No. 21-806

IN THE

Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *et al.*,
Petitioners,

v.

GORGI TALEVSKI, by his next friend, IVANKA TALEVSKI,
Respondent.

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

BRIEF OF INDIANA AND SIXTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in light of compelling historical evidence to the contrary, the Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.

2. Whether, assuming Spending Clause statutes ever give rise to private rights enforceable via Section 1983, FNHRA's transfer and medication rules do so.

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INTEREST OF THE *AMICI* STATES*

The States of Indiana, Alaska, Arkansas, Idaho, Kansas, Kentucky, Louisiana, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of petitioners.

As sovereign entities frequently charged with administering Spending Clause legislation, *Amici* States have a strong interest in whether Spending Clause statutes can *imply* rights enforceable via Section 1983. Private rights of action burden States with costly litigation even when they prevail and, when they lose, with judgments and plaintiffs' attorneys fees. In the last three years, Indiana alone has litigated over 1,200 Section 1983 cases. The chaotic state of implied-rights doctrine only exacerbates the litigation burden those cases impose, so the issue whether Spending Clause legislation may implicitly confer rights enforceable under Section 1983 is a nationally important issue warranting the Court's consideration.

Spending Clause statutes are fundamentally contractual: They require grant recipients, such as States, to comply with conditions in exchange for federal funding. Federal agencies are responsible for policing compliance—and accountable for any decision

* Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *Amici* States' intention to file this brief at least ten days prior to the due date of this brief.

to take enforcement action. Absent an express cause of action, *private* enforcement suits interfere with that contractual relationship, upend political accountability, and undermine the general rule that the parties should understand the terms of a contract from the outset. In short, inferring privately enforceable rights from Spending Clause statutes interferes with administration and enforcement mechanisms created by Congress, which the *Amici* States count on when deciding whether to participate in federal programs.

SUMMARY OF THE ARGUMENT

Ever since the Court permitted private enforcement of a Medicaid plan requirement via Section 1983 in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), it has retreated from allowing private suits to enforce Spending Clause legislation. Indeed, in the three decades since *Wilder*, the Court has refused to find *any* such enforceable statutes. Yet even as the Court's implied-right-of-action doctrine has shifted from a focus on private *benefits* to an insistence on unambiguously conferred *rights*, it has never expressly disavowed *Wilder*. The consequence is that lower courts remain confused as to when federal Spending Clause statutes are enforceable via Section 1983. And as three Justices remarked when dissenting from denial of certiorari in a similar case in 2018, the Court itself created the confusion; it alone can clear it up. Unsurprisingly, in the intervening three years, the lower-court muddle has only worsened. At long last, this case presents an ideal opportunity to resolve it.

The Court should therefore grant the petition to clarify the doctrine with a clear rule rooted in common-law principles of contract—and a common-sense understanding of Spending Clause legislation. Spending Clause statutes establish complicated programs requiring publicly accountable federal and state officials to balance competing interests as they promulgate and implement standards delegated by Congress. If a State fails to comply, the "typical remedy . . . is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). While government enforcement actions represent policy assessments by politically accountable actors, private enforcement actions have no similar mode of public accountability.

Moreover, where Congress has chosen to impose a requirement as a condition of receiving federal funds but *not* to create an individual cause of action, it is incoherent to think that Congress nevertheless intended to imply rights enforceable through a different federal statute, namely Section 1983. This point becomes even clearer when one considers the fee-shifting provision of Section 1988. Where Congress has provided no private enforcement mechanism whatsoever, courts have no sound basis for inferring that Congress "intended" not only a private right of action under Section 1983, but also the extra enforcement incentive that Section 1988 affords.

Accordingly, the Court should revisit *Wilder* and hold that Spending Clause legislation is not enforceable via Section 1983. Common-law principles of contract point to a clear, principled rule: Because Spending Clause legislation amounts to a contract between the federal government and the States accepting the federal funds, third parties may not bring private actions to enforce spending legislation absent an express cause of action. If Congress wishes to create such rights, it must do so explicitly.

