IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-23037-CIV-JORDAN/O'SULLIVAN

FLORIDA PEDIATRIC SOCIETY/THE FLORIDA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS; FLORIDA ACADEMY OF PEDIATRIC DENTISTRY, INC., et al.,

Plaintiffs,

vs.

ELIZABETH DUDEK, et al.,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM ON THE EFFECT OF ARMSTRONG v. EXCEPTIONAL CHILD CARE CENTER

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Pursuant to this Court's Order Requiring the Filing of Memoranda of Law, D.E. 1313, Plaintiffs submit this Memorandum on the Effect of *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S. Ct. 1378 (2015).

INTRODUCTION

The Supreme Court's decision in *Armstrong* precludes private enforcement of Section 30(a) of the Medicaid Act, the Equal Access requirement, 42 U.S.C. § 1396a(a)(30)(A). *See infra* Section I. Accordingly, it requires dismissal of Count II of Plaintiffs' Second Amended Complaint. This is all *Armstrong* requires. In *Armstrong*, the Supreme Court rejected the Ninth Circuit's approach allowing an action under the Supremacy Clause for a suit seeking to preempt state promulgated rates as inconsistent with Section 30(a). There was no claim in *Armstrong* concerning the Medicaid Act's Reasonable Promptness and EPSDT requirements, 42 U.S.C. § 1396a(a)(8) and (a)(10)(A), or its Effective Outreach and Treatment requirements, 42 U.S.C. § 1396a(a)(43)(A), (B) & (C). There was no discussion, whatsoever, in the decision concerning such claims and whether courts have correctly found such sections create privately enforceable rights under Section 1983. As discussed below, circuit courts throughout the nation have analyzed these provisions under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), concluding without exception that these sections of the Medicaid Act create privately enforceable rights. *See infra* Section II.A.

Further, Congress has essentially ratified the existence of such private rights over several decades in repeated legislation that assumes private enforcement of these sections, as opposed to what the Court found to be more equivocal treatment of Section 30(a). *See infra* Section II.C. Thus, as explained below, *Armstrong* does not require this Court to alter its own ruling—consistent with the weight of judicial authority—that upholds Plaintiffs' claims under Sections (a)(8), (a)(10)(A), and (a)(43).

No aspect of Plaintiffs' case rests exclusively on Section 30(a). Plaintiffs litigated this suit recognizing that there was considerable judicial uncertainty as to whether Section 30(a) was privately enforceable. For that reason, Plaintiffs carefully advanced—and this Court's findings rest upon—multiple grounds under various Sections of the Medicaid Act where private enforcement is not reasonably debatable. Even though one of the pillars of this Court's decision has been removed, the remaining pillars more than adequately support the Court's findings of fact and conclusions of law and the declaratory and injunctive relief now required. Further, the entry of appropriate declaratory and injunctive relief on these claims is consistent with *Armstrong* and follows from well-established authority for how federal courts should remedy state programs that are denying federal statutory or constitutional rights. *See infra* Section III.

This Court should now proceed to determine what evidentiary proceedings (and discovery) are required to enter such relief based on its careful and extensive Findings of Fact and Conclusions of Law, D.E. 1314. To that end, Plaintiffs have submitted declarations from numerous physicians, dentists, and experts showing that the myriad violations of federal rights proven during trial continue, that managed care is no panacea, and that, in certain respects, the denial of Florida children's rights to medical and dental care may have become even more acute. While Plaintiffs will not see Defendants' counter-proffer for several more days, there is no reason for the Court to defer the scheduled hearing on April 24th. *See* D.E. 1311, Order Following Status Conference (setting April 24 hearing date). If there is a need for discovery and evidentiary hearings on certain issues, the schedule and timing for those can be discussed at that

time. So, too, the parties can address issues related to *Armstrong*. The proffers have been submitted and *Armstrong* has been briefed, so there is no reason to delay the hearing.[1]

ARGUMENT

I. *ARMSTRONG* SOLELY CONCERNS PRIVATE ENFOREMENT OF SECTION 30(a) CLAIMS.

In *Armstrong*, providers of rehabilitation services sued Medicaid officials of the State of Idaho for alleged violations of the Medicaid Act's Equal Access requirement, claiming that the State had set Medicaid reimbursement rates too low. *Armstrong*, 135 S. Ct. at 1382. Because Ninth Circuit precedent precluded a Section 1983 action to enforce Section 30(a), *see Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), the plaintiffs in *Armstrong* instead sued to enforce Section 30(a) under the Supremacy Clause. Thus, the sole question on which the Supreme Court granted certiorari was whether "the Supremacy Clause give[s] Medicaid providers a private right of action to enforce [the Equal Access requirement] against a state where Congress chose not to create enforceable rights under that statute?" Order Granting Cert., Supreme Ct. Docket No. 14-15 (Oct. 2, 2014).

