No. 21-1431

IN THE

Supreme Court of the United States

ROBERT M. KERR, Director, South Carolina Department of Health and Human Services,
Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, *et al.*,
Respondents.

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

BRIEF OF INDIANA AND FIFTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Spending Clause statutes ever give rise to privately enforceable rights under § 1983, and if so, what is the proper framework for deciding when they do.

2. Whether, assuming Spending Clause statutes ever give rise to privately enforceable rights under § 1983, the Medicaid Act's any-qualified-provider provision creates a privately enforceable right to challenge a state's determination that a provider is not qualified to provide certain medical services.

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INTEREST OF THE *AMICI* STATES*

The States of Indiana, Alabama, Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Dakota, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of the petitioner.

Spending Clause statutes are fundamentally contractual and 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 to take (or refrain from taking) enforcement action. Absent an express cause of action, private 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.

As sovereign entities frequently charged with administering Spending Clause legislation, *Amici* States have a strong interest in whether Spending Clause statutes create implied rights enforceable through Section 1983. With Medicaid specifically, the *Amici* States have a direct stake in maintaining the system enacted by Congress. Under that system, it is the responsibility of the Secretary of Health and Human Services—not private plaintiffs—to determine whether State plans comply with federal conditions, including with respect to provider qualifications.

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* Pursuant to Supreme Court Rule 37.2(a), *Amici* States filed this brief more than ten days prior to the due date of this brief.

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

For decades, lower courts have attempted to reconcile conflicting Supreme Court precedents governing whether private entities may enforce, through Section 1983, rights "implied" by Spending Clause legislation. The Court has signaled again and again that it disfavors implied rights of action, but so far has stopped short of stating the only coherent rule available: Though Congress may expressly create private rights of action to enforce Spending Clause legislation, such programs never *imply* privately enforceable rights.

At long last, the Court has granted certiorari in a case that squarely presents the issue, *Health & Hospital Corporation of Marion County v. Talevski*, No. 21-806 (cert. granted May 2, 2022). That case concerns whether the Federal Nursing Home Reform Act implies rights enforceable via Section 1983. Granting review in this case would permit the Court to consider the implied-rights question in an additional context—Medicaid.

Providing Medicaid-specific guidance would be highly beneficial. First, conflicts over implied rights are especially rampant in Medicaid cases. And second, the complex federalism issues built into Medicaid demonstrate the potential for disruptive ripple

effects from inferring private rights from Spending Clause legislation.

While *Talevski* offers a dispute between a provider and patient, this case squarely presents the State-specific concerns—including clear-statement rules and political accountability—at stake when courts imply privately enforceable rights from Spending Clause statutes.

ARGUMENT

I. Implied-Rights Conflicts Are Especially Rampant in the Medicaid Context

Implied-rights questions regularly arise in the Medicaid context. Indeed, Medicaid cases document the rise, fall, and confusion of implied-rights doctrine. The high-water mark of the Court's permissive approach to private enforcement of federal statutes via Section 1983 was *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). There, 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. *Id.* at 510. It therefore concluded that a private remedy was available under Section 1983, even though Congress expressly provided for the Sec-

retary of Health and Human Services to enforce Medicaid plan requirements by withholding funding. *Id.* at 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. In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court stressed that, to be privately enforceable, a Spending Clause statute "must unambiguously impose a binding obligation on the States," using "mandatory, rather than precatory, terms." *Id.* at 340–41. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court found no "freestanding private right of action" to enforce regulations carrying out the non-discrimination directive of Title VI. *Id.* at 293. And in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), it rejected a student's bid to enforce the Family Educational Rights and Privacy Act (FERPA) because FERPA lacked any "clear and unambiguous" rights-creating language. *Id.* at 290–91.

Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320 (2015), represents the culmination of that approach. There, the Court rejected a healthcare provider's suit to enforce a Medicaid Plan requirement under the Supremacy Clause because "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 also observed that the plaintiffs did not assert a Section 1983 claim "since later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Id.* at 330 n.*. Thus the Court's recent cases make clear that privately enforceable rights should not be implied.

But because the Court has never expressly overturned *Wilder* itself, lower courts continue to infer enforceable rights from Medicaid that they would not (given *Suter*, *Blessing, Alexander,* and *Gonzaga*) infer from other Spending Clause statutes. *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).

The result: abundant circuit conflicts on the availability of Section 1983 to enforce various Medicaid provisions. *Compare Pediatric Specialty Care, Inc. v.*

Ark. Dep't of Human Servs., 443 F.3d 1005, 1013–16 (8th Cir. 2006), *vacated in part* 551 U.S. 1142 (2007) (finding Section 1396a(a)(30)(A) 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, 59–60 (1st Cir. 2004) (same), and *Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005) (same).

This case, which involved Medicaid's qualified-provider provision, showcases the confusion. 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:

Enforceable: *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).

Not Enforceable: *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).