ARGUMENT

I. The Decades-Long Search for Privately Enforceable Rights in Spending Clause Statutes Has Produced Only Cost and Confusion

A. The Court has inferred no private enforcement of a Spending Clause statute since *Wilder*, but plaintiffs frequently invoke—and prevail under—such rights

1. Section 1983 affords a cause of action to vindicate "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Using the "and laws" text, the Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), permitted private plaintiffs to enforce Social Security Act entitlements against state officials, asserting in the process that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Id.* at 4.

The Court purported to rely on a "consistent treatment" of allowing plaintiffs to enforce federal statutes, but cited only an assumption in *Edelman v. Jordan*, 415 U.S. 651 (1974)—which held that the Social Security Act itself did not supply a private right of action—that Social Security Act beneficiaries could enforce their statutory rights under Section 1983. *Thiboutot*, 448 U.S. at 5–6. Both the Court's assumption in *Edelman* and its holding in *Thiboutot*, however, rested on the broad, improbable, and now discredited postulate that *every* federal statute must somehow be privately enforceable. *See id.*

2. Soon enough, the Court held that not *all* federal statutes confer privately enforceable rights yet struggled to distinguish those that do from those that do not. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), the Court refused to permit enforcement of Congress's "findings respecting the rights of persons with developmental disabilities" in the Developmentally Disabled Assistance and Bill of Rights Act of 1975. *Id.* at 13. Such "findings," the Court concluded, merely contained "a congressional preference for certain kinds of treatment," which was "too thin a reed to support the rights and obligations read into it by the court below." *Id.* at 19. As for other challenged DDA provisions, the Court remanded for lower courts to answer "difficult questions" over "whether an individual's interest in having a State provide . . . 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." *Id.* at 28. Here is the first suggestion, at least, that a

federal statute must confer "rights" to be privately enforceable—though the Court provided no guidance as to how courts could find *implied* "rights."

That same term, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the Court ruled that, in providing an alternative enforcement scheme, Congress intended to preclude private enforcement of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972. Critically, however, the Court in *Sea Clammers* framed its holding and that of *Pennhurst* as "two exceptions to the application of § 1983 to statutory violations," namely, (1) in *Sea Clammers*, "whether Congress had foreclosed private enforcement of that statute in the enactment itself"; and (2) in *Pennhurst*, "whether the statute at issue there was the kind that created enforceable 'rights' under § 1983." *Id.* at 19. In other words, the Court viewed *all* federal statutes that conferred benefits on private persons to be *prima facie* enforceable via Section 1983. That view prevailed again in *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), where the Court permitted public-housing tenants to enforce Housing Act rent ceilings on the theory that "[t]he intent to benefit tenants is undeniable" and Congress had not supplied a comprehensive alternative remedy. *Id.* at 424–25, 430.

A few years later in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), the Court applied a more systematic—yet still benefit-oriented—

test when it permitted private enforcement of the National Labor Relations Act under Section 1983. The Court considered (1) whether the statute "creates obligations binding on the governmental unit"; (2) whether the statute is "'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce'"; and (3) "whether the provision in question was 'intend[ed] to benefit' the putative plaintiff." *Id.* at 106 (quoting *Wright*, 479 U.S. at 430, 431–32)). It also continued to ask whether Congress had "specifically foreclosed a remedy under § 1983 . . . by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.'" *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1003, 1005 n.9 (1984)).

Next came *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990)—the highwater mark of the permissive, benefit-oriented approach to private enforcement of federal statutes via Section 1983. In *Wilder*, the Court permitted public and private hospitals to sue Virginia officials under Section 1983 to enforce the Boren Amendment, which, as part of Medicaid's litany of plan requirements, conditioned Medicaid funding on a State's promise to pay "reasonable and adequate" fees to hospitals. *Id.* at 502–03. Over the dissent of Chief Justice Rehnquist—joined by Justices O'Connor, Scalia, and Kennedy—the Court concluded that Congress intended health providers to benefit from the Boren Amendment and, though Congress expressly provided for the Secretary of Health and Human Services to enforce Medicaid plan requirements by withholding funding, it did not foreclose a private remedy under Section 1983. *Id.* at 510, 523–24.

