; the balance must be used to reimburse heath care services provided by the State. *Id.* § 1414(b)(3)(iii).
- Requires that "any expenditure from the trust must have a reasonable relationship to the needs of the beneficiary." *Id.* § 1414(b)(3)-(ii).
- Restricts special needs trusts only to beneficiaries with "special needs that will not be met without the trust." *Id.* § 1414(b)(2).
- Narrows eligible beneficiaries to only those "under the age of sixty-five." *Id.* § 1414(b)(1).

The statute bars the creation of special needs trusts that do not satisfy these requirements and gives the State authority to petition the state courts for termination of any trust that failed to comply. 62 Pa. Cons. Stat. § 1414(c). Pennsylvania takes the position that funds placed in a trust failing to satisfy

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[2] The Second Circuit in *Wong* upheld another aspect of the Secretary's interpretation—that income placed in a special needs trust may be considered in making the separate, post-eligibility determination of how much the individual must contribute to defray the cost of his or her care. 571 F.3d at 253, 260-62.

these requirements must be considered in evaluating the grantor's Medicaid eligibility, even if the trust satisfies all of the requirements in Section 1396p-(d)(4) of the Medicaid Act. Pet. App. 14a-15a.

C. The District Court Proceedings

This action was commenced in 2006 by two pooled trusts and eight individuals holding pooled trust accounts who were Medicaid beneficiaries. The plaintiffs, who sought class certification, named as defendants the Pennsylvania officials responsible for administration of the State's Medicaid program. The complaint asserted causes of action under 42 U.S.C. § 1983 and the Supremacy Clause alleging that Section 1414, the Pennsylvania statute establishing requirements for Medicaid pooled trusts was preempted by Sections 1396a(a)(8), 1396a(a)(10), 1396a-(a)(18), 1396d(a) and 1396p(d)(4) of the Medicaid Act. It sought declaratory and injunctive relief.

The district court certified a class composed of "[a]ll disabled individuals who are, or will become, eligible for Medical Assistance" and who either have or will have special needs trust accounts that comply with the Medicaid Act and "who have been or will be denied" Medicaid benefits "as a result of the application of Section 1414." Pet. App. 54a-55a. The class also included "trustees of pooled special needs trusts holding such accounts and other persons acting in a representative capacity on behalf of such disabled individuals." *Id*. at 55a.

The district court held that the provisions of the Medicaid statute relied on by plaintiffs "each confer rights enforceable under § 1983" under the standard set forth by this Court in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). Pet. App. 151a. It also upheld

plaintiffs' causes of action under the Supremacy Clause. *Id.* at 80a-82a.

On the merits, the district court held that the provisions of the Pennsylvania law "set a more restrictive standard than" federal law and are therefore "preempted by federal law." Pet. App. 102a. It entered an order enjoining petitioners from enforcing the preempted provisions. *Id.* at 121a.

D. The Court of Appeals Ruling

The court of appeals unanimously affirmed in relevant part. Pet. App. 1a-52a.[3]

With respect to whether Section 1983 created causes of action to allow respondents to maintain their challenge to the Pennsylvania law, the court observed that

> [t]o find a private right of action under Section 1983: (1) the statutory provision must benefit the plaintiffs with a right unambiguously conferred by Congress; (2) the right cannot be so "vague and amorphous" that its enforcement would strain judicial competence; and (3) the statute must impose a binding obligation on the States.

Pet. App. 32a (citing *Gonzaga Univ.,* 536 U.S. at 282, and *Blessing* v. *Freestone*, 520 U.S. 329, 329 (1997)).

