No. 19-1186

In the Supreme Court of the United States

JOSHUA BAKER, IN HIS OFFICIAL CAPACITY AS DIRECTOR, SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JULIE EDWARDS, ON HER BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR 137 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Medicaid recipients have a private right of action under 42 U.S.C. § 1983 and 42 U.S.C. § 1396a(a)(23) to challenge a state's determination that a specific provider is not qualified to provide certain medical services.

2. What is the proper framework for deciding whether a statute creates a private right enforceable under 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION & INTEREST OF *AMICI CURIAE*[1]

This case presents a fundamental question this Court has never adequately answered about the power of the courts to bind Congress and the states to commitments they did not make. The question is this: When may a private citizen—or, in this case, a whole class of private citizens—sue to enforce their own interpretation of legislation enacted under the Constitution's Spending Clause?

It has never been obvious that private citizens should be able bring such lawsuits at all. After all, Spending Clause legislation is unique, deriving its legitimacy from an agreement between the federal government and the states—*not* between the government and private citizens. "[I]n return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp*. v. *Halderman*, 451 U.S. 1, 17 (1981). Like any contract, the terms of these federal-state contracts must be clear so the parties can gauge their exposure.

Thanks to a long, zig-zagging line of this Court's precedents, though, the terms are *not* clear. Repeatedly, but haphazardly, this Court and the lower courts have read into Spending Clause legislation private

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than *Amici* or their counsel made a monetary contribution to preparing or submitting this brief. Each of the parties has consented to the filing of this amicus brief.

rights to sue state officials under 42 U.S.C. § 1983—rights Congress never enacted and states did not accept. Although this Court has sought to clarify the standard for finding such rights, clarity is still lacking. The circuits have developed differing readings of this Court's precedent; even different panels within circuits have come to different conclusions. As this case illustrates—deepening the split between the circuits over whether a private citizen may bring a § 1983 action to enforce an alleged right under the Medicaid Act—the law remains ambiguous.

This uncertainty undermines the separation of powers and principles of federalism. Private enforcement suits, especially class actions, are costly exercises often spanning years. Such suits make the courts, rather than the agency designated by Congress, the front-line arbiter of the legislation. And the states cannot know in advance the commitments they are making when accepting federal funds.

The path out of this doctrinal thicket is found in the contractual nature of Spending Clause legislation. When § 1983 was passed, third parties could not enforce contracts, meaning Congress could not have intended for third parties to enforce Spending Clause "contracts" under § 1983. Numerous members of this Court have made this observation—most recently noting that even in "modern jurisprudence" third parties cannot sue to enforce "contracts between two governments." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (plurality opinion of Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J.). Yet the full Court has never so held.

This case presents an ideal opportunity to do so—making clear that third parties are never entitled to

enforce Spending Clause legislation unless Congress creates an express right of action. That will not only resolve the split among the lower courts in this case, but in all Spending Clause cases. It will also bring a valuable new measure of predictability to state and federal budgeting.

Amici curiae are 137 members of Congress who routinely author, debate, amend, and vote on Spending Clause legislation. *Amici* file this brief to explain the urgent need for clarity on these issues.

REASONS FOR GRANTING THE PETITION

I. Review is needed to clarify that because Spending Clause legislation is contractual, it cannot give rise to third-party suits, absent an expressly granted right *and* remedy.

Multiple members of this Court have recognized that because Spending Clause legislation initiates a contract between the federal government and a state, third-party enforcement actions should not lie to enforce Spending Clause legislation. The reason is that such actions require invoking § 1983, which was enacted at a time when contracts could not be enforced by third parties. Section 1983, then, cannot properly be pressed into the service of third-party actions. Instead of simply recognizing this fact, this Court has vacillated—allowing private suits one time and not another, depending on a variety of tests and clear-statement rules, each adding more complexity to the inquiry. The result is doctrinal bedlam.