After *Wilder*, the Court moved away from a private-benefit standard toward a textual-right standard. In *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court refused to permit private enforcement of the "reasonable efforts" state-plan requirement of the Adoption Assistance and Child Welfare Act of 1980 because it did not "unambiguously confer an enforceable right upon the Act's beneficiaries," *id.* at 363—finding, for the first time, statutory "beneficiaries" but *not* enforceable "rights." And in *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court, while adhering to the *Wright* factors, stressed that "the statute must unambiguously impose a binding obligation on the States" using "mandatory, rather than precatory, terms." *Id.* at 340–41. It remanded for lower courts to "break[] down the complaint into specific allegations . . . to determine whether any specific claim asserts an individual federal right" under Title IV-D. *Id.* at 346. That is, the Court instructed lower courts to focus on *rights* rather than *benefits*.

Continuing that same direction, the Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001), focusing on the "text and structure of Title VI," *id.* at 288, found no "freestanding private right of action" to enforce regulations carrying out the Act's non-discrimination directive. *Id.* at 293. Title VI perhaps created rights by providing that "[n]o person . . . shall . . . be subjected to discrimination," *id.* at 288 (quoting 42 U.S.C. § 2000d), but its text authorizing federal agency regulations did not. Indeed, that text is directed at the

Department of Education, which may only "effectuate" rights *already* created by Title VI. *Id.* (quoting 42 U.S.C. § 2000d-1).

Then, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court retreated from any semblance of a multi-factor benefits test in favor of examining "the text and structure of [the] statute" to determine whether "Congress intend[ed] to create new individual rights" enforceable via Section 1983. *Id.* at 286. Following *Sandoval*'s approach to discerning whether the statute included "'rights-creating' language," the Court rejected a student's bid to enforce the Family Educational Rights and Privacy Act (FERPA). *Id.* at 287. FERPA plainly conferred benefits on students (albeit non-monetary ones) but did not confer "the sort of 'individual entitlement' that is enforceable under § 1983." *Id.* at 287, 290 (quoting *Blessing*, 520 U.S. at 343) (emphasis omitted).

3. *Wilder* was thus plainly overtaken by doctrinal developments long ago, yet the Court has never overturned *Wilder* itself—though it has twice tiptoed up to that line.

Congress repealed the Boren Amendment but enacted 42 U.S.C. § 1396a(a)(30)(A), which similarly requires a State Medicaid plan to "assure that payments are consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of . . . care and services." *Id.* When the Ninth Circuit rejected enforcement of Section 30(A) via Section 1983, *see Sanchez v. Johnson*, 416

F.3d 1051, 1060 (9th Cir. 2005), providers tried a different enforcement route: The Supremacy Clause. The Court was originally slated to address that theory in *Douglas v. Independent Living Center of Southern California, Inc.*, 565 U.S. 606, 616 (2012), but ultimately avoided it, prompting the Chief Justice to write that "the Supremacy Clause does not provide a cause of action to enforce the requirements of § 30(A) when Congress, in establishing those requirements, elected not to provide such a cause of action in the statute itself." *Id.* at 618 (Roberts, C.J., dissenting).

The Court returned to the Supremacy Clause issue in 2015 in *Armstrong v. Exceptional Child Center, Inc.*, where, in agreement with the Chief Justice's *Douglas* dissent, it rejected a healthcare provider's suit to enforce Section 30(A) under the Supremacy Clause. 575 U.S. 320, 325–27 (2015). It explained that "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements . . . is the withholding of Medicaid funds by the Secretary of Health and Human Services." *Id.* at 328. The Court expressly recognized that the "payments" provision at issue in *Armstrong* was "parallel" to that deemed privately enforceable in *Wilder* yet declined to follow *Wilder*'s lead. *Id.* at 330–31. Indeed, the Court observed that a viable Section 1983 action also was not likely because "later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Id.* at 330 n.*. The Court, in other words, stopped just short of overturning *Wilder* itself.

4. So, in the three decades since *Wilder*, the Court has at every turn rejected implied Spending Clause rights, including under FERPA, *Gonzaga Univ.*, 536 U.S. at 276, the Adoption Assistance and Child Welfare Act, *Suter*, 503 U.S. at 350, the Public Health Services Act, *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 113 (2011), and, *Wilder* notwithstanding, even Medicaid's "payments" plan requirement, *Armstrong*, 575 U.S. at 327.