The court of appeals then separately considered whether these requirements were met with respect to the claims of the individuals and with respect to

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[3] The court of appeals held that the district court had erred in holding preempted the section of the Pennsylvania law granting authority to enforce the non-preempted provisions of the statute. Pet. App. 49a-51a.

claims asserted by the trusts. With respect to the individual plaintiffs' claims, the court stated that "Medicaid provides eligible individuals with the statutory right to receive medical assistance and to receive it with reasonable promptness" if "they meet the eligibility requirements as those requirements are defined by federal law." Pet. App. 33a (citing 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), & 1396d(a)). "Plaintiffs allege that Section 1414 changes the eligibility requirements for medical assistance, contrary to federal law. Thus, it interferes with Plaintiffs' right to receive medical assistance. Plaintiffs therefore have a cause of action under Section 1983." *Ibid.*

With respect to the trust plaintiffs' claims, the court found the question "closer," because—unlike the individual plaintiffs—"they do not have a right to receive medical assistance," but it concluded that "at least two provisions of the Medicaid statute confer rights upon the trusts." Pet. App. 33a-34a. First, the court determined that Section 1396p(d)(4)'s injunction "that the trust-counting rules 'shall not apply to' special needs trusts" resembled similar mandatory language that this Court "has held to create individual rights." *Id.* at 34a. Second, it determined that the requirement in Section 1396a(a)(18) that "[a] State plan for medical assistance must * * * comply with the provisions of section 1396p * * * with respect to * * * treatment of certain trusts" was not distinguishable from the requirement of Section 1396a(a)(8) that Medicaid plans "must" satisfy certain requirements—and observed that it already had held that the latter language creates a right enforceable under Section 1983. Pet. App. 34a.

The court of appeals rejected defendants' argument that the rules set forth in Section 1396p(d) are

not mandatory, and therefore fail to provide a sufficiently clear standard for courts to apply. Pet. App. 35a. It determined that "the statutory text"—in particular the statement in paragraph (d)(4) that "this subsection shall not apply" to special needs trusts meeting the requirements set forth in that paragraph—demonstrated Congress's plan "to shelter special needs trusts from having any impact on Medicaid eligibility." Pet. App. 30a-31a. Otherwise, "Congress could have said: 'States are not required to apply this subsection to any of the following trusts.'" *Id*. at 31a.

Section 1396p(d) also "sit[s] within a complex and comprehensive system of asset-counting rules. Congress rigorously dictates what assets shall count and what assets shall not count toward Medicaid eligibility." Pet. App. 31a. "Defendants argue that Congress left a gap or an unprovided-for case with regard to these trusts. But with such a rigorous system, it seems clear that Congress intended to create a purely binary system of classification: either a trust affects Medicaid eligibility or it does not." *Ibid*.

The court additionally concluded "that the Supremacy Clause provides Plaintiffs with an independent basis for a private right of action in this case." Pet. App. 35a.

ARGUMENT

There is no warrant for review by this Court of the court of appeals' determinations that multiple provisions of the Medicaid statute confer rights upon respondents that support a cause of action under Section 1983. *First*, petitioners do not even seek review of the lower courts' independent determination that the individual respondents are entitled to assert

a private right of action pursuant to Section 1983 based on the right-creating text of 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), and 1396d(a). *Second*, petitioners do not challenge the court of appeals' separate holding that the trusts have a Section 1983 cause of action based on the rights-creating text of 42 U.S.C. § 1396a(a)(18). Because each of these holdings provides a sufficient basis for the decision below, the questions presented in the petition concerning the existence of causes of action are entirely academic.

Moreover, the Section 1983 question that is presented in the petition does not warrant review. The conflict is shallow (only three courts of appeals have addressed the issue), and the Tenth Circuit decision on which petitioners rely has been viewed skeptically within that Circuit, is in tension with another Tenth Circuit ruling, and was expressly rejected by the Third and Eighth Circuits. It is not at all clear that the Tenth Circuit will continue to adhere to its view.

Furthermore, petitioners have not come close to demonstrating that the question is sufficiently important to warrant this Court's attention. And the decision below, which accords with the federal government's interpretation of the statute, is correct.

Because the Section 1983 issue is not worthy of review, there is no occasion for the Court to consider in this case the Supremacy Clause issue that it declined to address in *Douglas*. The petition for a writ of certiorari should be denied.

A. Petitioners Have Not Sought Review Of The Court Of Appeals' Separate Holding That The Individual Plaintiffs Could Invoke Section 1983 Based On Rights Conferred By Provisions Other Than Section 1396p(d)(4).

