

No. _____

**In the
United States Court of Appeals
for the Fifth Circuit**

EQUAL ACCESS FOR EL PASO, INC., *ET AL.*,
Plaintiffs-Respondents,

v.

ALBERT HAWKINS, AS
COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION,
Defendant-Petitioner.

On Petition for Permission To Appeal
from the United States District Court
Western District of Texas, El Paso Division

PETITION FOR PERMISSION TO APPEAL

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CERTIFICATE OF INTERESTED PERSONS

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42 U.S.C. §1983 *passim*

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EQUAL ACCESS FOR EL PASO, INC., *ET AL.*,
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ALBERT HAWKINS, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION,
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On Petition for Permission To Appeal
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PETITION FOR PERMISSION TO APPEAL

This interlocutory appeal would squarely frame the question of how the Supreme Court’s decision in *Gonzaga v. Doe*, 536 U.S. 273 (2002), affects this Court’s earlier decision in *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000), concerning the Equal Access Provision of the Medicaid Act. The district court found “it likely that the Fifth Circuit will decide that the Equal Access Provision does not confer a private right of action upon Recipient Plaintiffs in light of the decision of the Supreme Court in *Gonzaga*.” Order at 65. Accordingly, the district court certified the relevant questions to this Court under 28 U.S.C. §1292(b) and immediately issued a stay. Defendant-Petitioner Albert Hawkins asks the Court to grant permission for this interlocutory appeal.

STATEMENT OF FACTS

This action was brought by certain individual Medicaid recipients living in El Paso (the Recipient Plaintiffs), by certain medical-service providers such as doctors and hospitals (the Provider Plaintiffs), and by a non-profit corporation that claims to represent both of those groups. *See* Order at 4-5 (Tab A). As summarized by the district court, plaintiffs’ theory is that “HHSC’s setting of deficient Medicaid reimbursement . . . rates has prevented Medicaid recipients in El Paso from obtaining adequate access to medical services, in violation of certain provisions of the Medicaid Act, the Supremacy Clause, and the Equal Protection Clause.” Order at 5-6.

The named defendant, Albert Hawkins (the Executive Commissioner of the Texas Health and Human Services Commission (HHSC)) filed a motion to dismiss, which the district court largely but not entirely granted. Order at 66. The district court analyzed each claim in turn, concluding that most did not involve a federal right that could support a §1983 action. Order at 35-61. In the end, only one claim avoided dismissal—Recipient Plaintiffs’ claim that their access to medical care is less than that of the general population in El Paso. *See* Order at 65. The requested interlocutory appeal could dispose of that claim.

The statutory basis for that sole remaining claim has come to be known as the Equal Access Provision:

A State plan . . . must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . to assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . .

42 U.S.C. §1396a(a)(30)(A). Recipient Plaintiffs allege that this provision gives them an individually enforceable federal right.

Recipient Plaintiffs' theory places particular blame on the interaction between Medicaid's payment rates and the unique demography of El Paso, as captured in a statistic called the "payor mix" (the relative balance between residents covered by Medicaid, uninsured residents, and residents covered by private insurance). As the district court summarized their theory: "The lack of alleged access to adequate medical services is a result of the fact that inadequate Medicaid payment rates, when combined with El Paso's unique payor mix, have created an incentive (1) for physicians to practice in communities other than El Paso and (2) for physicians practicing in El Paso County to seek out patients covered by employer-sponsored insurance." Order at 6 (footnote omitted).

QUESTIONS OF LAW

1. In light of *Gonzaga v. Doe*, 536 U.S. 273 (2002), can the ultimate recipients of medical services paid for by Medicaid bring a claim under §1983 to enforce the Equal Access Provision of the Medicaid Act?
2. Do those ultimate recipients of medical services paid for by Medicaid have standing to assert the equal-access claim that they have pled?²

ARGUMENT

These questions ultimately concern the proper balance between the roles of the federal judiciary, the state governments participating in Medicaid, and the federal agency that oversees Medicaid. Recipient Plaintiffs are unhappy with Texas’s Medicaid plan—which was crafted by state policymakers and approved by the federal government as being in compliance with federal law. As a basis to ask the courts to second-guess those decisions, the plaintiffs assert that they have a personal, individual “right” to have a State include certain features in its Medicaid plan (regardless of whether the state or federal governments agrees).