Yet because the Court has never expressly disavowed *Wilder*, lower courts continue to permit enforcement of Medicaid plan requirements via Section 1983. *See, e.g.*, *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) (permitting Section 1983 action enforcing the "reasonable promptness" provision of the Medicaid Act, Section 1396a(a)(8)); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 192 (3d Cir. 2004) (permitting private enforcement of Medicaid Act sections 1396a(a)(8), 1396a(a)(10), and 1396d(a)(15) because "the Court has refrained from overruling *Wright* and *Wilder*"); *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (permitting private enforcement of Section 1396a(a)(8) because the "Medicaid Act does not explicitly forbid recourse to § 1983"); *Cal. Ass'n of Rural Health Clinics v. Douglas*, 738 F.3d 1007, 1011–13 (9th Cir. 2013) (permitting a provider to sue to enforce Section 1396a(bb), governing payment for services, via Section 1983).

While some courts continue to apply versions of the *Wilder/Blessing* multi-factor tests, others take *Gonzaga* to mandate a single inquiry—did Congress

unambiguously create *rights*? *Compare Briggs v. Bremby*, 792 F.3d 239, 244 (2d Cir. 2015) (permitting private enforcement of the Food Stamp Act under Section 1983, concluding that *Gonzaga* did not "undercut" *Wilder*), *and Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 371–72 (5th Cir. 2018) (concluding that the *Armstrong* plurality did not overrule *Wilder*, making Section 1396a(bb) privately enforceable), *with Martes v. Chief Exec. Officer of S. Broward Hosp. Dist.*, 683 F.3d 1323, 1326, 1328–30 (11th Cir. 2012) (applying *Gonzaga*'s "unambiguously conferred right" test to preclude private enforcement of Section 1396a(a)(25)(C), which "is formulated as a requirement of a Medicaid state plan"). In *Jones v. District of Columbia*, the court found no enforceable rights among several sections of the Medicaid Act and rejected plaintiffs' reliance on *Wilder* because "the Court's *Gonzaga* decision in 2002 was a game-changer for § 1983 suits." 996 A.2d 834, 845 (D.C. 2010).

It should be no surprise, therefore, that lower courts have reached opposite conclusions about whether the same statutes are privately enforceable under Section 1983. The Circuits are famously divided 5-2 (with the Fifth Circuit having switched sides) over whether Section 1983 is a proper vehicle for challenging disqualification of a Medicaid provider. *Compare Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019), *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962

(7th Cir. 2012), *and Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006), *with Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347 (2020) (en banc) (overruling *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017)), *and Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017).

Other Medicaid plan requirements engender similar conflicts. *Compare BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 824 (7th Cir. 2017) (finding Section 1396a(a)(13) privately enforceable via Section 1983), *with Developmental Servs. Network v. Douglas*, 666 F.3d 540, 546–48 (9th Cir. 2011) (finding the same provision unenforceable); *compare Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013–16 (8th Cir. 2006) (finding Section 1396a(a)(30) enforceable via Section 1983), *with John B. v. Goetz*, 626 F.3d 356, 362–63 (6th Cir. 2010) (per curiam) (finding the same provision unenforceable), *Long Term Pharmacy All. v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004) (same), and *Sanchez*, 416 F.3d at 1060 (9th Cir.) (same).

Outright conflict exists outside Medicaid as well. *See, e.g.*, *N.Y. State Citizens' Coalition for Children v. Poole*, 922 F.3d 69, 73–74 (2d Cir. 2019) (noting that two circuits have held that the Adoption Act payments provision is privately enforceable, and one circuit has held that it is not). *Compare Cabinet for Human Res. v. N. Ky. Welfare Rights Assoc.*, 954 F.2d 1179, 1179–80 (6th Cir. 1992) (concluding that the Low-Income Home Energy Assistance Act does not

give rise to rights enforceable via Section 1983), *and Hunt v. Robeson Cnty. Dep't of Soc. Servs.*, 816 F.2d 150, 151 (4th Cir. 1987) (same), *with Crawford v. Janklow*, 710 F.2d 1321, 1325 (8th Cir. 1983) (finding LIHEAA rights enforceable via Section 1983), *and Kapps v. Wing*, 404 F.3d 105, 127 (2d Cir. 2005) (noting that "[t]he question of whether § 8624(b)(13) of the LIHEAA creates rights that are enforceable under § 1983 is not an easy one" given the difficulty of determining "a unified approach to provisions contained in spending clause statutes" "[i]n the aftermath of the Court's decision in *Gonzaga*").