The plaintiffs in this case fall into two categories: individual persons and trusts. Pet. App. 12a. The court below separately considered whether each category of plaintiff could assert a cause of action under Section 1983. However, the petition does not seek review of the lower court's determination with respect to the individual plaintiffs; indeed, neither the questions presented nor the argument even mentions the statutory provisions on which the court of appeals relied.

Because the court of appeals' holding with respect to the individual plaintiffs' ability to assert a claim under Section 1983 is sufficient to support the judgment below, review by this Court of the questions presented could not alter the judgment and would therefore constitute an advisory opinion. Certiorari accordingly should be denied.

First, in addressing the individual plaintiffs' Section 1983 claim, the court stated that "Medicaid provides eligible individuals with the statutory right to receive medical assistance and to receive it with reasonable promptness," citing 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), and 1396d(a). Pet. App. 33a. The court observed that it "has already concluded that Medicaid provides a private right of action under Section 1983 for interference with this right." *Ibid.* (citing *Sabree ex rel. Sabree* v. *Richman*, 367 F.3d 180, 189 (3d Cir. 2004)). The plaintiffs alleged that "Section 1414 changes the eligibility requirements for medical

assistance, contrary to federal law." *Ibid*. "Thus, it interferes with Plaintiffs' right to receive medical assistance. Plaintiffs therefore have a cause of action under Section 1983." *Ibid*. At no point did the court of appeals invoke Section 1396(p)(d)(4) in its analysis of the individual plaintiffs' ability to assert a Section 1983 claim.

Second, the petition does not seek review of the court of appeals' holding that Sections 1396a(a)(8), 1396a(a)(10), and 1396d(a) confer rights on the individual plaintiffs enforceable under Section 1983. The only statutory provision mentioned in the first question presented and in the argument in support of certiorari is Section 1396p(d)(4). At no point do petitioners contest the court of appeals' holding that Sections 1396a(a)(8), 1396a(a)(10), and 1396d(a) separately create rights that may be enforced by the individual plaintiffs.

Third, it is not surprising that petitioners failed to raise this issue. The courts of appeals agree that one or more of these provisions confer rights enforceable under Section 1983. See, *e.g.*, *Bontrager* v. *Ind. Family & Soc. Servs. Admin.,* 697 F.3d 604, 607 (7th Cir. 2012) (citing Section 1396a(a)(10) and noting that "several circuit courts have held that the Medicaid provision at issue creates an enforceable federal right"); *Watson* v. *Weeks*, 436 F.3d 1152, 1155 (9th Cir. 2006) (relying on § 1396a(a)(10)), *cert. denied sub nom. Goldberg* v. *Watson*, 549 U.S. 1032 (2006); *Westside Mothers* v. *Haveman*, 289 F.3d 852, 863 (6th Cir. 2002) (relying on § 1396a(a)(10)). These courts, like the court below, found a right enforceable under Section 1983 based solely on these provisions' guarantees that States must provide "medical assistance," as defined in the statute, to "all [eligible] in-

dividuals." They did not find it necessary to determine in addition that the particular statutory provision that the State was alleged to have violated—defining the State's obligation to provide the particular type of medical care or establishing the eligibility standard—itself conferred a right enforceable under Section 1983.

For example, the question in *Bontrager* was whether the State's $1,000 annual limit on dental services violated its obligation under Section 1396a-(a)(10) to provide "medical assistance." The Seventh Circuit held that Section 1396a(a)(10)(A)'s obligation that a State "mak[e] medical assistance available" by itself created an enforceable right. *Bontrager,* 697 F.3d at 606-07. It then went on to analyze the question whether the cap on dental services was permissible based on the statutory and regulatory provisions defining that standard. *Id.* at 608-11.

Similarly, in *Watson*, the court found that the plaintiffs' challenge to the State's determination that they were ineligible for certain home and community based services was cognizable under Section 1983 based on the guarantee in Section 1396a(a)(10), even though their eligibility for those services was dependent on another provision—Section 1396n(c). 436 F. 3d at 1155. Again, the court did not determine whether the latter provision created a right enforceable under Section 1983; the right created by Section 1396a(a)(10) was sufficient to support a private right of action.