In resolving the threshold question of whether federal law authorizes such an individual suit, the district court was trapped between an older decision of this Court and a newer Supreme Court decision that seem to command different results.

In 2000, this Court held in *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235

² Although the district court phrased the second question slightly more broadly, *see* Order at 64 (“whether Recipient Plaintiffs have standing to bring any of their claims”), only their equal-access claim survived the motion to dismiss.

F.3d 908 (5th Cir. 2000), that this type of plaintiff was the “intended beneficiary” of this Medicaid provision and thus could bring an individual §1983 claim. Two years later, the Supreme Court changed the controlling legal test in *Gonzaga v. Doe*, 536 U.S. 273 (2002), articulating new standards that these plaintiffs cannot meet. The Court should permit this interlocutory appeal to resolve that tension and address how courts in this Circuit should apply *Gonzaga* to the Equal Access Provision.

I. THERE ARE COMPELLING REASONS TO PERMIT THIS INTERLOCUTORY APPEAL.

Since *Gonzaga*, two sister circuits have addressed whether the Equal Access Provision creates an individually enforceable federal right, both relying heavily on *Gonzaga* to conclude that the provision cannot support a §1983 claim. *See* Part I.A, *infra*. By the same token, it does not appear that this Court could have reached the same result in *Evergreen* had it been decided after *Gonzaga*; the decision does not conduct the textual analysis that is now commanded by *Gonzaga*, instead focusing on the beneficiary status of the recipients—a factor that *Gonzaga* has now clarified is insufficient. *See* Part I.B, *infra*. And Recipient Plaintiffs’ attenuated theory that blames El Paso’s unusual “payor mix” is too speculative to support constitutional standing. *See* Part I.C, *infra*.

A. Sister Circuits Have Concluded That *Gonzaga* Forecloses Claims Under the Equal Access Provision.

Since the *Gonzaga* decision, two other Circuits have faced the question whether the Equal Access Provision creates a federal right enforceable by §1983. Both of them have answered no.

1. The Ninth Circuit has read *Gonzaga* to bar equal-access claims brought by recipients.

In 2005, the Ninth Circuit relied on *Gonzaga* to conclude that recipients and providers—even if they may *benefit* from the equal-access provision—nonetheless did not have the sort of individual *right* sufficient to support a §1983 claim. *Sanchez v. Johnson*, 416 F.3d 1051, 1055-62 (9th Cir. 2005). The court explained that, before *Gonzaga*, the Supreme Court had given “confusing[]” signals because “the first *Blessing* factor addressed . . . intended ‘benefit’ . . . whereas the second factor referred not to a ‘benefit’ but a ‘right.’” *Id.* at 1057. It is now clear, however, that merely being an intended beneficiary is not enough:

After *Gonzaga*, there can be no doubt that . . . a plaintiff seeking redress under §1983 must assert the violation of an individually enforceable *right* conferred specifically upon him, not merely a violation of federal law or the denial of a *benefit* or *interest*, no matter how unambiguously conferred. The text and structure of §30(A) do not persuade us that Congress has, with a clear voice, intended to create an individual right that either Medicaid recipients or providers would be able to enforce under §1983.

416 F.3d at 1062 (emphasis added).

The *Sanchez* court followed *Gonzaga*'s directive to scrutinize the statutory text for "individually focused, rights-creating language." 416 F.3d at 1057 (citing *Gonzaga*, 536 U.S. at 283-84). It examined the text of the Equal Access Provision, observing that "there is nothing in the text of [the provision] that unmistakably focuses on recipients or providers *as individuals*." *Id.* at 1059 (emphasis added). Instead, the text has "an aggregate focus" and speaks of "methods and procedures' for providing services generally." *Id.* The Equal Access Provision never refers to recipients expressly, not even as a class—at most they might arguably be subsumed in the larger class of the "general population." *Id.* (noting that, by contrast, the statute "does at least refer explicitly to Medicaid providers"). Accordingly, the court held that the Equal Access Provision did not create an individual federal right under *Gonzaga*. *Id.* at 1062.

2. The First Circuit has reversed itself in light of *Gonzaga*, using reasoning that applies just as well to recipients.

Before *Gonzaga*, the First Circuit had held that the Equal Access Provision could support a §1983 action brought by providers of health care. *Visiting Nurse Ass'n v. Bullen*, 93 F.3d 997, 1003-05 (1st Cir. 1996). The *Bullen* decision reasoned that, if the provision was meant to benefit a plaintiff, it was presumptively enforceable through §1983. *Id.* at 1002-03. *Bullen* held that providers were among the beneficiaries of the Equal Access Provision and thus

could bring suit under §1983, noting in dicta that recipients were also among the beneficiaries.³ *Id.* at 1004 & n.7.