The decision below encapsulates the confusion. The panel relied on the *Blessing* factors to fashion privately enforceable rights secured under FNHRA, 42 U.S.C. § 1396r. App. 31a–35a. Yet in an opinion by Judge Easterbrook, the Seventh Circuit had previously *rejected* application of *Blessing*, concluding that post-*Wilder* precedents squarely foreclose recognizing new substantive rights under Spending Clause statutes. *Nasello v. Eagleson*, 977 F.3d 599, 601 (7th Cir. 2020). That is, because this Court "has not added to the list of enforceable provisions since *Wilder*," the Seventh Circuit concluded that, after *Armstrong*, federal courts of appeals may not "enlarge the list of implied rights of action." *Id.* "Creating new rights of action," as Judge Easterbrook's majority opinion in *Nasello* rightly concluded, "is a legislative rather than a judicial task." *Id.*

The Court has found itself on the cusp of deciding this issue before. In *Gee*, three Justices voted to grant

certiorari to consider the provider-choice issue, describing it as "present[ing] a conflict on a federal question with significant implications," that "is important and recurring." *Gee v. Planned Parenthood Gulf Coast, Inc.*, 139 S.Ct. 408, 408–09 (2018) (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from denial of certiorari). Critically, Justice Thomas recognized that the provider-choice issue was but one context raising "fundamental questions about the appropriate framework for determining when a cause of action is available under § 1983—an important legal issue independently worthy of this Court's attention." *Id.* at 409. As recounted above, in the last three years, things have only gotten worse.

As Justice Thomas said: "We created this confusion. We should clear it up." *Id.* at 410. This case, unencumbered by collateral controversial issues, presents the perfect vehicle for doing so.

B. Congress has good reasons for declining to create private rights of action in Spending Clause statutes

Under the Spending Clause, Congress offers States federal funds in exchange for compliance with specified conditions. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"

(quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.))). Spending Clause statutes establish complicated programs requiring publicly accountable federal and state officials to balance competing interests as they promulgate and implement standards delegated by Congress. Accordingly, if a State fails to comply with a federal standard, "the typical remedy . . . is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 28. At bottom, such government enforcement actions represent policy assessments of their own by politically accountable actors. Private enforcement actions have no such built-in accountability limits.

As the Court concluded in the context of Medicaid, Spending Clause legislation often sets forth broad standards inviting agency discretion—standards that are "judicially unadministrable" in the context of individual rights claims. *Armstrong*, 575 U.S. at 328. For example, Section 30(A), at issue in *Armstrong*, "mandate[d] that state plans provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'" *Id.* Exclusive agency decision-making under such "judgment-laden standard[s]" ensures "expertise, uniformity, widespread consultation, and resulting administrative guidance" and "avoid[s] 'the comparative risk of inconsistent interpretations and misincentives that can arise . . . in a private action.'" *Id.* at 328–29

(quoting *Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring in judgment)).

But private enforcement would vitiate many such benefits of federal agency action. Indeed, allowing private suits "could spawn a multitude of dispersed and uncoordinated lawsuits" by individual plaintiffs and thereby lead to a "substantial" "risk of conflicting adjudications." *Astra*, 563 U.S. at 120 ("Far from assisting [the federal agency charged with enforcement], suit by 340B entities would undermine the agency's efforts to administer both Medicaid and § 340B harmoniously and on a uniform, nationwide basis."). Moreover, disparate conclusions among the circuits means that burdens on the individual States sometimes differ.

C. When Congress imposes a condition on federal funds without a private right of action, it is incoherent to ask whether Congress nevertheless "intended" to create a privately enforceable right

In *Gonzaga*, the Court "reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga Univ.*, 536 U.S. at 283. Thus, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286.