Fourth, petitioners did not contend below, and cannot argue here, that whether these provisions confer an enforceable right on the individual plaintiffs depends on the meaning of Section 1396p(d)(4). The Third Circuit's approach—finding a Section 1983

right based solely on the Medicaid statute's guarantees of "medical assistance" to "all [eligible] individuals"—accords with the well settled precedent just discussed.

In sum, because the court below concluded that the *individual* plaintiffs may invoke Section 1983 to challenge Pennsylvania's Section 1414—on the basis of the rights created by Sections 1396a(a)(8), 1396a(a)(10), and 1396d(a)—and petitioners have not sought review of that determination, the questions presented by petitioners are immaterial to the outcome of this case. With the individual plaintiffs' cause of action unchallenged, it is irrelevant whether either Section 1396p(d)(4) or the Supremacy Clause provides an alternative cause-of-action mechanism. Indeed, petitioners have identified nothing at stake for them—let alone of any broader importance—that turns on this distinction.

B. Petitioners Have Not Sought Review Of The Court of Appeals' Separate Holding That Section 1396a(a)(18) Confers A Right On The Trust Plaintiffs Enforceable Under Section 1983.

The court of appeals concluded that Section 1396a(a)(18) confers upon the trust plaintiffs a right enforceable under Section 1983. It observed that the language of this section—"[a] State plan for medical assistance must * * * comply with the provisions of section 1396p of this title with respect to * * * treatment of certain trusts"—"parallels" the language of Section 1396(a)(8), providing that "[a] State plan for medical assistance must * * * provide * * * that [medical] assistance shall be furnished with reasonable promptness to all eligible individuals." Pet. App. 34a & n.16. Because it had held that the latter provi-

sion conferred enforceable rights on individuals, it concluded that the former provision confers rights upon the trusts. *Ibid*.

To be sure, the court went on to reject petitioners' "counterargument" that the Section 1396p(d) rules are not mandatory and that the *Blessing* standard therefore was not satisfied. Pet. App. 34a-35a. It stated "[b]ecause we already have concluded that the special needs exemptions are mandatory, we must reject this argument." *Id.* at 35a.

But the fact that the court below found it convenient to resolve the issue in that manner—because it already had addressed the underlying merits issue in the case—does not mean that the cause-of-action inquiry is dependent on the underlying merits of the plaintiffs' claim. Here, because Section 1396a(a)(18) plainly confers a right—in the same manner as the provisions relied upon by the individual plaintiffs (see pages 14-15, *supra*)—the court below could have found a cause-of-action-creating right without addressing the merits.

A simple example illustrates the point. Assume that a statute creates two classes of individuals, those entitled to a government benefit and those who will not receive the benefit. The statutory standard, "chronically ill," requires further interpretation. Surely a cause of action would be available to anyone who could advance a good faith legal argument that he or she fell within the statutory standard, even though some of those individuals likely would lose their claims on the merits.

That is the approach taken recently by the Eighth Circuit in a case involving this very statutory provision. In *Center For Special Needs Trust Admin-*

istration, Inc. v. *Olson*, 676 F.3d 688 (8th Cir. 2012), the court considered whether an individual was disqualified from receiving Medicaid benefits as the result of an allegedly improper transfer of funds to a special needs trust and whether those funds could be claimed by the State as reimbursement for Medicaid expenses. The court held that the statute conferred a right enforceable by the trustee under Section 1983, because it contained mandatory language, but that the plaintiff was not protected by the right and therefore was obliged to turn over the funds. *Id.* at 700-703.

Similarly, when a plaintiff asserts a Section 1983 claim based upon an alleged violation of the Constitution, the availability of a cause of action does not depend on whether the constitutional claim is meritorious. It is enough that the provision of the Constitution invoked contains some mandatory obligation and a standard capable of application by the courts. See *Graham* v. *Connor*, 490 U.S. 386, 394 (1989) ("§ 1983[] analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. * * * The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right.") (citing *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979)). This approach applies to statutory rights as well.

For that reason, Section 1396a(a)(18) provides a critical ingredient in the Section 1983 inquiry. It makes clear that Congress intended the rules set forth in Section 1396p(d) to be binding, and that persons whose interests are directly affected by the interpretation of those rules were meant to be protected, just as what the courts have concluded with

respect to the other mandatory requirements of Section 1396a(a).