In 2004, in another case brought by a provider, the First Circuit reversed itself: “If *Gonzaga* had existed prior to *Bullen*, the panel could not have come to the same result. Whether *Gonzaga* is a tidal shift or merely a shift in emphasis, we are obligated to respect it, and it controls this case.” *Long Term Care Alliance v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004).

The *Long Term* court relied on the application of what it called “two touchstones in *Gonzaga*’s analysis”—that “Subsection 30(A), unlike subsection 13(A), has no ‘rights creating language’ and identifies no discrete class of beneficiaries.” *Id.* at 57. Instead, the text of “subsection 30(A) has much broader coverage, sets forth general objectives, and mentions no category of entity or person specifically protected.” *Id.* at 56. Both of those “touchstones” could apply just as well to claims brought by recipients as to those brought by providers—the statutory text has no rights-creating language and does not even mention recipients, whether as individuals or a class. 42 U.S.C. §1396a(a)(30)(A). For that reason, the Ninth Circuit has concluded that the First Circuit’s “reasoning applies also to recipients.” *Sanchez*, 416 F.3d at 1061 (citing *Long Term*, 362 F.3d at 56-58).

³ The *Evergreen* decision cited this portion of *Bullen* to support its conclusion that recipients could bring such a claim. *Evergreen*, 235 F.3d at 927.

B. After *Gonzaga*, This Court’s *Evergreen* Decision Could Not Be Decided the Same Way.

In 2000, a panel of this Court concluded in *Evergreen* that recipients of medical care could bring a §1983 action as the intended beneficiaries of the Equal Access Provision. 235 F.3d at 931-32. But two years later, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court changed the foundation on which the *Evergreen* court had relied, articulating a new emphasis on finding certain “rights-creating” language in the text of the statute rather than merely inferring that a certain group was meant to benefit. *Id.* at 287-88. In light of that new guidance, *Evergreen* could not be decided the same way today.

The *Gonzaga* Court noted that some imprecision in earlier Supreme Court cases had led to inconsistent decisions in the lower courts about what characteristics in a federal statute converted it into a “right” that could be enforced through a §1983 action. 536 U.S. at 282-83 (discussing the mixed signals present in a key part of the *Blessing* decision) (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)). The Court’s prior cases had loosely discussed concepts of “benefits” and “rights,” and the “confusion led some courts to interpret *Blessing* as allowing plaintiffs to enforce a statute under §1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect.” *Id.* at 283. The Court accepted some blame for the confusion, noting “[t]he fact that all

of these courts have relied on the same set of opinions from [the Supreme Court] suggests that our opinions in this area may not be models of clarity.” *Id.* at 278.

In response to that confusion, the *Gonzaga* Court clarified that “it is *rights*, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under [§1983].” *Id.* The decision gives concrete guidance about how to distinguish enforceable rights from mere benefits. First, it looked to see if the statutory provision contained “the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights.” *Id.* at 287. The Court noted that a statute that spoke “only to the Secretary of Education” was “two steps removed from the interests of individual students and parents” and did not support a §1983 claim. *Id.* Second, the Court noted that the provision was written in terms of “institutional policy and practice, not individual instances.” *Id.* at 288. The focus on methodology rather than the effect on any particular individual made the statute “a far cry from the sort of individualized concrete monetary entitlement found enforceable in *Maine v. Thiboutot*, 448 U.S. 1 . . . (1980), *Wright [v. Roanoke Redevelopment and Hous. Auth.]*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hospital Ass’n*, 496 U.S. 498 . . . (1990).” *Id.* at 288 n.6.