Indeed, provisions of Spending Clause legislation are *already* enforceable—at least by the federal government, and often by state agencies as well. For example, FERPA directed the Secretary of Education to determine whether to withhold funding from institutions with a "prohibited 'policy or practice.'" *Id.* at 287 (quoting 20 U.S.C. § 1232g(b)(1)). In this vein, Congress does sometimes enact a private cause of action as part of Spending Clause statutes. *See, e.g.*, Rehabilitation Act, 29 U.S.C. § 794a(a) (making available "[t]he remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)" to "employee[s]," "applicant[s] for employment" and "person[s] aggrieved" under the statute). But other times it refuses to do so. *Gonzaga Univ.*, 536 U.S. at 287 (stating that "there is no question that FERPA's nondisclosure provisions fail to confer enforceable rights" as it was "entirely lack[ing] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights" (quoting *Sandoval*, 532 U.S. at 288–89)).

As *Gonzaga* illustrates, where Congress has chosen to impose a requirement as a condition of receiving federal funds but *not* to create an individual cause of action, the inquiry should end there. It makes little sense to continue to entertain the possibility that Congress nevertheless intended to imply rights enforceable through a different federal statute, namely Section 1983. Why would Congress refuse to create express private rights, yet expect courts to infer private rights from oblique conditions on federal funding?

Answering this question becomes even more difficult when one considers the fee-shifting consequences of inferring rights enforceable via Section 1983. Displacing the "American Rule," Congress, via 42 U.S.C. § 1988, permits courts to tax Section 1983 defendants with attorneys fees for prevailing plaintiffs, which of course creates incentives for enforcing any federal law that comes within Section 1983's "and laws" ambit. Yet when Congress imposes conditions on federal funds in Spending Clause legislation, it considers exactly how those conditions should be enforced and what incentives to provide for enforcement. Where it has provided no enforcement mechanism whatsoever, Courts have no sound basis for inferring that Congress "intended" not only a private right of action under Section 1983, but also the extra enforcement incentive that Section 1988 affords.

II. Common-Law Principles of Contracts Foreclose Inferring Privately Enforceable Rights in Spending Clause Statutes

The Court can and should grant the petition and take this opportunity to alleviate the above confusion. If it does so, it will discover that common-law principles of contract—namely, the law of third-party beneficiaries—point to a clear, principled rule. Because Spending Clause legislation amounts to a contract between the federal government and the States accepting the federal funds, third parties may not bring private actions to enforce spending legislation absent an express cause of action.

A. Spending Clause legislation amounts to a contract between States and the federal government

The Spending Clause authorizes Congress to "place conditions on the grant of federal funds." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). The Court has "long recognized that Congress may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), albeit within limits. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987); *see also NFIB v. Sebelius*, 567 U.S. 519, 576–77 (2012).

One such limit arises out of principles of contract law because a Spending Clause statute is essentially "a *contract*: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Barnes*, 536 U.S. at 186 (quoting *Pennhurst*, 451 U.S. at 17 (emphasis added)). Accordingly, under contract principles, the strength and legitimacy of Congress's spending power hinges on whether the State "voluntarily and knowingly accepts the terms of the contract," *Pennhurst*, 451 U.S. at 17 (internal quotation marks omitted). Critically, "[t]here can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id*; *see also Dole*, 483 U.S. at 207 (one of "several general restrictions" on the spending power is that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly,

cognizant of the consequences of their participation.'" (quoting *Pennhurst*, 451 U.S. at 17)).

The "knowing acceptance" standard preserves the vertical balance of power between States and the federal government, "ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Sebelius*, 567 U.S. at 576–77. As a threshold requirement, therefore, Congress must speak to States with "a clear voice" when communicating its conditions. *Pennhurst*, 451 U.S. at 17.

Principles of contract law also define the scope of available remedies. *Barnes*, 536 U.S. at 187. A remedy is "'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* (internal citation omitted) (emphasis in original) (quoting *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73 (1992)). When the remedy in question implicates a Spending Clause statute, the traditional "remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 28. And while "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," *Barnes*, 536 U.S. at 187, "[w]hen Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such

a remedy," "thereby enlarg[ing] their jurisdiction." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 730–31 (1979) (Powell, J., dissenting). The Court has thus recognized that common-law principles of contract inform the scope of spending legislation because such legislation amounts to a contract between the federal government and the States.