That is all that is required to find a right enforceable under Section 1983. Otherwise the cause-of-action analysis would collapse into the merits determination in every case.

Petitioners do not allege that any court of appeals has held that Section 1396(a)(18) does not confer a right enforceable under Section 1983. Moreover, as we have already discussed (see pages 14-15, *supra*), numerous other courts of appeals have found Section 1983 private rights of action arising from provisions of Section 1396a indistinguishable from paragraph (a)(18).

The petition, of course, ignores Section 1396a-(a)(18) and discusses only Section 1396p(d). That narrow focus ignores the court of appeals' reliance on multiple provisions in determining that the trust plaintiffs were entitled to invoke Section 1983. And it provides yet another reason for denying review of the gerrymandered question that petitioners have presented for review.

C. The Question Whether Section 1983 Provides A Cause Of Action To Enforce Section 1396p(d)(4) Does Not Warrant Review.

Given the multiple independent bases for upholding the court of appeals' Section 1983 cause-of-action determination, there is no reason for this Court to review the questions presented. In addition, the first question presented itself does not warrant review. The conflict is shallow, and the single conflicting decision, rendered by the Tenth Circuit, rests on a prior ruling containing only three sentences of analysis

that appear to conflict with another Tenth Circuit ruling. The petition does not even attempt to demonstrate the issue's importance. And the decision below is correct. There simply is no reason for the Court to review the narrow question whether Section 1396p(d)(4) creates an enforceable right.

1. Any disagreement among the courts of appeals is tentative and underdeveloped.

Petitioners claim that the Third Circuit's decision in this case conflicts with decisions of the Second and Tenth Circuits on the question whether Section 1983 provides a private right of action to enforce respondents' rights under Section 1396p(d)(4). But that is a question the Second Circuit expressly *declined* to address. For its part, the Tenth Circuit dedicated just three sentences to the issue, and the decision on which petitioners rely appears to conflict with another ruling by the same court. Indeed, the Eighth Circuit, after reviewing the decision below and the ruling by the Tenth Circuit, recently agreed with the court below on the issue. Any disagreement among the courts of appeals is therefore tentative and underdeveloped.

First, contrary to petitioners' assertion (Pet. 11), the Second Circuit has not addressed the question whether Section 1396p(d)(4) creates a right enforceable under Section 1983. In fact, that court in *Wong* v. *Doar*, 571 F.3d at 254 n.9, expressly declined to address the issue.

Second, although one panel of the Tenth Circuit held that Section 1396p(d)(4) does not create a right enforceable under Section 1983, it did not fully analyze the Section 1983 question, and subsequent

Tenth Circuit panels have indicated skepticism about the ruling.

The ruling on which petitioners rely, *Hobbs* v. *Zenderman*, 579 F.3d 1171 (10th Cir. 2009), rested on a prior Tenth Circuit decision, *Keith* v. *Rizzuto*, 212 F.3d 1190 (10th Cir. 2000). *Keith* addressed the merits of the plaintiff's claim that Section 1396p(d) requires States to exclude from the Medicaid eligibility determination any assets in a special needs trust that complies with paragraph (d)(4).

The court rejected the plaintiff's contention based entirely on the following analysis:

> Section 1396p(d)(3) does not merely "allow" states to count trusts in determining Medicaid eligibility; it *requires* them to do so. Section 1396p(d)(4) therefore provides an exception to a requirement. States accordingly need not count income trusts for eligibility purposes, but nevertheless may, like Colorado, opt to do so.

Keith, 212 F.3d at 1193.

The *Hobbs* court concluded that *Keith*'s interpretation of Section 1396p(d) precluded a finding that the statute "impose[s] a binding obligation on the State" because *Keith* held that the provision did not impose any obligation on the States. 579 F.3d at 1179-1181. But *Hobbs* expressed doubt about the holding in *Keith*, following it only because the ruling was binding on the subsequent panel: "Although the statute might have been read in the first instance to require States to exempt special needs trusts, that construction is foreclosed by our opinion in *Keith*." 579 F.3d at 1180; see also *ibid*. ("we are not free to adopt the reasoning" of courts that have found an en-

forceable right "even if we were to agree with that approach"); *id*. at 1181 ("[w]e are compelled to conclude" that Section 1396p(d) does not create an "enforceable" right).