A. This Court has long held that spending legislation creates a contract between states and the federal government.

Under the Spending Clause, Congress has power "to place conditions on the grant of federal funds." *Barnes* v. *Gorman*, 536 U.S. 181, 185-186 (2002). As a result, this Court has "repeatedly characterized * * * Spending Clause legislation as much in the nature of a *contract*." *Ibid.* (citation and internal quotations omitted) (emphasis in original). In "return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. and Hosp.*, 451 U.S. at 17. "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Ibid.*

This contractual structure allows Congress to place conditions on states that it could not enforce directly. The spending power "is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936). Congress may therefore achieve "objectives not thought to be within Article I's 'enumerated legislative fields' * * * through the use of the spending power and the conditional grant of federal funds." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (quoting *Butler*, 297 U.S. at 65).

Congress's ability to leverage the spending power this way, however, depends on states accepting the terms of the federal "offer." Without that acceptance, Spending Clause legislation may become a weapon of "coercion, destroying or impairing the autonomy of the states." *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 586 (1937); see also *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 577 (2012) (spending legislation may exert over states "a power akin to undue influence")

(quoting *Steward*, 301 U.S. at 590) (Roberts, C.J., joined by Kagan, J. and Breyer, J.). Courts, therefore, may not require states to "assume more burdensome obligations." *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 597 (1983) (quoting *Pennhurst State Sch. & Hosp.*, 451 U.S. at 29).

This limit on the judiciary extends to remedies. After all, it is up to the parties to the contract to define "the scope of available remedies" to enforce Spending Clause legislation. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). As a result, this Court has "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages." *Barnes*, 536 U.S. at 186. When a court adds a remedy not stated in the contract, it changes the terms of the bargain on which the parties agreed.

B. As numerous members of the Court have recognized, third parties could not enforce contracts in 1871, when Congress passed what is now § 1983.

The contractual nature of Spending Clause legislation also has implications for who may enforce the legislation. Since this Court began finding private rights to enforce Spending Clause legislation under § 1983, a growing number of justices have flagged an interpretive problem with that approach.

The problem was first noted in *Blessing* v. *Freestone*, 520 U.S. 329 (1997). There, two justices observed that when "[t]he State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds," a recipient of those funds is a "third-party beneficiary." *Id.* at 349 (Scalia, J., concurring,

joined by Kennedy, J.). "Until relatively recent times," however, "the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it." *Ibid.* (citing 1 W. Story, A Treatise on the Law of Contracts 549-550 (4th ed. 1856)). "This appears to have been the law at the time § 1983 was enacted." 520 U.S. at 350. Thus, the ability of a private citizen "to compel a State to make good on its promise to the Federal Government was not a 'right * * * secured by the * * * laws' under § 1983." *Ibid.*

Given this historical context, the concurring justices were not "prepared without further consideration to reject the possibility that third-party-beneficiary suits simply do not lie," so they joined the Court's opinion because "it leaves that possibility open." *Ibid.*

A few years later, a concurring justice recognized that the "contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation" because "[i]n contract law, a third party to the contract * * * may only sue for breach if he is the 'intended beneficiary' of the contract." *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (quoting Restatement (Second) of Contracts § 304 (1979)). The respondents, however, had not advanced this argument. *Ibid.* Were "the issue to be raised," the concurring justice "would give careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Ibid.*

In 2015, the problem was raised yet again—this time in a four-member plurality opinion. In *Armstrong*, the plurality recognized that reading private rights of action into Spending Clause legislation is inconsistent with the contract between the federal

government and the states. 575 U.S. at 332. As the plurality noted, even "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." *Ibid.* (internal citations omitted).

C. Given the law in 1871—and still today—§ 1983 does not authorize third parties to enforce Spending Clause legislation.

The concurring opinions in *Blessing* and *Walsh*, and the plurality in *Armstrong*, were correct. This Court's "job is to interpret the words consistent with their 'ordinary meaning * * * at the time Congress enacted the statute.'" *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). Taking the words of § 1983 in their historical context, their original public meaning did not create a right for third-party beneficiaries to enforce Spending Clause legislation. Even today, third parties cannot sue to enforce the government's contracts.