The Court has found itself on the cusp of addressing this conflict before. In *Gee v. Planned Parenthood*

Gulf Coast, *Inc.*, 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" and as "important and recurring." 139 S. Ct. 408, 408–09 (2018) (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from denial of certiorari). And the Justices recognized that the provider-choice issue raised broader "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.

Since the *Gee* cert denial, circuit courts continue to diverge, leading one judge below to plead for the Court to provide direction. Concurring only in the judgment, Judge Richardson observed that "the caselaw on implied private rights remains plagued by confusion and uncertainty," and "hop[ed] that clarity will soon be provided." Pet. App. 28a (Richardson, J., concurring); *see also, e.g.*, *Baker*, 941 F.3d at 710 (Richardson, J., concurring) (same); *Nasello v. Eagleson*, 977 F.3d 599, 602 (7th Cir. 2020) (acknowledging that the circuits' decisions finding Section 1396a(a)(8) privately enforceable are "hard to reconcile with the Supreme Court's post-*Wilder* doctrine").

This case, together with *Health & Hospital Corporation v. Talevski*, No. 21-806, presents an opportunity for the Court to remedy this plague of confusion. As the multiple divergent circuit decisions on the qualified-provider issue demonstrate, the Court's intervention with respect to private Medicaid Act enforcement is just as important as with private

FNHRA enforcement. This case presents the Medicaid-specific question in addition to the broad implied-rights question raised in *Talevski*, making it an appropriate companion for the Court to consider next Term.

II. Inferring Private Rights from Medicaid Disrupts Congress's Chosen Balance for Government Accountability

Using its spending power, Congress may give States federal funds with strings attached, so long as it sets forth those conditions clearly and without coercion, much in the way of a contract. *See Barnes v. Gorman*, 536 U.S. 181, 186–87 (2002). In Medicaid, for example, Congress set up a scheme in which States may establish healthcare benefits programs and seek federal matching grants. If the Secretary of Health and Human Services is satisfied that the conditions are met, the State receives federal funds. If the Secretary is not satisfied, funding may be limited or denied. Congress anticipated disputes arising over compliance and provided various resolution procedures for States to follow. Allowing *private* suits to enforce Medicaid plan requirements and other conditions upends Congress's enforcement program, undermines incentives for federal-state cooperation, and vitiates the federal government's accountability in enforcing Medicaid.

1. The Court has "long recognized" that, within limits, "Congress may fix the terms on which it shall disburse federal money to the States" using its spend-

ing power. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987); *see also Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 576–77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

Spending Clause statutes include procedures by which the federal government, and often state agencies, manage compliance with these conditions. For example, FERPA directs the Secretary of Education to determine whether to withhold funding from institutions with a "prohibited 'policy or practice.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (quoting 20 U.S.C. § 1232g(b)(1)); *see also, e.g.*, *Suter v. Artist M.*, 503 U.S. 347, 360 (1992) (explaining that, under the Adoption Assistance and Child Welfare Act, the "Secretary has the authority to reduce or eliminate payments to a State on finding that the State's plan no longer complies with [a provision] or that 'there is a substantial failure' in the administration of the plan such that the State is not complying with its own plan" (quoting 42 U.S.C. § 671(b))).

Indeed, with Spending Clause statutes, 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. Only occasionally does Congress authorize a private cause of action to enforce conditions on federal grants. *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).

The Medicaid Act—which includes a few basic requirements but permits States many options—provides only for federal agency enforcement, not private enforcement. The Secretary of Health and Human Services determines whether a State has met the requirements of the Act and, if not, whether to dock some (or all) funding of a non-conforming State. *See* 42 U.S.C. § 1396c; 42 C.F.R. § 430.12(c).

Thus, by its terms, the Medicaid Act imposes legal obligations only on the Secretary, who must ensure that States substantially comply with plan requirements before approving federal matching grants. *See* 42 U.S.C. § 1396c. If the Secretary finds that a state plan "has been so changed that it no longer complies" with the requirements of Section 1396a or that "in the administration of the plan there is a failure to comply substantially with any such provision[,]" then the Secretary "shall notify [the] State . . . that further payments will not be made to the State." *Id.* Payments will be discontinued "until the Secretary is satisfied that there will no longer be any such failure to comply." *Id.* Or, rather than cutting off payments completely, the Secretary may "limit payments to categories under or parts of the State plan not affected by [the] failure" to comply. *Id.*

Critically, States are in no way obligated to implement a Medicaid program in accordance with the conditions required for federal funding. *See, e.g.*, *Harris*

v. McRae, 448 U.S. 297, 301 (1980) ("[P]articipation in the Medicaid program is entirely optional."). States participating in Medicaid remain free to amend their programs, even if that means the Secretary will deny federal funding consequently. *See* 42 U.S.C. § 1396c; 42 C.F.R. § 430.12(c). Even after a State accepts federal funds, Section 1396c recognizes that State's continuing prerogative to alter its Medicaid program. Any State that administers a non-compliant program runs the risk that the Secretary will turn off the funding spigot, but this remains a *lawful* option for the State under the statute. "[T]he *sole remedy* Congress provided for a state's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services." *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 328 (2015) (emphasis added).