Moreover, *Keith*, and therefore *Hobbs*, are in considerable tension with the Tenth Circuit's decision in *Reames* v. *Oklahoma*, 411 F.3d 1164 (10th Cir. 2005). The question there was whether the assignment of social security disability payments to a Section 1396p(d)(4) special needs trust prevented consideration of those funds in calculating the amount of the beneficiary's Medicaid co-payment.

The *Reames* court first observed that a "Special Needs trust generally authorizes protection of assets * * * from Medicaid determinations." 411 F.3d at 1168. It stated that paragraph (d)(4)(A) "enables disabled individuals under age 65 to contribute 'assets' to a Special Needs Trust for their benefit without having such assets treated as countable assets for Medicaid purposes." *Ibid.*

That principle was not dispositive in *Reames* because of special rules relating to income received by the beneficiary: "the federal regulation governing Medicaid co-pay mandates that a state agency must reduce its payments to the institution in an amount equal to the institutionalized Medicaid recipient's income." 411 F.3d at 1169. Because the disability benefits were not assignable, they were received by the beneficiary before being transferred to the trust, and therefore could be considered in calculating a beneficiary's co-payment obligation. *Id*. at 1171-1173.

But the *Reames* court plainly expressed a view of the meaning of Section 1396p(d) directly opposite from the one adopted in *Keith*, and relied upon in

Hobbs—that the provision in fact does bar considering the assets of special needs trusts in making eligibility determinations. That is likely in part because the *Reames* court was aware of the federal government's interpretation of the statute (see 411 F.3d at 1171-1173), while the *Keith* court was not.

In view of the skepticism of the *Hobbs* panel and the conflicting views expressed in *Reames*, it cannot be said that the Tenth Circuit has reached a definitive decision regarding Section 1396p(d).

That is especially true in light of the recent Eighth Circuit decision expressly rejecting the Tenth Circuit's analysis (and adopting the holding of the court below) that Section 1396p(d)(4) does create a right enforceable under Section 1983. In *Center For Special Needs Trust Administration*, the Eighth Circuit specifically rejected the Tenth Circuit's reasoning on the ground that it was inconsistent with the statutory text. 676 F.3d at 700 & n.2.

Given the inconsistency among Tenth Circuit decisions and the paucity of the reasoning in *Keith*, and the subsequent contrary decisions by the Eighth Circuit and the court below (including the court below's reliance on Section 1396a(a)(18)), there is substantial doubt that the Tenth Circuit will continue to adhere to its view. Certainly there is no reason for this Court to intervene now, before the Tenth Circuit has had a chance to consider these subsequent decisions by its sister courts of appeals.

2. The question whether Section 1396p(d)(4) creates an enforceable right is not sufficiently important to justify this Court's attention.

There is no indication that the issue raised by the petition is important or recurring. Petitioners do not make even the slightest effort to show that the issue of the existence of a cause of action under Section 1396p(d) is relevant to a significant number of pending cases or will arise so frequently in the future that review by this Court is warranted now.[4]

3. The decision below is correct.

Further review also is not warranted because the Third Circuit's decision is correct. Section 1396p-(d)(4) satisfies the *Gonzaga* standard, which requires that the statutory provision confer a right on the particular plaintiffs, that the statutory standard is not so vague and amorphous that it is beyond the competence of the courts to apply, and that the statute impose a binding obligation. *Gonzaga*, 536 U.S. at 282; *Blessing*, 520 U.S. at 329.

To begin with, paragraph (d)(4)(C) plainly is intended to benefit respondents here. As the Eighth Circuit explained, this paragraph regulates how the non-profit trustees manage their business "and does not solely tell the state how to act." *Ctr. For Special Needs Trust Admin.*, 676 F.3d at 699. The non-profit

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[4] To the extent there is any doubt on this point, the Court may wish to invite the views of the Solicitor General if it believes it would benefit from an additional perspective on whether the issue has any importance, given the federal government's role in the Medicaid program and its expressed views on the meaning of this provision.

trustees benefit from (d)(4)(C) because this paragraph allows them to retain trust corpus to apply towards operating expenses. Of course, this paragraph also benefits the individual beneficiaries: by exempting pooled trust assets, paragraph (d)(4)(C) allows disabled individuals a modest supplement to their quality of life without sacrificing government medical benefits.