1. As this Court has explained, "members of the 42d Congress were familiar with common-law principles," and "they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport* v. *Fact Concerts*, 453 U.S. 247, 258 (1981). In "enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law" (*Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989)), and the public would not have understood § 1983 to do so.

The common-law rule in 1871 when Congress enacted § 1983 could not be "plainer": "a person for whose benefit a promise was made, if not related to the

promisee, could not sue upon the promise." C. Langdell, A Summary of the Law of Contracts 79 (2d ed. 1880); see also J. Clark Hare, The Law of Contracts 193 (1887) ("It is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to the parties, and cannot be enforced by third parties."). In other words, "no one can sue on a contract to which he was not a party." 2 F. Wharton, A Commentary on the Law of Contracts 155 (1882). Indeed, even if "the beneficial interest" of the contract is in a non-party, "in general the party with whom a contract is made is the proper plaintiff." 1 F. Hilliard, The Law of Contracts 422 (1872).

This principle was so universally recognized that when the New York Court of Appeals *departed* from the rule in a plurality opinion in 1859, it was "quite at odds with received wisdom." A. Waters, *The Property in The Promise: A Study of The Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109, 1115 (1985); see also M. H. Hoeflich and E. Perelmuter, *The Anatomy of a Leading Case*: Lawrence v. Fox *in the Courts, the Casebooks, and the Commentaries*, 21 U. Mich. J.L. Reform 721, 726 (1988) ("*Lawrence* v. *Fox* departed significantly from nineteenth-century contract doctrine."). Its opinion remained an outlier for over half a century; other courts did not begin allowing third parties to enforce contracts until the mid-1900s. Waters, *supra*, at 1150-1166. Ultimately, change would come only after Professor Arthur Corbin of Yale Law School launched his "Campaign of 1918-1930" to abolish the rule against third-party suits. *Ibid.*

In short, third-party enforcement of contracts—let alone Spending Clause legislation—was not allowed in

1871. It therefore cannot be read into § 1983 today. See *Newport*, 453 U.S. at 258.

2. Nor can it be read into § 1983 under modern contract law. This Court has rejected third-party standing to enforce contracts between the federal government and a private actor. See *Astra USA, Inc.* v. *Santa Clara County*, 563 U.S. 110, 117-118 (2011); *German All. Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230-231 (1912). Although such contracts benefit the public, "individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." Restatement (Second) Contracts, § 313 cmt. a (1981). Because "the government usually operates in the *general* public interest, third parties are presumed to be incidental beneficiaries." 9 Corbin on Contracts § 45.6 (2019).

These principles apply with extra force to Spending Clause legislation, which creates an agreement between governments. Again, as the *Armstrong* plurality noted, "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." 575 U.S. at 332 (internal citations omitted). There is simply "no authority * * * whereby an individual has been found entitled to judicial enforcement of a government-to-government agreement on the legal theory that they are third party beneficiaries of the agreement." *Kwan* v. *United States*, 272 F.3d 1360, 1363 (Fed. Cir. 2001).

In 1871, the law of third-party enforcement of contracts pointed in one direction: *against* reading § 1983 to enable third parties to enforce Spending Clause "contracts." The same remains true today.

D. Despite the clear historical backdrop of § 1983, the Court's decisions on private enforcement of spending legislation are anything but clear.

More than 100 years after § 1983 was passed, this Court opened the door to third-party lawsuits to enforce Spending Clause legislation under § 1983 in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 419 (1987). Only three years later, this Court applied this newfound right to Medicaid. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990). But because Congress never intended § 1983 to be used in that manner, the Court has never been able to articulate a clear, predictable test for deciding when such suits are allowed and when they are not. Pet. 13-20, 22-23. Most recently, the Court has experimented with multi-factor tests, burden-shifting regimes, and clear-statement rules.