In a five-to-four opinion authored by Justice Scalia, the Court ruled that providers cannot use the Supremacy Clause or invoke the Court's general equitable power to enforce the Medicaid Act's Equal Access requirement. *See Armstrong*, 135 S. Ct. at 1384. The Supreme Court concluded that "the Medicaid Act impliedly precludes private enforcement of §30(A)" because Congress authorized the Secretary of Health and Human Services to withhold Medicaid Act funds in case of a violation by a state[2] and because it found that the competing demands in the

[1] Defendants requested to postpone the parties' submission of an offer of proof and affidavits. *See* D.E. 1315. Given the submission of both parties' offers of proof and affidavits, there is no rationale in Defendants' motion for delay of the April 24th hearing.

[2] The Court acknowledged that "the provision for the Secretary's enforcement by withholding funds might not, by itself, preclude the availability of equitable relief," *see Armstrong*, 135 S. Ct

text of the Equal Access Provision were "judicially unadministrable." *Id*. at 1385. As explained below, the same cannot be said of the Reasonable Promptness, EPSDT, and Effective Outreach and Treatment provisions. *See infra* Section II.

Justice Breyer provided the decisive vote in *Armstrong*. He did not join Section IV of Justice Scalia's opinion, which broadly questioned private enforcement of Spending Clause legislation. *See Armstrong*, 135 S. Ct. at 1387. Even though he found that federal courts could not exercise equitable powers in the case before the Court, Justice Breyer stressed that "that answer does not follow from the application of a simple, fixed legal formula," but rather that "Congress intended to foreclose respondents from bringing this particular action for injunctive relief." *Id*. at 1388. Like the majority, Justice Breyer had no reason to discuss other actions for injunctive relief under the Medicaid Act, let alone actions brought under provisions where courts have repeatedly found that Congress created rights enforceable under Section 1983.

Thus, when Justice Scalia offered a broader opinion that might have been read to address the private enforcement of the Medicaid Act more generally—or virtually any Spending Clause legislation, for that matter—he lost Justice Breyer's vote, leaving just four Justices to sign Part IV of Justice Scalia's opinion. *Id*. at 1387–88. Meanwhile, four Justices dissented, in an opinion that embraced this Court's own reasoning that *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) supported private enforcement of Section 30(a), *Armstrong*, 135 S. Ct. at 1394–95 (Sotomayor, J., dissenting).

Armstrong must be read to mean what it says—that Section 30(a) is not subject to private enforcement—no more and no less. Even though *Armstrong* involved a claim under the Supremacy Clause, and a claim brought by providers rather than beneficiaries, Plaintiffs

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at 1385, and, of course, did not have reason to address the issue in the context of a statutory provision where Congress intended to create individual rights enforceable under Section 1983.

recognize the language of the decision precludes private enforcement of Section 30(a) and that, as a result, Count II of Plaintiffs' Second Amended Complaint, asserting a Claim under that provision, is no longer tenable. *See* D.E. 220-2, Second Amended Compl. at 31.[3]

II. THE MEDICAID ACT'S REASONABLE PROMPTNESS, EPSDT, AND OUTREACH AND EFFECTIVE TREATMENT PROVISIONS REMAIN ENFORCEABLE UNDER *GONZAGA* AND *ARMSTRONG*.

A. It Remains the Law of this Circuit and Others that the Medicaid Act's Reasonable Promptness, EPSDT, and Effective Outreach and Treatment Requirements are Enforceable Under Section 1983.