Applying those two factors would have led to a different result in *Evergreen*. First, the Equal Access Provision does not have “rights-creating” language but is instead phrased in terms of the governmental entities that must submit or approve a

plan. 42 U.S.C. §1396a(a)(30)(A). Far from singling out recipients as having some sort of individual right, the Equal Access Provision does not even mention them—not even as a class. There is no textual basis to conclude that Congress meant to bestow a federal *right* rather than merely a benefit. Second, much as the provision at issue in *Gonzaga* was about procedures rather than whether any particular student’s information would be disclosed, *see Gonzaga*, 536 U.S. at 288, the Equal Access Provision is written in terms of the “methods and procedures relating to . . . payments,” not on whether any particular individual has greater or lesser access to health care, *see* 42 U.S.C. §1396a(a)(30)(A). Had it been decided after *Gonzaga*, *Evergreen* should have concluded—as have both the Ninth Circuit and First Circuit—that *Gonzaga* forecloses individual enforcement of the Equal Access Provision.⁴

C. Plaintiffs’ Theory Is So Attenuated That It Goes Beyond the Limits of Article III Standing.

The Recipient Plaintiffs’ uniquely attenuated theory not only stretches beyond congressional intent under the test set out in *Gonzaga*, but beyond the constitutional limits on justiciability as well.

⁴ The district court’s suggestion that there is “some indication[.]” that *Evergreen* had anticipated and applied “the more rigorous analysis required by *Gonzaga*” is unpersuasive. Order at 38. The *Evergreen* decision did not look for (or find) the same individualized, rights-creating language now required by *Gonzaga*.

To have constitutional standing, a plaintiff must plead and prove three elements: an injury-in-fact, causation, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). The district court held the Recipient Plaintiffs to have alleged the injury-in-fact of “difficulties in accessing medical assistance in the El Paso area.” Order at 12-13. It is the other two elements—causation and redressability—on which their theory falters.

Recipient Plaintiffs’ theory is remarkably attenuated. They do not ask the district court to directly cure *their* alleged injury of lack of access. To the contrary, the Recipient Plaintiffs ask the district court to make the economics of Medicaid *more profitable for providers*. Raising the per-patient or per-service reimbursement rate, however, simply increases the *current* providers’ profit margin on each patient. Any possible effect on Recipient Plaintiffs’ access to care requires speculation about the reactions of unidentified third parties—*potential* Medicaid providers who are *not* in the Medicaid network in El Paso but who *might* someday elect to join. The links are further stretched by what Recipient Plaintiffs allege to be the unfavorable “payor mix” in El Paso, an independent factor neither caused by HHSC nor redressable by the remedy sought.⁵ And, even if the aggregate statistics

⁵ The district court noted that standing was a “close question” in light of Recipient Plaintiffs’ reliance on this “independent factor not caused by HHSC’s conduct.” Order at 64 n.57.

for El Paso as a whole were to improve, it would be pure speculation whether any particular plaintiff would have greater access to care.

In short, Recipient Plaintiffs' injury-in-fact does not match the remedy sought. The remedy arguably available to plaintiffs under a §1983 action (raising payments to current providers) is too far removed from the injury-in-fact (each individual's alleged lack of access because of too few providers) to support judicial action under Article III.

II. THIS APPEAL IS APPROPRIATE UNDER 28 U.S.C. §1292(B).

An interlocutory appeal under 28 U.S.C. §1292(b) has three prerequisites: “(1) the order involves a controlling question of law in the case (2) as to which there is substantial ground for difference of opinion and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *Aparicio v. Swan Lake*, 643 F.2d 1109, 1111 n.2 (5th Cir. 1981) (citing 28 U.S.C. §1292(b)). The district court certified that those requirements have been met. *See* Order at 64-65; *see also* 28 U.S.C. §1292(b).

A. These Are Controlling Questions of Law.

The two questions certified by the district court are pure questions of law that could control the outcome of Recipient Plaintiffs' equal-access claims. The plaintiffs cannot proceed if they lack constitutional standing to bring the claims they have pled. *Steel Co.*, 523 U.S. at 102. Nor can they bring a §1983 claim if

the Equal Access Provision does not create an individualized federal right. *E.g.*, *Gonzaga*, 536 U.S. at 290.

B. There Is a Substantial Ground for Difference of Opinion.

There is a substantial ground for difference of opinion on these questions. Indeed, the district court thought it “likely” that its interlocutory order would later be reversed by this Court in light of *Gonzaga*. Order at 65.

1. After *Gonzaga*, there is substantial ground for disagreement about whether the Recipient Plaintiffs can bring this claim.

