No. 21-2325

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SAINT ANTHONY HOSPITAL,
Plaintiff-Appellant,

v.

THERESA EAGLESON, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Illinois
Hon. Steven C. Seeger
1:20-cv-02561

SAINT ANTHONY HOSPITAL'S RESPONSE TO PETITIONS FOR REHEARING *EN BANC*

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2325

Short Caption: Saint Anthony Hospital v. Theresa Eagleson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Michael L. Shakman Date: July 21, 2021

Attorney's Printed Name: Michael L. Shakman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Edward W. Feldman Date: September 9, 2021

Attorney's Printed Name: Edward W. Feldman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: /s/ Mary Eileen Cunniff Wells Date: July 21, 2021

Attorney's Printed Name: Mary Eileen Cunniff Wells

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: /s/ William J. Katt Date: September 9, 2021

Attorney's Printed Name: William J. Katt

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Rachel Ellen Simon Date: October 6, 2021

Attorney's Printed Name: Rachel Ellen Simon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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INTRODUCTION

Petitioner HFS disagrees with how the majority answered a question of first impression, and on that basis seeks *en banc* review. Doc. 68, HFS Pet'n 1-3. "But the function of *en banc* hearings is not to review alleged errors for the benefit of losing litigants." *HM Holdings v. Rankin*, 72 F.3d 562, 563 (7th Cir. 1995) (cleaned up). "Given the 'heavy burden' that *en banc* rehearings impose on an already overburdened court, such proceedings are reserved for the truly exceptional cases." *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (*per curiam*) (cleaned up). This is not such a case.

The majority's reading of 42 U.S.C. §1396u-2(f) ("Section u-2(f)") is both reasonable and correct. It conflicts with no ruling of this Court, the Supreme Court, or another Court of Appeals. Quite the contrary. The holding is consistent with a line of this Court's cases applying the three-part test dictated by Supreme Court precedent for determining whether private litigants can bring suits under 42 U.S.C. § 1983 for violations of certain Medicaid Act provisions. That no federal circuit had applied that test to Section u-2(f), *see, e.g.,* HFS Pet'n 1, confirms the absence of any conflict. HFS simply disagrees with how the majority construed the statute and applied the governing standards. That does not a "conflict" make.

HFS's "importance" argument fares no better. This case is important, but it is not *exceptionally* so in its present posture. The majority partially reversed a dismissal on the pleadings, and reversed denial of a motion to supplement the complaint to add a due-process claim that does not rest on Section u-2(f). It ordered

no relief. Much of what HFS complains about is what it imagines (incorrectly) might go into a remedial order after further proceedings on remand. Those proceedings will determine whether and what impact the case may have. "Exceptional" impact is neither obvious nor ripe. Exceptional importance can only be determined if a remedy is ordered on a full factual record. It cannot be determined on reversal of a dismissal order that merely directed that the case proceed in the district court. There is certainly no conflict with the decision of another circuit, the one example of exceptionality in the rule. *See* Fed. R. App. P. 35(b)(1)(B).

The petitioning MCOs—insurance company intervenors who have neither brought claims nor had claims brought against them in this case—identify no conflicting law. Their argument that Saint Anthony Hospital's claims against HFS should be arbitrated with them, instead, is hardly an issue of exceptional importance, nor one that the district court even decided. Doc. 60, Op. 44 ("The district court did not address this issue, and we decline to do so here as well.").

This case should proceed in the district court, not only on the Section u-2(f) claim the majority found viable on the pleadings, but also on Saint Anthony's due-process claim that is independent of any of the issues raised in the Petitions. HFS and the MCOs do not and cannot claim that the majority's decision to permit addition of the due process claim is inconsistent with precedent or presents a question of exceptional importance. It is a routine pleadings ruling applying well-settled principles allowing amendments to a complaint early in a lawsuit.

The pending Supreme Court appeal in *Talevski* does not support delaying this case, particularly where Saint Anthony's due-process claim will be unaffected by *Talevski*. If *Talevski* is decided in a manner that impacts the majority's decision that Section u-2(f) is privately enforceable, the district court can address it at that time.