While it has been controversial as to whether a Section 1983 cause of action lies to enforce a claim arising under Section 30(a),[4] no such controversy exists over Plaintiffs' claims that arise under Sections (a)(8), (a)(10)(A), and (a)(43). *See* D.E. 220–2, Second Amended Compl. at 29–31 (Count I), 34–36 (Count IV). Those provisions simply were not at issue in *Armstrong*: they were not mentioned in the questions on which certiorari was sought; they were not mentioned in the sole question on which certiorari was granted, they were not mentioned in the parties' briefs; they were not mentioned during oral argument; and, most importantly, they were not mentioned in the Court's opinion. *See* Cert. Pet., 2014 WL 3101423 (July 2, 2014); Order Granting Cert., Supreme Ct. Docket No. 14-15 (Oct. 2, 2014); Pet. Br., 2014 WL 6679363 (Nov. 17, 2014); Resp. Br., 2014 WL 7387000 (Dec. 17, 2014); Pet. Reply Br., 2015 WL 163994 (Jan. 13, 2015); Oral Arg. Tr., Supreme Ct. Docket No. 14-15 (Jan. 20, 2015); *Armstrong*, 135 S.

[3] Plaintiffs believe that only a limited number of changes to the Amended Findings of Fact and Conclusions of Law are required in light of *Armstrong*. These changes would be made to: Section V.B.2, discussing Section 30(a), *see* D.E. 1314 at pp. 27–34; the first sentence of paragraph 80, *id*. at 60; the end of the first sentence of the second paragraph of the Conclusions of Law, *id*. at 145; the third paragraph on page 145, *id*.; the second paragraph on page 147; the first and last paragraphs on page 149; and the last sentence of the second new paragraph on page 151.

[4] This Court recognized that multiple courts of appeal had concluded that Section 30(a) was not enforceable under Section 1983.

Ct. at 1378. Armstrong did nothing to disturb the overwhelming body of case law supporting actions brought to enforce these provisions under Section 1983.

1. Reasonable Promptness Requirement

The Reasonable Promptness requirement states that "[a] State plan for medical assistance must . . . 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." 42 U.S.C. § 1396a(a)(8). In *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998), the Eleventh Circuit concluded "that the appellees have a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act, and that this right is enforceable under section 1983," *id.* at 719. As this Court recently explained: "*Doe* is of course binding precedent. Whether *Doe* has been so eroded by *Gonzaga* that it should be overruled is for the Eleventh Circuit to decide. My job, as a district judge, is to follow *Doe* at this time." D.E. 1314, Amended Findings of Fact and Conclusions of Law at 24.

Every Circuit Court to have considered this issue after *Gonzaga University v. Doe*, 536 U.S. 273 (2002) has agreed with this Court that the Reasonable Promptness requirement is privately enforceable under Section 1983. *See Romano v. Greenstein*, 721 F.3d 373, 379 (5th Cir. 2013) ("Section 1396a(a)(8) is unmistakably focused on the individual. It does not speak only in terms of institutional policy and practice, nor does it have an aggregate focus." (internal quotation marks omitted)); *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (noting that "the provision uses mandatory rather than precatory terms"); *Sabree v. Richman*, 367 F.3d 180, 183 (3d Cir. 2004) (holding that § (a)(8) "unambiguously confer[s] rights vindicable under § 1983"); *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) ("The subsection mandates that state plans 'must' provide that medical assistance 'shall' be provided with reasonable promptness. These

are not mere guidelines, but rather requirements which states must meet under the Medicaid system.").

Doe is not affected by *Armstrong*. The bases on which the *Armstrong* Court concluded that Section 30(a) is not privately enforceable are not present in the Reasonable Promptness requirement, which differs in multiple ways. It does not contain a balancing test like that required by Section 30(a). Nor is it "judicially unadministrable": indeed, the Eleventh Circuit has rejected that view, stating that the Reasonable Promptness requirement "presents a sufficiently specific and definite standard readily susceptible to judicial assessment." *Doe v. Chiles*, 136 F.3d at 717; *see also Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) ("A statute is not impermissibly vague simply because it requires judicial inquiry into 'reasonableness'" (internal quotation marks and citation omitted)); *id.* ("Common law courts have reviewed actions for reasonableness since time immemorial." (citing 1 W. Blackstone, *Commentaries* *77)). As a Third Circuit panel stated: "Without difficulty, we conclude that . . . the rights sought to be enforced by [§§ 1396a(a)(8) and 1396a(a)(10)(A)] are specific and enumerated, not 'vague and amorphous.'" *Sabree*, 367 F.3d at 189.[5]