B. Common law bars third-party beneficiaries from suing to enforce contracts, particularly government contracts

The Court has long held that, in enacting Section 1983, "members of the 42d Congress were familiar with common-law principles" and "likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). And in 1871, the core governing principles of common law contract law stipulated "that no stranger to the consideration can take advantage of a contract, though made for his benefit." W. W. Story, A Treatise on the Law of Contracts 509 (5th ed. 1874).

That is, at the moment of Section 1983's adoption, contract law provided that, "unless the promise is made to the plaintiff, or the consideration moves from him, he cannot generally sue on it." *Id.* at 526. That principle would bar courts from inferring enforceable rights for what are, in effect, third-party beneficiaries to Spending Clause legislation. *See Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring)

(applying the common law third-party rule to Spending Clause legislation); *see also* David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 104 (1994) ("[T]hird-party rights … are 'secured' (if at all) not by any 'law,' but only by the contract between the recipient and the United States, and section 1983 does not even remotely contemplate causes of action for contract violations.").

The Court, however, ignored the implications of that historical view in *Wilder v. Virginia Hospital Association* when it inferred a right of action to enforce the Boren Amendment because "health care providers are the intended beneficiaries." 496 U.S. 498, 509–10 (1990). The dissent observed that the majority "reason[ed] that the policy underlying the Boren Amendment would be thwarted if judicial review under § 1983 were unavailable," but "[t]his sort of reasoning . . . has not hitherto been thought an adequate basis for deciding that Congress conferred an enforceable right on a party." *Id.* at 525 (Rehnquist, C.J., dissenting).

Since then, several members of the Court have noted that allowing private litigants to enforce Spending Clause legislation against state officials goes against the grain of both historical *and* modern contract law principles. In *Blessing*, for example, Justices Scalia and Kennedy observed that contract law at the time of Section 1983's passage did not allow a third-party beneficiary to enforce a contract's terms. *Blessing*, 520 U.S. at 349–50 (Scalia, J., concurring). Thus, allowing a third-party beneficiary to "compel a State

to make good on its promise to the Federal Government [is] not a 'righ[t] . . . secured by the . . . laws' under § 1983." *Id.* at 350. To permit otherwise would be a "vast expansion" of contract-law principles. *Id.*

More recently, a plurality of the Court observed that, even as it has permitted third-party beneficiaries to assert claims in some contexts, "modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government . . . much less to contracts between two governments." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (plurality op.). Justice Scalia (joined by the Chief Justice and Justices Thomas and Alito) offered a principled distinction between (1) suits based on a contractual relationship between two *private parties,* versus (2) suits predicated on contractual relationship between (a) *private* party and the *government*, or between (b) *two governments*: Although "intended beneficiaries" are allowed to "sue to enforce the obligations of private contracting parties," intended beneficiaries are plainly *not* permitted to sue the government—"much less to [enforce] contracts *between two governments*." *Id.* (emphasis added).

And in a case rejecting Medicaid preemption of a State prescription-drug pricing law, Justice Thomas agreed that the contract analogy "raises serious questions as to whether third parties may sue to enforce Spending Clause legislation—through pre-emption or otherwise." *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in

the judgment). He suggested that, in a suitable case, he would afford "careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Id.* This case is an appropriate vehicle to resolve that question.

In sum, the Court's precedents confirm that, because "a private right of action under federal law is not created by mere implication," Congress must furnish an "unambiguously conferred" right. *Armstrong*, 575 U.S. at 332 (quoting *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002)); *see also Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 118 (2011) ("The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity." (quoting 9 J. Murray, Corbin on Contracts § 45.6, p.92 (rev. ed. 2007))). And third-party beneficiaries are *not* allowed to "compel a State to make good on its promise to the Federal Government." *Blessing*, 520 U.S. at 350 (Scalia, J., concurring). Accordingly, the common-law principles of contract squarely foreclose inferring privately enforceable rights in Spending Clause statutes—full stop.

This case provides a fresh occasion to revisit and overturn *Wilder*, and history furnishes a clear, cognizable rule that can be consistently administered by lower courts: The traditional common law barrier to third-party contract claims means that courts may not infer privately enforceable rights from Spending

Clause statutes. If Congress wishes to create such rights, it must do so expressly.

CONCLUSION

The Court should grant the petition and reverse the decision below.

Respectfully submitted,

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