Blessing called for courts to *begin* their search for a third-party right to sue with a three-part test: "[f]irst, Congress must have intended that the provision in question benefit the plaintiff"; "[s]econd, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence"; and "[t]hird, the statute must unambiguously impose a binding obligation on the States." 520 U.S. at 340-341 (internal citation and quotation marks omitted). Passing this test, however, creates "only a rebuttable presumption that the right is enforceable under § 1983." *Ibid.* The presumption is rebutted if Congress has forbidden "recourse to § 1983 in the statute itself," or "create[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement." *Id.* at 341.

Lower courts immediately divided—and remain so (*infra* at 12-15)—on how to apply the complex *Blessing* regime. Attempting to clarify the law once more, the Court in *Gonzaga University* v. *Doe*, 536 U.S. 273, 281 (2002), swiped at *Blessing*, stating that it "fail[ed] to see how relations between the branches are served by having courts apply a multi-factor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not." *Id*. at 286. Instead, if "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Ibid*. (internal citations and quotation marks omitted).

The Court did not expressly overrule *Blessing*, however, and even kept its presumption in place. "Once a plaintiff demonstrates that a statute confers an individual right," the Court held, "the right is *presumptively* enforceable by § 1983." *Id*. at 284 (emphasis added). "The State may rebut this presumption by showing that Congress specifically foreclosed a remedy under § 1983"—whether expressly, in "the statute itself," or "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id*. at 284 n.4 (internal citations and quotation marks omitted).

II. The Court's lack of clarity regarding third-party suits has split the lower courts and confused the states.

Instead of clarifying the law, this Court's decisions have spawned "a multitude of dispersed and uncoordinated lawsuits" leading to "conflicting adjudications"—the very reasons this Court rejected private rights of action to enforce Medicaid contracts with

private suppliers. *Astra USA*, 563 U.S. at 120. It is true, as the court below observed, that under current law courts "imply private rights of action" upon finding that Congress was "unmistakably clear" and "unambiguously conferred" a private right. Pet. 24a, 26a. But that is an "oxymoron—how can an implied right of action be phrased in clear and unambiguous terms, when statutory silence is what poses the question whether a right may be implied?" *McCready* v. *White*, 417 F.3d 700, 703 (7th Cir. 2005) (Easterbrook, J.) (internal citations and quotation marks omitted). And in practice, "private enforcement of federal law has come to resemble the game of pin the tail on the donkey." Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 St. Louis U. J. Health L. & Pol'y 207, 231 (2016).

This unpredictability strikes at the heart of the Spending Clause contract and frustrates the administration of Spending Clause programs. That is particularly true for the program at issue here: Medicaid. And no one can predict which program private litigants will sue under next. Such private lawsuits impose massive costs on state budgets. Review is needed to clarify the law once and for all.

A. This Court's lack of clear guidance has spawned inter- and *intra*-circuit splits.

As petitioners have well documented, this Court's jurisprudence has led to multiple circuit splits involving a variety of statutes. Pet. 20-21, 23-28. Indeed, although the court below joined five circuits in finding "Congress's intent to make a private right enforceable under § 1983 * * * 'unmistakably clear'" (Pet. 24a (quoting *Gonzaga*, 536 U.S. at 286)), the Eighth Circuit came to the opposite conclusion, finding that

"Congress has *not* spoken—as required by *Gonzaga*—with a clear voice that manifests an unambiguous intent to confer individual rights" (*Doe* v. *Gillespie*, 867 F.3d 1034, 1043 (8th Cir. 2017) (emphasis added; internal citations and quotation marks omitted)).