After *Gonzaga*, two sister circuits have examined the Equal Access Provision and reached a conclusion at odds with that of the district court. *Compare Sanchez*, 416 F.3d at 1055-62, and *Long Term*, 362 F.3d at 59, with Order at 39. That stark divergence between the district court’s order and the only two Circuits to have examined the impact of *Gonzaga* in this context is not allayed by this Court’s pre-*Gonzaga* decision in *Evergreen*. To the contrary, *Evergreen* relied heavily on an inference that recipients (though not named in the statute) were nonetheless its “intended beneficiaries,” using a mode of reasoning that *Gonzaga* clarified was now inadequate to find an individually enforceable federal right. *Compare Evergreen*, 235 F.3d at 927 (concluding that recipients are “intended beneficiaries”), with *Gonzaga*, 536 U.S. at 283-84. *Accord Sanchez*, 416 F.3d at 1061 (finding the text to lack the necessary focus on “individual entitlements” and the required “rights-creating” language); *Long Term*, 362 U.S. at 57 (same). The

Court should grant this interlocutory appeal to consider the continued viability of *Evergreen* in light of *Gonzaga*.

2. Given Recipient Plaintiffs’ attenuated theory, there is substantial ground for disagreement about standing.

The district court was faced with a difficult standing problem in that Recipient Plaintiffs’ theory depends on the actions of non-defendant third-party providers. In essence, Recipient Plaintiffs ask the district court to extend the carrot of higher Medicaid fees to give *other* providers who were not in the network an incentive to join. It was only the actions of those third-parties that could actually alleviate Recipient Plaintiffs’ alleged injuries. Absent the cooperation of those third-parties, a judicial decree would not affect the injury.⁶

The Supreme Court held that a plaintiff who was aggrieved by a third-party’s decision to take a certain action lacked standing to ask the government to change the financial incentives facing that third party because the causal chain was too speculative. *Allen v. Wright*, 468 U.S. 737, 756-760 (1984); *Simon v. E. Ky. Welfare Rights*, 426 U.S. 26, 43-46 (1976). The district court recognized the Recipient Plaintiffs’ theory to be much like those rejected in *Allen* and *Simon*. See Order at 15-17 (discussing the ways in which the Recipient Plaintiffs’ theory was “like *Allen* and *Simon*”).

⁶ The district court found it “a close question as to whether Recipient Plaintiffs have standing in light of the allegation that their injuries are a result of El Paso’s unique payor mix”—which is not alleged to be caused by HHSC or cured by the remedy sought. Order at 64 n.57 & 65.

The district court’s key error was in trying to correct a constitutional deficiency in standing by using language found in a mere statute. Rather than make its own independent evaluation of whether the plaintiffs’ injury-in-fact (lack of access by recipients to additional providers) would be redressed by judicial decree (raising rates to current providers), the district court instead chose to infer that causal link from word choice in the statute: “the statute informs the court’s counterfactual speculation.” Order at 17 (causation); *see also* Order at 21 (“once again the Court’s speculation is aided by the requirements of the Equal Access Provision” because the plaintiffs’ requested relief will “*by definition . . .* result in increased access” (emphasis added)). But a statute does not answer the constitutional question of redressability. “In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered ‘a distinct and palpable injury to himself,’ that is likely to be redressed if the requested relief is granted.” *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (citation omitted). Here, the link between Recipient Plaintiffs’ injury and the judicial relief they seek is too attenuated to support constitutional standing.

C. An Immediate Appeal Could Materially Advance the Ultimate Termination of the Litigation.

After the district court’s dismissal order, “only one claim remains”—the equal-access claim brought by Recipient Plaintiffs. Order at 65. And the district court considered it “likely” that this Court would later conclude that such claims

should not be allowed “in light of the decision of the Supreme Court in *Gonzaga*.” Order at 65. With that in mind, the district court explained that “[i]t would be an improper use of judicial resources and the resources of the parties to proceed with the case before these aforementioned questions of law are decided.” Order at 65. The district court has therefore issued a stay of further proceedings. Order at 66.

The Court should resolve this controlling legal question before the parties and district court expend more resources to grapple with the factual complexities of Recipient Plaintiffs’ highly attenuated theory of causation, which turns on the behavior of as-yet-unidentified third-party medical providers (both in El Paso and outside of El Paso) in response to hypothetical reimbursement rates, as well as other economic and demographic factors. *Cf.* Order at 15-22 (discussing the attenuation of plaintiffs’ theory). That mire can be avoided by interlocutory appellate review of the threshold legal questions certified by the district court.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court grant permission to file an interlocutory appeal.

Respectfully submitted,

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