I. The Majority Opinion Presents No Conflicts.

a. HFS's Petition Violates Rule 35(b)(1)(A).

Rule 35(b)(1)(A) of the Federal Rules of Appellate Procedure states that a petition for rehearing *en banc* based on purported conflicting decisions,

> … must begin with a statement that … the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (*with citation to the conflicting case or cases*)….

Fed. R. App. P. 35(b)(1)(A) (emphasis added). In violation of this mandate, HFS's Petition begins not with such a statement, but a mischaracterization of the majority opinion.

b. The Majority Correctly Applied the Precedent the Parties Agreed Should Apply: Blessing v. Freestone.

In its appellate brief, HFS agreed with Saint Anthony that the Supreme Court has distilled its guidance on private rights of action into a three-factor test set forth in *Blessing v. Freestone*, 520 U.S. 329 (1997). *See* Doc. 44, HFS Brief ("The inquiry as to whether a federal statute creates a private right that may be enforced under section 1983 begins with the three factors articulated in *Blessing v. Freestone*, 520 U.S. 329 (1997)."). *Blessing*'s three-factor test is the standard for analyzing private rights in this context, as this Court has repeatedly held. *See, e.g.*, *Talevski v. Health & Hosp. Corp.*, 6 F.4th 713, 718 (7th Cir. 2021) (applying *Blessing* and finding private

right enforceable under § 1983), *cert. granted*, 142 S. Ct. 2673 (2022); *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 820 (7th Cir. 2017) (same); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972-73 (7th Cir. 2012) (same); *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 606-07 (7th Cir. 2012) (same). *See also Gonzaga University v. Doe*, 536 U.S. 273, 282 (2002) ("*Blessing* … set forth three 'factors' to guide judicial inquiry into whether or not a statute confers a right…").

Yet HFS omits any reference to *Blessing* in its Petition, and does not argue that the majority's ruling conflicts with *Blessing*. Indeed, the majority unquestionably and explicitly analyzed Section u-2(f) through the lens of the *Blessing* factors, just as HFS said it should. *See* Op. 13-34. HFS's tacit admission that the majority applied the correct standard confirms that *en banc* review should be denied.

c. The Majority Properly Analyzed the Text of Section u-2(f).

The plain text of the majority opinion belies HFS's repeated statement that the majority "did not even attempt to analyze § u-2(f)'s text." *E.g.*, HFS Pet'n 7. The majority devoted much of its opinion to that very task. It began its analysis of the *Blessing* factors by reciting the full text of both Section u-2(f) and a related section incorporated into it, *see* Op. 13-14, and it went on to carefully analyze various relevant aspects of that statutory text. For example, the majority stated:

- "The text requires MCOs to contract that they 'shall make payment to health care providers … on a timely basis.' § 1396u-2(f)." Op. 15.

- "The statutory text explains that payment must be made 'on a timely basis *consistent with the claims payment procedures* described in section 1396a(a)(37)(A) of this title.' § 1396u-2(f) (emphasis added). Those procedures include the 30/90 pay schedule." Op. 16.
- "The statutory text specifies that the State 'shall provide' that MCOs 'shall make payment to health care providers … on a timely basis.' 42 U.S.C. § 1396u-2(f). The focus of section 1396u-2(f) is not 'two steps removed' from the interest of providers. Its focus is directly on the interest Saint Anthony asserts here: ensuring that providers receive timely payment from MCOs." Op. 20.
- "And the provision is not concerned only with whether MCOs in the aggregate pay providers on the 30/90 pay schedule, but whether individual providers are receiving the payments in the timeframe promised. We see this in the provision's close attention to provider-specific exemptions from the 30/90 pay schedule. Section 1396u-2(f) says that its mandate applies 'unless the health care provider and the organization agree to an alternate payment schedule.' It establishes a personal right to timely payment, which all providers are entitled to insist upon." Op. 20.
- "Section 1396u-2(f) contains mandatory language, however: 'A [State contract] … with a medicaid managed care organization *shall* provide that the organization *shall* make payment to health care providers … on a timely basis….' 42 U.S.C. § 1396u-2(f) (emphasis added). The double use of 'shall'

rebuts the notion that the State's obligation is anything less than mandatory." Op. 22.