Although the majority below seemed to think the answer was clear cut—and the state should have been on notice—the concurrence recognized a "broader question lurking in the background": "What is the proper framework for determining whether a given statute creates a right that is privately enforceable under § 1983?" Pet. 41a (Richardson, J., concurring). After reviewing this Court's decisions, the concurrence could not answer whether "*Wilder*, specifically, and the *Blessing* factors, generally, [are] still good law" after *Gonzaga*. *Id.* at 44a. Bound by circuit precedent, the concurrence felt impelled "by the three factors from *Blessing*" to find a right of action, but "with hope that clarity will be provided." *Id.* at 44a-45a.

The concurrence's forthright admissions point to a problem beyond circuit splits. Even *within* circuits, jurists are developing different frameworks to tell whether Spending Clause legislation creates third-party rights that are privately enforceable.

For example, should district courts in the First Circuit apply the *Blessing* factors, as did one panel, (*DeCambre* v. *Brookline Hous. Auth.*, 826 F.3d 1, 10 (1st Cir. 2016)), or follow the lead of another panel that found "*Gonzaga* tightened up the *Blessing* requirements. It did not precisely follow the *Blessing* test but rather relied on several somewhat different factors" (*Rio Grande Cmty. Health Ctr., Inc.* v. *Rullan*, 397 F.3d 56, 73 (1st Cir. 2005))? Or, turning to the Second Circuit, did *Gonzaga* change the first *Blessing* factor

(*N.Y. State Citizens' Coal. for Children* v. *Poole*, 922 F.3d 69, 78 (2d Cir. 2019)), or are all three *Blessing* factors unaltered (*Backer* v. *Shah*, 788 F.3d 341, 344 (2d Cir. 2015))?

Perhaps, as the Third Circuit held, *Gonzaga* adds a factor *after* considering the *Blessing* factors. *Health Sci. Funding, LLC* v. *N.J. HHS*, 658 F. App'x 139, 141 (3d Cir. 2016) ("We have interpreted *Gonzaga University* as requiring us to first apply the three components of the *Blessing* test and then, to inquire into whether the statutes in question unambiguously confer a substantive right.") (internal quotes omitted). Or is it *before*, as the Eleventh Circuit believes? *Schwier* v. *Cox*, 340 F.3d 1284, 1291 (11th Cir. 2003) ("before we analyze the application of the *Blessing* factors * * * [in] keeping with *Gonzaga*, we must first ask whether Congress created an 'unambiguously conferred right'"). The analysis depends on where you are located.

In the Ninth Circuit, district courts must wonder whether *Gonzaga* cabined prior precedent or had no effect. Compare *Stilwell* v. *City of Williams*, 831 F.3d 1234, 1242 n.5 (9th Cir. 2016) (*Gonzaga* "cabin[ed] the line of cases that had held § 1983 actions to be available"), with *Cal. Ass'n of Rural Health Clinics* v. *Douglas*, 738 F.3d 1007, 1011-1012 (9th Cir. 2013) (though citing *Gonzaga*, applying *Blessing* factors unaltered). For their part, district courts in the Seventh Circuit cannot tell whether one must apply all the *Blessing* factors or none of them. Compare *BT Bourbonnais Care, LLC* v. *Norwood*, 866 F.3d 815, 821 (7th Cir. 2017) ("Working our way through the criteria the Supreme Court established in *Blessing* * * *"), with *McCready*, 417 F.3d at 703 (applying *Gonzaga*, never citing *Blessing*). Taking its own path, the Sixth Circuit applies a three-part analysis from *Gonzaga*,

including a clarified first *Blessing* factor. See *Hughlett* v. *Romer-Sensky*, 497 F.3d 557, 562 (6th Cir. 2006).

B. The Medicaid Act is particularly contractual, and its construction requires clarity to protect Congress and the states from being ambushed.

No program is more affected by the unpredictability of this Court's Spending Clause jurisprudence than the program at issue in this case: Medicaid.