If the Secretary does so limit or withhold Medicaid funds from a State for noncompliance, the State may seek judicial review of that determination. 42 U.S.C. § 1316; 42 C.F.R. § 430.38. But such review comes only after the appropriate state and federal agencies have attempted to work out any differences through negotiation—and only after the federal government has determined the price (in grant funding) for a State's alleged breach of conditions. Congress's distribution of accountability among the various government actors does not leave room for private plaintiffs to short circuit this process.

2. The Secretary's responsibility for considering state compliance with Medicaid plan requirements is

particularly suitable for the requirement at issue in this case. The Secretary may approve a Medicaid plan only if it provides that "any individual eligible for medical assistance . . . may obtain such assistance from any institution . . . *qualified* to perform the service or services required." 42 U.S.C. § 1396a(a)(23) (emphasis added). The Medicaid Act does not define "qualified," but a federal regulation says that "a State may exclude any individual or entity from participation in the Medicaid program for any reason for which the Secretary could exclude the individual or entity from participation" or "for any reason . . . authorized by State law." 42 C.F.R. § 1002.3 (implementing 42 U.S.C. § 1396a(p)(1)). The upshot is that States and the Secretary have the chance to work out the meaning of "qualified" in the plan negotiation process before turning to the courts.

In this case, to prevent Medicaid dollars from funding abortion indirectly, the South Carolina Governor ordered the South Carolina Department of Health and Human Services (DHHS) to disqualify abortion clinics from being Medicaid providers of family planning services—and to ask CMS for any necessary waivers. Pet. App. 114a; 119a–120a (citing S.C. Code Ann. § 43-5-1185). Accordingly, DHHS "submitted" and began "negotiating with CMS regarding such a mandatory waiver." Pet. App. 120a.

But before South Carolina and CMS could conclude that negotiation—and before South Carolina could learn whether, or how much, it might have to sacrifice Medicaid grants to adopt its abortion-provider disqualification—the plaintiffs filed this Section

1983 lawsuit to enjoin the Governor's order, full stop. The result is that South Carolina is enjoined from applying its qualified-provider policy without the federal government making any determination about the State's compliance with the Medicaid Act and outside Congress's prescribed enforcement scheme. And it is deprived of the opportunity to carry out its lawful disqualification of abortion providers from a state program even if doing so means foregoing federal dollars.

3. Fundamentally, Spending Clause programs, which require grant recipients (including States) to comply with conditions in exchange for federal funding, constitute contracts. And as with ordinary contracts, third-party enforcement thwarts traditional legal norms and undermines the principals' responsibilities.

As with ordinary contracts, the legitimacy of spending programs depends on whether grant recipients, particularly States, "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. This "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 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.). So, Congress must speak to States with "a clear voice" when communicating its conditions. *Pennhurst*, 451 U.S. at 17. And third-party beneficiaries may not, without express authority, sue to enforce Spending Clause contracts between the States and federal government.

See Blessing v. Freestone, 520 U.S. 329, 349 (1997) (Scalia, J., concurring); 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.").

Contract remedy principles are also relevant here. *See Barnes*, 536 U.S. at 187. Federal grant recipients understand that available remedies may include those traditionally available in suits for breach of contract. But third-party suits are *not* traditionally available, so "[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). Thus 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.

That traditional rule is sound. Private lawsuits to enforce Medicaid—including the lawsuit here—undercut Congress's chosen enforcement scheme, impair the political accountability that safeguards proper administration of Medicaid, and result in disparate outcomes throughout the country. As the Eighth Circuit has recognized, federal lawsuits brought under Section 1983 "would result in a curious system for review of a State's determination that a Medicaid provider is

not 'qualified.'" *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017). The Medicaid Act "requires that when a State terminates a Medicaid provider, the State must afford the provider an opportunity for administrative appeal and judicial review in the state courts." *Id.* But if "individual patients separately could litigate or relitigate the qualifications of the provider in federal court," the inevitable result will be "parallel litigation and inconsistent results." *Id.* at 1041–42; *see also Astra USA Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 120 (2011) ("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.").

Where Congress has enacted a Spending Clause program and directed a federal agency to (1) consider grant applications using specified criteria, and (2) decide whether to suspend all or some grant payments for failure to satisfy those criteria, grant recipients are entitled to those contractual terms. Federal agencies are accountable to the President, which may affect how they enforce conditions and value alleged breaches. Implied rights of action rob grant recipients—here, independent sovereigns in the federal system—of that political accountability, not to mention the ability to make an informed choice between a preferred state policy and a quantum of federal dollars. The Court should review this case alongside *Talevski* to ensure that, as it decides whether Spending Clause legislation ever implies enforceable rights for beneficiaries, it also considers critical implications for States.

CONCLUSION

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

Respectfully submitted,

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