- "The provision's mandatory language, coupled with the additional oversight and reporting responsibilities, supports the reading that section 1396u-2(f) must be doing more than imposing merely the formality of contract language. Providers' right to timely payment must exist in practice." Op. 26.

The majority *also* appropriately considered related statutory provisions—like 42 U.S.C. §1396u-2(h)(2)(B), which describes Section u-2(f) as the "rule for prompt payment of providers"[1]—to ensure its interpretation was consistent with the broader context and purpose of the statute. That does not mean it ignored the text of Section u-2(f) when it plainly did not.

d. The Majority's Ruling Does Not Conflict with Any Cases.

HFS's concession that this court is the first federal circuit to construe Section u-2(f), *e.g.,* Doc. 68, HFS Pet'n 1, confirms the absence of any conflicting Supreme Court or Court of Appeals decision, let alone one justifying *en banc* review. Indeed, the MCOs do not even argue that the majority's analysis conflicts with any cases. Instead, HFS argues that the majority's ruling conflicts with general provisions of various general Supreme Court decisions. But, even here, it provides no clear statement of which decision HFS contends the majority's ruling conflicts with, as required by Rule 35(b)(1)(A). We surmise that HFS contends the majority conflicts

[1] The dissent dismissed this statutory text of 42 U.S.C. §1396u-2(h)(2)(B) as a "heading or title" not worthy of the force of law, Op. 53, but it is neither. It is in the body of the statute. *See id.*

with the five cases it cites on page 1, about which HFS accuses the majority of "respect[ing] none." HFS Pet'n 1. That is not a conflict argument for purposes of Rule 35(b)(1)(A). Rather, it is an argument that the majority misapplied the governing standard to this particular statute. Such an argument does not justify *en banc* review. Moreover, it is wrong.

Contrary to HFS Pet'n 1, 9, the majority conflicts with neither *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), nor *Gonzaga*. HFS grounds its "conflict" argument on its view that Section u-2(f) is not sufficiently "unambiguous" in conferring a private right. That does not describe a conflict with another decision. HFS simply disagrees with the majority that "Congress spoke sufficiently clearly" (Op. 27) to meet the governing standard.

Indeed, the majority correctly applied *Gonzaga*, which interpreted *Pennhurst*. *Gonzaga* clarified that for a statute to "unambiguously" confer a private right, *Blessing*'s first factor—whether Congress "intended that the provision in question benefit the plaintiff," *Blessing*, 520 U.S. at 340—is only met where the statute is "'phrased in terms of the persons benefited,'" *Gonzaga*, 536 U.S. at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979)), as opposed to some decisions interpreting *Blessing* that had found private rights where the plaintiff was merely "within the general zone of interest that the statute is intended to protect." *Id.* at 283. *Gonzaga*'s test is precisely the analysis the majority applied. *See, e.g.*, Op. 21 ("[Section u-2(f)] uses 'individually focused terminology,' *Gonzaga*, 536 U.S. at 287, unmistakably 'phrased in terms of the persons benefited,' *id.* at 284, quoting *Cannon*

[], 441 U.S. [at] 692 n.13[], and satisfies *Blessing* factor one."). *See also* Op. at 20-21 (analyzing text of Section u-2(f)).

HFS also claims the majority did not "respect[]" *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853, 1867 (2019), and *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51-52 (2008). *See* HFS Pet'n 1-2. Neither case has anything do with Medicaid or even private rights of action generally. If anyone "disrespected" the cases, it was HFS, as it cited neither in its appellate brief. *See* Doc. 44, HFS Brief. In its Petition, HFS merely cites them for boilerplate principles of statutory interpretation that HFS contends the majority violated. But again, this is not a conflict between the cases. It is HFS's disagreement with how the majority engaged in statutory construction. Such disagreements provide no reason for *en banc* review. *HM Holdings*, 72 F.3d at 563.

The majority also respected *Cannon's* requirement to look "'to the language of the statute itself.'" HFS Pet'n 1-2 (quoting *Cannon*). As shown above at 4-6, that is precisely what the majority did.