Even though *Armstrong* forecloses private enforcement of the Equal Access requirement, the Reasonable Promptness requirement provides an independent, undiminished basis for core elements of the Court's Amended Findings of Fact and Conclusions of Law. As the Court found, Defendants have violated the Reasonable Promptness requirement where "one-third of the enrolled children are not receiving any of their expected preventative care each year," D.E. 1314,

[5] The determination of a breach of the "reasonable promptness" provision is particularly easy where agency officials have admitted they are not in compliance. *See, e.g.*, D.E. 1314, Amended Findings of Fact and Conclusions of Law, p. 117, ¶ 260 ("Mr. Sharpe [an AHCA official] testified that he did not believe AHCA was in compliance with the reasonableness promptness standard as to dental care.").

Amended Findings of Fact and Conclusions of Law at 147; when specialists have limited the numbers of Medicaid patients they are willing to see, *id.* at 148; when "79% of the children enrolled in Medicaid are getting no dental services at all," *id.* at 149; and when "the same problems that plague fee-for-service Medicaid—failure to provide well-child check-ups, a scarcity of specialists, excessive wait times and travel distances for specialty care, and a lack of dental care—infect the Medicaid HMOs," *id.* at 151.

2. EPSDT Requirement

The EPSDT requirement, 42 U.S.C. § (a)(10)(A), is similarly undisturbed by *Armstrong*. It states that Defendants must "provide . . . for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . [of §] 1396d(a) of this title, to . . . all individuals [who are eligible]." 42 U.S.C. §1396a(a)(10). The specific EPSDT services that must be provided are individually listed at 42 U.S.C. § 1396d(r) and include periodic check-ups, including lead blood testing, needed specialty medical care, and dental care—the precise services at issue in this litigation.

Every Circuit Court to have considered the question after *Gonzaga* has held that the EPSDT requirement can be enforced under Section 1983. *See Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 607 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2002 (2013); *Watson v. Weeks*, 436 F.3d 1152, 1159, 1161 (9th Cir. 2006) (contrasting the EPSDT requirement with the Equal Access requirement); *S.D. v. Hood*, 391 F.3d 581, 607 (5th Cir. 2004); *Sabree v. Richman*, 367 F.3d 180, 183, 194 (3d Cir. 2004) ("Congress clearly and unambiguously conferred the rights of which plaintiffs have allegedly been deprived by Pennsylvania, and has not precluded individual enforcement of those rights."). In addition, both of the district courts in the similar Oklahoma and Illinois litigations relied on the EPSDT requirements, as well as the reasonable promptness requirement of Section (a)(8), in supporting their decisions. *See Okla. Chapter of*

the Am. Acad. of Pediatrics v. Fogarty, 366 F. Supp. 2d 1050 (N.D. Okla. 2005), *rev'd on other grounds*, 472 F.3d 1208 (10th Cir. 2007); *Memisovski ex rel. Memisovski v. Maram*, No. 92-cv-1982, 2004 WL 1878332 (N.D. Ill. Aug. 23, 2004).

Armstrong's reasoning with respect to Section 30(a) does not apply to the EPSDT requirement. *Armstrong* identifies Section 30(a) as the broadest, least specific requirement that could be imagined. *Armstrong*, 135 S. Ct. at 1385. In contrast, when a plaintiff "asks the courts to interpret the EPSDT statutes to ascertain whether they require [a state] to provide him with a specific benefit . . . . [t]hat level of statutory analysis does not 'strain judicial competence;' it is the sort of work in which courts engage every day." *S.D.*, 391 F.3d at 605.