In addition, there is nothing "vague and amorphous" about the rights protected by this paragraph. Paragraph (d)(4)(C) lists specific and judicially manageable criteria for determining which trusts qualify for the exemption. For example, these pooled trusts must be "managed by a nonprofit association" and "established solely for the benefit of [disabled] individuals" "by the parent, grandparent, or legal guardian." 42 U.S.C. § 1396p(d)(4)(C).

This language is entirely unlike the provisions that this Court previously has found too vague to create enforceable rights under Section 1983. For example, in *Suter* v. *Artist M.*, 503 U.S. 347 (1992), this Court held that there was no cause of action to enforce a statutory requirement that states have a "plan" to make "reasonable efforts" to keep children out of foster homes. *Id.* at 351. And in *Blessing*, this Court found that there was no private right of action to enforce a "substantial compliance" standard. 520 U.S. at 335. By contrast, (d)(4)(C) contains explicit, bright-line rules.

Finally, paragraph (d)(4)(C) unambiguously imposes a binding obligation on the states. As the Eighth Circuit has noted, the "provision here is couched in mandatory terms: 'This subsection *shall not* apply to any of the following trusts * * *.'" *Ctr. For Special Needs Trust Admin.*, 676 F.3d at 700

(quoting 42 U.S.C. § 1396p(d)(4)). In addition, paragraph (d)(1) states that "[f]or purposes of determining an individual's eligibility for, or amount of, benefits under a State plan * * *, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual."

Section 1396a(a)(18) confirms that subsection (d) imposes mandatory duties by providing that states "must" comply with the "provisions of section 1396p * * * with respect to * * * treatment of certain trusts." Moreover, Section 1396p(d) does not contain language that is "precatory"; on the contrary, the language clearly imposes a mandatory obligation, it is the content of that obligation that is unclear. The mandatory obligation is all that is required—a court need not determine that the plaintiff will prevail in order to find the cause-of-action test satisfied. See pages 17-18, *supra*.

Even if, contrary to our submission, the cause-of-action issue merges with the merits, the decision below was clearly correct, for three reasons.

First, the multiple references in the statutory language to the exclusion of trusts described in paragraph (4)—both in paragraph (1) and in the introductory clause of paragraph (4)—make clear that Congress sought to place special needs trusts in a separate, protected category in order to accomplish its goal of providing certainty for Medicaid beneficiaries seeking to ensure funds to cover minor expenses. Leaving the matter to the discretion of the States does not accomplish that goal.

Second, the enumeration of eligibility criteria is clear, specific, and detailed—indicating that Congress intended to provide "a federal definition for

what constitutes a special needs trust." Pet. App. 32a. It would be bizarre for Congress to enumerate such specific criteria if it expected the States to simply come up with their own.

Third, the statutory structure is inconsistent with construing the provision as a grant of complete discretion to the States. Paragraph (5), which grants the States some discretion with regard to trust exemptions, places firm limits on that discretion. States must "establish procedures (in accordance with standards specified by the Secretary)" to grant waivers from the trust-counting rules in cases of "undue hardship * * * as determined on the basis of criteria established by the Secretary." 42 U.S.C. § 1396p(d)(5). Such tight control over the States' administration of the waiver process is inconsistent with the notion that Congress would have given the States free reign to totally disregard its definitions of exempt trusts.

Common sense also indicates that Section 1396p-(d)(4)(C) must be enforceable under Section 1983. The paragraph in question tells private parties how to conduct their affairs. Under this paragraph, a pooled trust can be exempted from Medicaid eligibility calculations only if the settlor and the trustee comply with the detailed requirements in the statute. The statute specifies (1) who can be a beneficiary of this kind of trust, (2) which individuals can establish a trust, and (3) how funds can be treated. These requirements are, in effect, instructions for private parties. If State law places different burdens on regulated parties, they should not have to choose

between risking substantial legal penalties and complying with a law they believe is preempted.[5]

Fourth, the federal government has interpreted the provision in the same way as the court below. See pages 6-7 , *supra*. Given the very substantial deference accorded to the Secretary's interpretations in this area, that factor weighs strongly in favor of the holding below.