Before a state receives federal funds, the Centers for Medicare & Medicaid Services (in the Department of Health and Human Services) must approve the state's plan as complying with "the statutory and regulatory requirements governing the Medicaid program." *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012). But the Medicaid Act does not condition funds on accepting private suits. The "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*, 575 U.S. at 328.

Nonetheless, as now construed by the circuits, this Court's precedent allows private actors to use § 1983 suits to second-guess the federal agency. In the 14 years following *Gonzaga*, federal circuit courts decided 44 § 1983 actions involving 24 Medicaid provisions. The circuits found private rights of action to enforce 16 of these provisions but denied such rights as to the other 8. See Perkins, *supra*, at 226-229 (Table 2).

This mass of litigation threatens the purpose of Medicaid legislation. Private enforcement raises costs for both states and the federal government. Although this Court's cases focus on federal funds, Medicaid is

jointly financed by the states, which are therefore on the hook, as well. Congressional Research Service, *Medicaid: An Overview* 1 (June 24, 2019) (*Medicaid Overview*). In "a typical year, the average federal share of Medicaid expenditures was about 57%," making the average state share "about 43%." *Id.* at 17.

The costs of class actions to enforce Medicaid provisions have been enormous. The cases can take years to resolve. See, *e.g.*, *Deal OK'd in Medicaid Suit*, The Dallas Morning News, A4, Apr. 6, 2007 (discussing "14-year-old lawsuit" over Medicaid reimbursement rates). Defense costs can run in the millions. See, *e.g.*, Mary Jo Pitzl, *Foster-care suit legal bills cost DCS $7M: No end in sight as pricey 5-year battle continues*, The Arizona Republic, 1A, Feb. 11, 2020; Kelli Kennedy, *Settlement reached: Agreement provides better care for children on Medicaid*, Sun Sentinel (Broward Edition), 3B, Apr. 10, 2016 (recounting "decades[-]long class-action lawsuit," which the "state has spent well over $7 million defending").

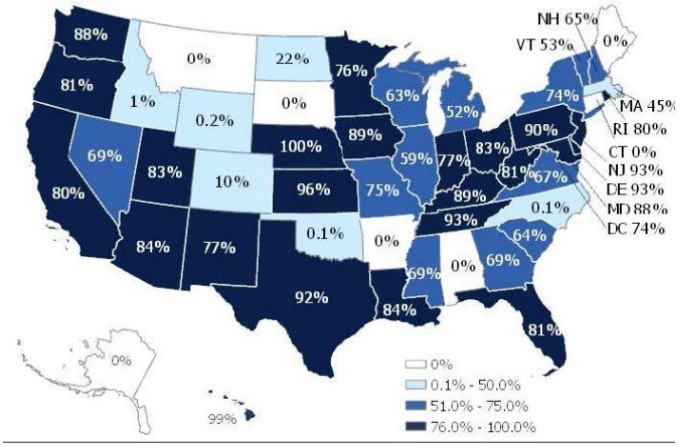
States can be blindsided by judicial decisions that impose massive, budget-busting costs. In one case, for instance, state officials predicted the potential additional costs from a judicial decision would run from $1 billion to $7 billion. See, *e.g.*, Robert T. Garrett, *Medicaid ruling may hit surplus: Upgrading kids' care could carry $5B tab*, The Dallas Morning News, 1A, Mar. 7, 2007. And program beneficiaries do not always agree with the remedies advocated by class representatives, adding to the uncertainties. Rita Price, *Families opt out of class-action lawsuit*, The Columbus Dispatch, 1B, June 9, 2017.

All these costs threaten to discourage innovation. To foster innovation and allow for the differing needs

among diverse geographic areas, Congress intentionally built substantial flexibility into Medicaid. *Medicaid Overview* at 18. For instance, Medicaid includes "waiver authorities" to allow states to "try new or different approaches to the delivery of health care services or adapt their programs to the special needs of particular geographic areas or groups of Medicaid enrollees." *Ibid.*; see also 42 U.S.C. §§ 1115, 1915(b), (c).