3. Effective Outreach and Treatment Requirement

This Court carefully and correctly concluded that the Effective Outreach and Treatment requirement can be enforced under Section 1983. *See* D.E. 1314, Amended Findings of Fact and Conclusions of Law at 35–37; *accord Westside Mothers v. Olszewski*, 454 F.3d 532, 543–44 (6th Cir. 2006). Plaintiffs are unaware of any post-*Gonzaga* courts that have taken a contrary view. The Effective Outreach and Treatment requirement provides that Defendants must "[i]nform[ ] all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance . . . of the availability of early and periodic screening, diagnostic, and treatment services . . . and the need for age-appropriate immunizations against vaccine-preventable diseases," and sub-sections (B) and (C) provide a right to treatment for all such children who request such care. 42 U.S.C. §1396a(a)(43). Like Sections (a)(8) and (a)(10)(A), the Effective Outreach and Treatment mandate is unaffected by *Armstrong*'s logic. It spells out in plain detail exactly what the state commits to do when it opts to accept federal Medicaid funds, and it gives states explicit, unambiguous directions. Post-*Gonzaga* decisions have consistently these provisions to be privately enforceable. *See, e.g., John B. v. Emkes*, 852 F.

Supp. 2d 944, 947 (M.D. Tenn. 2012), *aff'd*, 710 F.3d 394 (6th Cir. 2013); *Parents' League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 895, 904 (S.D. Ohio 2008); *Kenny A. v. Perdue*, 218 F.R.D. 277, 293 (N.D. Ga. 2003).

B. The Reasonable Promptness, EPSDT, and Effective Outreach and Treatment Requirements are Judicially Administrable.

Under Section 1983, federal courts, even after *Gonzaga*, routinely deal with the question of whether state action denies or fails to provide federal rights, including under statutes requiring a judicial evaluation of reasonableness. *See, e.g.*, *Johnson v. Hous. Auth.*, 442 F.3d 356, 364 (5th Cir. 2006) (upholding Section 1983 enforcement of portions of the United States Housing Act, defined by regulation to require housing authorities to set utility allowances based on "the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality . . . us[ing] normal patterns of consumption for the community as a whole and current utility rates); *Grammer v. John J. Kane Reg'l Ctrs.–Glen Hazel*, 570 F.3d 520, 524, 528 (3d Cir. 2009) (enforcing the Nursing Home Reform Amendments under Section 1983, such as provisions stating that "[a] nursing facility must provide services and activities to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident in accordance with a written plan of care … ," 42 U.S.C. § 1396r(b)(2)(A)); *Rolland v. Romney*, 318 F.3d 42, 53–54 (1st Cir. 2003) (enforcing other portions of Nursing Home Amendments, 42 U.S.C. § 1396r(e)(7)(G)(iii) and 42 C.F.R. § 483.440(a)(1), requiring that intellectually disabled nursing home residents receive "special services," defined in part as an "aggressive, consistent implementation of a program of specialized and generic training, . . . that is directed toward . . . [t]he acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible"); *ASW v. Oregon*, 424 F.3d 970, 978 (9th Cir. 2005) (enforcing provision of the

Adoption Assistance and Child Welfare Act of 1980 under Section 1983, requiring States to provide "an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with *reasonable promptness*" (emphasis added)); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 981 (9th Cir. 2010) (upholding Section 1983 enforcement of provisions of the Child Welfare Act requiring States to "cover the cost of" such items as "reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement," as well as "the reasonable costs of administration and operation of such institution as are necessarily required to provide [food, clothing, and other necessities and incidentals for children]").

Even apart from Section 1983 actions, courts, including the Supreme Court, have recognized the role of courts in determining the adequacy of state-provided care. Thus, in *Brown v. Plata*, 131 S. Ct. 1910 (2011), the Court affirmed an injunction requiring California to reduce its prison population to 137.5% of design capacity within two years because it found that overcrowding caused prisoners with serious medical or mental health problems to receive inadequate health care, *id*. at 1924. The Court was not deterred by the fact that the injunction was grounded on the finding that inmates were not receiving adequate medical care, or finding a causal link between overcrowding and inadequate care. *See id*. at 1944 ("Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree of judgment.").

"Since the dramatic expansion of Spending Clause programs in the 1960s and 1970s, there never has been a time when the requirements of these programs have not been judicially

enforceable by their ultimate beneficiaries under some legal theory." Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 Colum. L. Rev. 1838, 1868 (2003).[6] This Court should strongly reject Defendants' contention that *Armstrong* totally upends the well-established authority authorizing judicial enforcement of beneficiaries' rights under the Medicaid Act.

C. Congress Has Long Recognized that the Reasonable Promptness, EPSDT, and Effective Outreach and Treatment Requirements are Enforceable under Section 1983.