In sum, even if the cause of action turns on the merits of respondents' claim, the decision below was plainly correct.

D. The Petition Does Not Present The Question Whether Section 1396p(d)(4)-(C) Preempts State Law.

The petition does not present the underlying merits question in the case—that is, whether Section 1396p(d)(4)(C) preempts State law. It seeks review only of whether "Section 1396p(d)(4) impose[s] a mandatory obligation on States * * * such that Medicaid recipients and their trusts may pursue a private cause of action to enforce this provision." Pet. i. Petitioners' *amici*, which focus solely on the issue as to whether Section 1396p(d)(4) creates rights enforceable under Section 1983, confirm the point. *Brief of* Amici Curiae *State of Michigan and 16 Other States for Petitioners*, No. 12-470 at 8-10.

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[5] There is no indication—and no claim by petitioners—that Congress has expressly or impliedly precluded enforcement under Section 1983. See *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). In any event, the burden of showing preclusion is on the defendant, and they have waived the argument. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107-08 (1989).

Even if the petition could be construed as raising the underlying merits question, that issue still would not warrant review. As we have discussed, the issue has been addressed by only two courts of appeals and the only conflicting decision—the Tenth Circuit's ruling in *Keith*—has been viewed skeptically within the Tenth Circuit, is in considerable tension with another decision by that court, and was expressly rejected by the court below. There simply is no clear conflict warranting this Court's intervention.[6] Petitioners do not even try to demonstrate that the merits question is important—that there are large numbers of pending or anticipated cases that will turn on the question presented. They claim that the treatment of trusts remained problematic after Congress took action in 1993, but rely only on a report that is eighteen years old and that relies entirely on pre-1993

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[6] The merits issue before the Second Circuit in *Wong* related to the separate question—not presented on the facts of this case—whether Section 1396p(d) allows consideration of social security disability payments in calculating the amount of the co-payment owed by a Medicaid beneficiary. *Wong*, 571 F.3d at 251 (Medicaid statute "requires a state to make two separate determinations: (1) whether an individual is 'eligib[le] for' Medicaid and, if so, (2) the 'extent of' benefits to which he is entitled"; the "sole issue on this appeal relates to the * * * 'post-eligibility' determination. Specifically, Wong submits that defendants erred as a matter of law when, in calculating his Medicaid benefits, they treated as income the monthly [social security disability insurance] benefits that he places into a Special Needs Trust"); see generally pages 6-7 note 2, *supra* (discussing the federal government's positions on these two distinct issues).

data. Pet. 12-13 & n.8.[7] And, as we have just discussed, the court of appeals' holding was correct.

E. This Case Is Not An Appropriate Vehicle For Consideration Of The Supremacy Clause Issue.

Finally, because of the multiple ways in which respondents have demonstrated private causes of action (see pages 13-29, *supra*), this case is not an appropriate vehicle to resolve the question presented with respect to the Supremacy Clause. Regardless of the outcome of that issue, respondents possess a cause of action to challenge the State law in question here.[8] Thus, because resolution of the question will have no bearing on the outcome of the case, certiorari is not warranted. See *Douglas* v. *Indep. Living Ctr.*, 132 S. Ct. 1204 (2012) (granting certiorari on the Supremacy Clause question, before vacating and remanding without consideration).

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] The arguments advanced by the amici relate generally to lawsuits seeking to enforce the requirements of the Medicaid law, not to Section 1396p(d). Indeed, the petition notes that several other States have adopted laws regulating special needs trusts, but only one of those States joined the amicus brief. See Pet. 13 & n.9.

[8] The court of appeals did not agree with the district court's conclusion that the Supremacy Clause cause of action was essential for part of respondents' case. Pet. App. 35a n.17 (characterizing the district court's view of the complaint as "overly narrow").

Respectfully submitted.

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