This flexibility results in "substantial variation" among state programs in "factors such as Medicaid eligibility, covered benefits, and provider payment rates." *Medicaid Overview* at Summary. States, for instance, may choose to deliver services through a traditional fee-for-service model or a managed care model. As the figure below shows, the use of managed care varies significantly by state. *Id.* at 14.

Figure 4. Percentage of Medicaid Enrollees with Comprehensive Risk-Based Managed Care, by State
(as of July 1, 2017)



Source: CMS, *Medicaid Managed Care Enrollment and Program Characteristics, 2017*, Table 4, Winter 2019.

In deciding whether to innovate, even after receiving approval by the Secretary, states must now weigh

the risk of *potential* private-enforcement suits. That is not what Congress intended when it created Medicaid; nor is it what the states or the public would have understood of a Spending Clause statute that does not expressly provide such private remedies.

C. This Court's lack of clarity undermines the separation of powers and principles of federalism.

In addition to undermining congressional intent, this Court's lack of clarity undermines principles of federalism and the separation of powers.

As to federalism, the law at present "requires clairvoyance from funding recipients." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 192 (2005) (Thomas, J., dissenting). Of course, states will be in the dark any time they are subject to a "multi-factor balancing test" allowing courts "to pick and choose which federal requirements may be enforced by § 1983 and which may not." *Gonzaga*, 536 U.S. at 286. But in this case, *the balancing test itself* is not even clear. As a result, each district and circuit court, not Congress or the states, writes its own test. Compare *Midwest Foster Care & Adoption Ass'n* v. *Kincade*, 712 F.3d 1190, 1196 (8th Cir. 2013) (*Gonzaga* replaced *Blessing*'s first factor with three-part test, holding that 42 U.S.C. §§ 672(a) and 675(4)(A) do *not* create a right enforceable under § 1983), with *Cal. State Foster Parent Ass'n* v. *Wagner*, 624 F.3d 974, 979 (9th Cir. 2010) (applying *Blessing* factors to hold that 42 U.S.C §§ 672(a) and 675(4)(A) *do* create such an enforceable right).

This unpredictability precludes the knowing and voluntary acceptance that "is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our

federal system." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 576-577. Whether Spending Clause legislation provides clear notice must be assessed "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the federal] funds." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). The question is "whether such a state official would clearly understand that" the millions of program recipients have been deputized as private attorneys general to enforce the statute. *Ibid.* Under current law, no state official could say with confidence whether private causes of action lie under the typical Spending Clause statute. Inevitably, this lack of clarity regarding "a condition on the grant of federal moneys" alters the "constitutional balance between the States and the Federal Government." *Will*, 491 U.S. at 65.

The patchwork of approaches also undermines the separation of powers. As Justice Powell explained, when courts rather than Congress determine whether a statute should be enforced through private litigation, "the legislative process with its public scrutiny and participation has been bypassed," undermining "the normal play of political forces." *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting). States thus "are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation." *Ibid.*

In sum, the current regime "raise[s] the most serious concerns regarding *both* the separation of powers (Congress, not the Judiciary, decides whether there is a private right of action to enforce a federal statute) *and* federalism (the States under the Spending Clause agree only to conditions clearly specified by Congress, not any implied on an ad hoc basis by the courts)."

Douglas, 565 U.S. at 620 (Roberts, C.J., dissenting) (rejecting the notion that "equity jurisdiction supports finding a direct cause of action in the Supremacy Clause" to enforce Spending Clause legislation) (emphasis added). Review is needed.

III. Requiring an express cause of action for third parties to enforce Spending Clause legislation will bring predictability while preserving individual rights.

Fortunately, there is no mystery about how the Court can end the chaos we have just described. It can hold that if Congress intends to allow private parties to enforce Spending Clause legislation, it should explicitly create a private right *and* a private remedy.