Congress has repeatedly amended the Medicaid Act and has also overturned part of a Supreme Court opinion interpretation that threatened to eliminate certain private causes of action under the Medicaid Act. While the Supreme Court majority in *Armstrong* found that the "question whether the Boren Amendment permitted private actions was far from 'settled,'" *Armstrong*, 135 S. Ct. at 1387, that cannot be said more generally of private enforcement of the Medicaid Act through Section 1983. Such legislative action and inaction, in the face of Section 1983 suits brought under the Medicaid Act over the last 25 years, both before and after the Supreme Court's decision in *Gonzaga*, is telling.

In 1992, the Supreme Court in *Suter v. Artist M.*, 503 U.S. 347 (1992) held that a provision of the Medicaid Act was not enforceable under Section 1983 in part because the Act only required the state to adopt a state plan to be approved by the Secretary, and the provision at issue was part of the required state plan. Two years later, Congress rejected the Supreme Court's ruling and established that locating a right within the statute's state plan requirement could not

[6] "Many of the federal government's most important programs now derive their authority from the Spending Clause. Usually they are structured as cooperative ventures between the states and the national government, with federal statutes both providing funding and setting standards for state administration. Rarely does the federal bureaucracy itself comprehensively enforce state compliance with the terms of these statutes. Instead, Spending Clause program requirements have been enforced primarily by citizens acting as 'private attorneys general.'" Samberg-Champion, *supra* at 1838.

alone preclude private enforcement of that statute. The Congressional amendment states: "In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." *See* 42 U.S.C. § 1320a-2. The Medicaid program, 42 U.S.C. 1396 *et seq.*, falls within "this chapter," and thus, enactment of the so-called *Suter* Fix demonstrates that Congress intended provisions of state plans to be enforceable through Section 1983.[7]

More recently, in 2010, as part of its enactment of the Patient Protection and Affordable Care Act, Pub.L. 111–148, 124 Stat. 119 (March 23, 2010), Congress clarified the definition of "medical assistance" under 42 U.S.C. § 1396d(a) of the Medicaid Act. Congress did so to make clear that courts, *see, e.g.*, *Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1143, 1146 (10th Cir. 2006), that had interpreted that phrase to require only prompt payment for medical care, not the actual provision of care, and so had dismissed plaintiffs' Section 1983 claims, had misconstrued the statute. *See* H.R. Rep. No. 111–299, 2009 WL 3321420, at *649–50 ("These opinions have read the term to refer only to payment; this reading makes some aspects of the rest of Title XIX difficult and, in at least one case, absurd. … [The Bill] conform[s] this definition to the longstanding administrative use and understanding of the term."). In so doing, Congress effectively reversed judicial decisions that had rejected Section 1983 claims under the Sections (a)(8) and (a)(10)(A) by interpreting the statute to simply require states to promptly pay for medical care, not to ensure patients promptly received such care. Doing so would have made no sense if Congress had not

[7] That at least some Medicaid Act provisions are enforceable through Section 1983 was not even in dispute in *Armstrong*, as even the Idaho defendants conceded that "some provisions of the Medicaid Act may establish individual rights enforceable through § 1983[.]" Pet. Reply Br., 2015 WL 163994 (Jan. 13, 2014).

intended these sections to be privately enforceable at all. Nor would it make sense that Congress has acquiesced in decades of private enforcement of these provisions under the Medicaid Act, both before and after *Gonzaga*, if it had not intended for private enforcement of these rights under Section 1983.

III. PLAINTIFFS' REQUESTED DECLARATORY AND INJUNCTIVE RELIEF IS CONSISTENT WITH *ARMSTRONG*.

In the first place, this is a Section 1983 action: once the Court finds that certain sections of the Medicaid Act are enforceable under Section 1983, that means there is an express cause of action created by Congress where the full panoply of a federal court's legal and equitable powers is available. Nothing in *Armstrong* addresses the scope of a federal court's equitable powers in a Section 1983 case; that issue was not before the Court.[8]

Second, declaring that Defendants have denied individuals federally protected rights—the right to EPSDT care, the right to receive such care with reasonable promptness, and the right to be effectively informed of these rights—is a traditional judicial function. The concerns of *Armstrong*, and in particular those expressed by Justice Breyer's concurring opinion, are with the more administrative calculus involved in weighing competing considerations of "efficiency, economy and quality of care," in connection with setting of a particular rate called for under Section 30(a). A declaration that Florida's Medicaid program as currently operated does not assure EPSDT rights, does not provide compensation sufficient to ensure reasonably prompt access to care, and, given the elimination of the outreach program, violates a requirement for effective outreach, all may be entered in full accord with the *Armstrong* decision.