II. This Case Is Not of "Exceptional Importance" for *En Banc* Purposes.

Every case is important to the parties. Saint Anthony would like to be timely and transparently paid for the medical services it provides to Medicaid patients. HFS would prefer to hand-off responsibility to the MCOs and not to be required to pay attention to whether the MCOs are complying with the prompt payment requirements of the Medicaid Act. To be sure, this case does have ramifications beyond the parties, as the problem of untimely payments is systemic and places safety

net providers like Saint Anthony in financial jeopardy, threatening their ability to serve Medicaid patients, as the majority recognized. Op. 36 ("This is a hard case with high stakes for the State, Medicaid providers, and Medicaid beneficiaries."). But federal courts frequently hear high stakes cases. High stakes do not make this case "exceptional" so as automatically to warrant *en banc* review.

HFS tries to conjure exceptionality by mischaracterizing Saint Anthony's claim and the remedy it seeks. The majority's decision will not require "state Medicaid directors . . . to duplicate the claims-processing functions performed by MCOs," HFS Pet'n 12, and Saint Anthony does not seek such relief. Monitoring and oversight are not "duplication," and Saint Anthony does not seek to turn HFS into a claims-processing department or a federal district court into a claims-processing supervisor. Section u-2(f) requires "clean" claims—those that are fully documented when submitted—to be paid within a fixed timeframe. A claim cannot be paid unless it is "clean," and must be paid if it is "clean." Thus, once a claim is paid, it was by definition "clean" at the time it was submitted and no further information was requested. Data on when each paid claim was last submitted and was paid, plus basic arithmetic, would enable HFS to determine if MCOs are meeting the federal statutory benchmarks. If MCOs are not, HFS has enforcement mechanisms at its disposal to encourage better performance. *See*, e.g., Op. 25-26. None of that requires HFS or the courts to step into the MCOs claims-processing shoes. Saint Anthony is not asking HFS to review every claim to see if MCOs correctly decided they were "clean" or unclean.

Contrary to the "claim-by-claim" strawman that HFS and the MCOs (Doc. 70, MCO Pet'n 18-19) erect, Saint Anthony's Section u-2(f) claim is not about whether any particular claim *should* be paid, or in *what* amount. It is about the inadequacy of the State's oversight of the *timing* of *payments*, i.e., when clean claims were submitted and when they were paid. MCOs can still dispute claims involving unenrolled individuals, uncovered services, improperly classified treatments, or any other defects, and MCOs are responsible for calculating the amount due on each claim. HFS Pet'n at 13. But, MCOs must also *actually* pay the claims that are properly submitted, and must do so on the schedule Congress prescribed. The majority simply held that HFS has a statutory oversight duty to ensure those payments are being made on that schedule. It can do so with post-hoc monitoring and enforcement. *See also*, Doc. 53, Saint Anthony Reply 30-32.

The procedural posture of this case contradicts the petitioners' exceptionality claims. The majority simply returned the case to the district court for Saint Anthony to be given an opportunity to prove the statutory violation, as the majority stated. Op. 36, 44. HFS's and the MCOs' arguments ignore that Saint Anthony's other, independent claim will proceed as well—its due process claim, as to which neither seeks *en banc* review.

Much of the *angst* HFS proffers concerns not the viability of the *claim*, but the parade of horrible imagined *remedies* HFS speculates the district court might impose if Saint Anthony prevails. But the nature and scope of any remedy Saint Anthony might obtain are unknown. If Saint Anthony secures a remedy, HFS can appeal, and

if the remedy is truly of exceptional importance, the full court can consider *en banc* review if a panel affirms it. This case is far distant from that point now.