Congress knows how to create private rights of action—indeed, it has done so in certain Spending Clause statutes but not in others. For instance, Congress created an individual right to enforce provisions of the Individuals with Disabilities Education Act—expressly creating jurisdiction over such actions in the district courts and providing for attorneys' fees. See 20 U.S.C. § 1415(i)(3)(A) ("The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy."); *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296 (noting that the Act provided that "[i]n any action * * * brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs" to the parents of "a child with a disability" who is the "prevailing party") (quoting 20 U.S.C. § 1415(i)(3)(B)).

In the Medicaid Act, however, Congress provided enforcement tools only for the governing agency. See, *e.g.*, 42 U.S.C. § 1396c (Secretary can withhold

Medicaid funds for noncompliance); *Armstrong*, 575 U.S. at 335 (Breyer, J., concurring) ("federal agency may be able to sue a State to compel compliance with federal rules"). Requiring such explicit provisions before allowing private enforcement would be consistent with *Gonzaga*'s insistence on clarity. And it would be consistent with the constitutional demand that states be able to know what they are getting into when they accept funds allocated under the Spending Clause. Judicially created private rights of action are not.

Animating many of the cases in this area seems to be a suspicion that federal-agency enforcement is not enough. Instead, courts must deputize beneficiaries as private attorneys general. That is a policy decision not suited for the courts.

What is more, the underenforcement concern is not justified. Because of information and agency costs, federal agencies may be *better* suited to ensure statutory compliance and to assess how specific enforcement mechanisms affect the whole program. See, *e.g.*, Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (And How) It Might Be Good for Health Law*, 90 B.U.L. Rev. 2323, 2372-2382 (2000). Courts confronted with litigation on one Medicaid provision, for instance, are prone to create "systemic error costs" because "they lack the wide-angle lens necessary" for the "systemic evaluations necessary to shape a Medicaid program." *Id.* at 2375-2376.

"Medicaid administration is nothing if not complex." *Managed Pharmacy Care* v. *Sebelius*, 716 F.3d 1235, 1248 (9th Cir. 2013). The "executive branch has been giving careful consideration to the ins and outs of the program since its inception, and the agency is the expert in all things Medicaid." *Ibid.* Courts are not.

Even without the ability to bring suit, moreover, individuals can still seek redress. The Medicaid Act, for example, provides for certain claims to be heard by state agencies. To be approved by the Secretary, a state Medicaid plan must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3).

It is a mistake to assume that if the law is clarified to require Congress to create private rights of action expressly, the agencies will stand by indifferently. Following this Court's decision in *Armstrong*, for example, the Department of Health and Human Services recognized that "provider and beneficiary legal challenges are not available to supplement CMS [*i.e.*, Centers for Medicare & Medicaid Services] review and enforcement to ensure beneficiary access to covered services." Department of Health and Human Services; Medicaid Program; Methods for Assuring Access to Covered Medicaid Services, 80 FR 67576, 67577-67578 (Nov. 2, 2015). Therefore, the agency promulgated regulations to "strengthen CMS review and enforcement capabilities." *Id*. at 67578.

Still further, an "injured party can seek judicial review of the agency's refusal on the grounds that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. And an injured party can ask the court to compel agency action unlawfully withheld or unreasonably delayed." *Armstrong*, 575 U.S. at 336 (Breyer, J., concurring) (internal citation and quotation marks omitted). Such actions have proven effective. *E.g.*, *Gresham* v. *Azar*, 950 F.3d 93, 95 (D.C. Cir. 2020) (successful challenge to Secretary's approval of Medicaid demonstration requests);

Newton-Nations v. *Betlach*, 655 F.3d 1066, 1068 (9th Cir. 2011) (successful challenge to Secretary's decision to heighten mandatory copayments).

Private citizens, in short, will not lack protection and recourse if this Court finally closes the § 1983 door to enforcing Spending Clause legislation. And if Congress wishes to open the door by creating a private right of action, it knows how to do so.

CONCLUSION

Certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

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