[8] Indeed, the very question on which certiorari was granted specifically was limited to whether the Supremacy Clause gave Medicaid providers a private right of action to enforce Section 30(a) against a state "*where Congress chose not to create enforceable rights under the Statute*." (emphasis added). *Armstrong* does not involve the scope of federal equitable relief when Congress has chosen to create enforceable rights under Section 1983.

Third, nothing in *Armstrong* precludes an injunction to enforce these rights by directing Defendants to prepare, submit, and institute a plan to bring the Florida Medicaid program into compliance with these rights and to remedy the enumerated violations. Typically, courts, at least in the first instance, have given Defendant state officials an opportunity to devise relief, often in consultation with plaintiffs or with the benefit of experts, to remedy the identified violations. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 362–63 (1996) (suggesting that courts should give state administrators an opportunity to propose a remedy for their own deficient programs); *Schwartz v. Dolan*, 86 F.3d 315, 319 (2d Cir. 1996) ("[B]ecause there were different possible ways to remedy the violation, the [agency] should have been allowed the opportunity to present its own proposal … after the existing scheme was declared unconstitutional."). As opposed to the injunction in *Armstrong*, this form of injunction would allow Defendants to "exercise[] wide discretion within the bounds of [legal] requirements." *Bounds v. Smith*, 430 U.S. 817, 832–33 (1977) (praising district court's willingness to work with administrators to find creative solution for constitutionally deficient prison system); *accord Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 965 (E.D. Cal. and N.D. Cal. 2009) (three-judge panel) (ordering administrators to propose a remedy, allowing them to "choose among many different options or combinations of options for" correcting a constitutional violation).

Such relief, of course, must be subject to judicial review that it will actually remedy the identified problems and do so within reasonable time limitations. *See, e.g.*, *Coleman*, 922 F. Supp. 2d at 964–65 (setting a two-year prison-population target but allowing administrators to submit their own plan for achieving this target and noting that the court would "incorporat[e] the state's proposal if it is feasible, with any appropriate modifications or amendments we may deem necessary"). If Defendants fail to implement proper remedies, and the violations continue, the

Court has the ability to impose yet stronger and more definitive relief, as illustrated by the Supreme Court's recent approval of a lower court's mandatory release of prisoners from overcrowded California prisons. *Brown*, 131 S. Ct. at 1929 ("Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population.").[9]

CONCLUSION

Armstrong requires the Court to dismiss Count II; it requires no more than that. This Court should proceed with the process set forth in its March 23rd Order, conduct a hearing on April 24th, and provide for discovery and evidentiary hearings to the extent required before entering declaratory and injunctive relief to enforce the Court's findings that the Reasonable Promptness, EPSDT, and Effective Outreach and Treatment provisions of the Medicaid Act have been violated by Florida's Medicaid system.

Dated: April 17, 2015

Respectfully Submitted,

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[9]Analogously, if Defendants do not provide a proper remedial plan or the Legislature refuses to fund it, the Court has the ability to require a minimum rate to be paid to managed care providers, such as occurred as a result of the Affordable Care Act, which effectively raised the Medicaid rate to Medicare levels for many primary care providers and certain specialists for a two-year period, including those in managed care settings. Justice Breyer acknowledged the potential for addressing rates directly in an appropriate case, *Armstrong*, 135 S. Ct. at 1389, and of course, he was writing in the context of general exercise of federal equitable powers, not judicial remedies to enforce a Section 1983 right that Congress intended be subject to judicial enforcement.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2015, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Stuart H. Singer
Stuart H. Singer

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Florida Pediatric Society/The Florida Chapter of The American Academy of Pediatrics; Florida Academy of Pediatric Dentistry, Inc., et al. v. Elizabeth Dudek in her official capacity as Secretary of the Florida Agency for Health Care Administration, et al.

Case No. 05-23037-CIV-JORDAN/O'SULLIVAN
United States District Court, Southern District of Florida

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