The MCOs' focus on arbitration is both inapt and unexceptional. *See* MCO Pet'n 8-17. The majority did not "reject[]" arbitration. *Id.* 12. It held that "[b]oth HFS and the MCOs have their distinct obligations to ensure timely payment for providers[,and] Saint Anthony is entitled to seek relief against HFS as well as against the MCOs." Op. 44. As the plaintiff, Saint Anthony choose to sue HFS, and the majority found its theory viable. That choice does not undermine hypothetical arbitrations between Saint Anthony and any particular MCO.[2]

The MCOs' defense of the nobility of arbitration is entirely beside the point. *See* MCO Pet'n 10-17. HFS—a state agency—*cannot* be forced into arbitration. If Saint Anthony has a viable claim against HFS, as the majority found, that claim *cannot* be arbitrated. This case does not present the question of whether arbitration is a favored forum. Arbitration is simply not an option for the claims between Saint Anthony and HFS. And the majority (like the district court) explicitly did not address the MCO's highly dubious theory that arbitration agreements to which HFS is not a party should be enforced in a manner that prevents Saint Anthony from bringing a viable federal statutory claim against HFS. Op. 44 ("The district court did not

[2] One MCO, Meridian, did initiate arbitration against Saint Anthony in response to this case. The arbitrator stayed the arbitration because Meridian has not complied with contractual preconditions to initiating an arbitration and was not entitled to proceed. R96-1, R97. In more than a year since, Meridian has made no effort to cure its noncompliance. Its goal is not actually to arbitrate anything. Its goal is to impede Saint Anthony's rights against HFS.

address this issue, and we decline to do so here as well."). *En banc* review of an undeveloped issue ruled on by neither the district court nor the panel makes no sense.

The MCOs grossly mischaracterize the majority's discussion of arbitration, which was in the context of whether Congress *foreclosed* a private right of action via "a comprehensive enforcement scheme that is incompatible with individual enforcement." Op. 36 (quoting *Gonzaga*, 536 U.S. at 285 n.4). The majority held that nothing in the Medicaid statute—which does not even mention arbitration—suggests Congress intended provider-MCO arbitrations to be a "comprehensive enforcement scheme" that foreclosed private enforcement against HFS. *Id.* 34-36. Thus, the MCOs have it backwards when they say the majority "points to nothing in the legislative history of Medicaid's prompt-pay rule that suggests Congress made a judgment that arbitration cannot effectively address disputes over MCOs' compliance with Medicaid prompt-pay rule." MCO Pet'n 11. It was HFS's and the MCOs' burden, in order to overcome *Blessing*'s presumption of a private right of action, to show that Congress set up a "comprehensive enforcement scheme" to foreclose private actions. Their failure to do so is not a reason for *en banc* review.

III. This Court Should Not Hold the Petitions Pending *Talevski*.

There is no good reason to delay justice waiting for a decision in *Talevski*, presumably to issue next spring or summer. *Talevski* does not address Section u-2(f). If the Supreme Court significantly changes its precedent on Medicaid private rights of action, those changes could affect the majority's opinion in this case. But we simply do not know at this time—and may not for up to ten months—what, if any, effect

there will be, whether positive, neutral, or negative. Waiting for the sake of waiting is unjust, particularly where the delay slows not only Saint Anthony's Section u-2(f) claim that this Court has found viable, but also Saint Anthony's due-process claim that *Talevski* will not affect. The district court can manage the case in a manner consistent with whatever is decided in *Talevski*.

Saint Anthony has not argued in this response the merits of its position because the merits are not the primary focus for determining whether *en banc* review is warranted. But the merits are relevant to HFS's request to delay further a lawsuit filed by a safety net hospital over two years ago, to address the serious problems encountered because HFS fails to monitor and enforce MCO compliance with federal statutory prompt-payment obligations. Prompt and transparent payment for Medicaid services is vital to the operation of hospitals like Saint Anthony whose patient cohort is almost exclusively Medicaid-reliant. Waiting almost another year for a Supreme Court decision that may, or may not, affect only part of this case is clearly unwarranted.

CONCLUSION

This Court should deny the Petitions for *En Banc* Review.

Dated: August 19, 2022

Respectfully submitted,

SAINT ANTHONY HOSPITAL

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CERTIFICATE OF COMPLIANCE

This response complies with the word limitations set forth in this Court's order dated August 5, 2022 (Doc. 72), because it does not exceed fifteen (15) pages.

This response also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the typestyle requirements of Fed. R. App. P. 32(A)(6) because it has been prepared in a proportionally spaced typeface (12-point Century Schoolbook) using Microsoft Word.

August 19, 2022

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 19, 2022, I electronically filed this response with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

August 19, 2022

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