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

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT SUMMARY

Respondents admit that the decision below exacerbates a mature circuit conflict over 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 provider is not qualified to provide certain medical services. Br. in Opp'n ("Opp.") 9 & 17; accord Pet. 20–21, 23–28. Helpfully, Respondents add that there is a mature district-court split as well. Opp. 17–18 n.8. And they do not deny that there are multiple circuit splits involving a variety of other federal statutes—all arising out of this Court's mixed signals as to the proper framework for deciding whether a statute creates a private right enforceable under § 1983. Compare Opp. 20–23 with Pet. 28–33.

So Respondents argue instead that the court of appeals got it right, Opp. 9–17, and that this Court should defer review because the case is an interlocutory appeal from a preliminary injunction, *id.* at 23–24. These objections are misplaced.

That the Fourth Circuit's decision might be right under one view of the conflicting caselaw is no reason to deny review. If Respondents are correct, millions of Medicaid recipients in the Eighth Circuit are being denied their private right to a qualified provider. And leaving the caselaw in disarray invites deeper discord in this area and even more circuit splits in others.

And while this Court frequently denies petitions in an interlocutory posture when there is still work left to be done in the lower courts, that is not the case here. There is no reason to let this circuit split percolate any longer.

None of this will come as a surprise to this Court; after all, three Justices recently recognized the existence of the circuit split and the importance of resolving it. *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., joined by Alito, J., and Gorsuch, J., dissenting from denial of certiorari). As Judge Richardson nearly begged in his concurring opinion below, it is long past time for this Court to clarify how lower courts should analyze statutes when looking for rights privately enforceable under § 1983, and to apply that analysis to Medicaid's any-qualified-provider provision in § 1396a(a)(23). Certiorari is not only warranted, it is long overdue.

ARGUMENT

I. The Court should grant the petition, clarify the framework for deciding whether Congress created a private right of action, and resolve the circuit split over the any-qualified-provider provision.

In the ordinary case, a petitioner identifies a circuit split and urges this Court to resolve it, and the respondent then protests that there is no actual conflict in authority. This is not one of those cases. Respondents willingly admit that there is a 6-1 split over whether the any-qualified-provider provision provides a private right of action. Opp. 17–20. Respondents admit that conflict is even deeper when considering the various district courts that have opined on the issue. *Id.* at 17–18 n.8. And they do not contest that three Justices of this Court recognized the split in *Gee* and urged the Court to resolve it. The time is right to resolve the conflict, and this is an ideal vehicle to do so.

As three members of this Court put it, lower "[c]ourts are not even able to identify which of [the Court's] decisions are 'binding.'" *Gee*, 139 S. Ct. at 410 (Thomas, J., dissenting from denial of certiorari). Amici share that view. Nineteen states underscored the need to clarify the framework for determining when Spending Clause statutes create private rights and highlighted the burden on state resources and state sovereignty in the present morass. Br. for Nebraska, Indiana, and 17 Other States 4–24. Just last year, many of those same states *plus twelve more* and the District of Columbia filed a brief supporting New York's petition asking this Court to clarify that framework to ensure "Spending Clause legislation is interpreted in a manner that supports rather than disrupts the operation" of foster care, another "quintessentially state-level program." Connecticut et al. Amici Br. 1, *Poole v. N.Y. State Citizens' Coalition for Children*, No. 19-574.

States legislatures and state public-policy groups have cause for concern, too. Well more than half of South Carolina's legislators decried how the ruling below deprived the State and its citizens of their substantive rights to enact public policy, a result that is starkly at odds with Congress's intent. Br. of Amici Curiae 86 Current and 2 Former South Carolina Legislators 4–21. Pro-life advocates explained how lower courts have misread this Court's past decisions while ignoring more recent cases reflecting a "heightened solicitude for federalism" and state sovereignty—hauling states opposed to abortion into federal courts to force them to contract with the nation's largest abortion provider. Br. Amicus Curiae of Americans United for Life 2–15; Amicus Br. of the

American Center for Law & Justice, and the Committee to Allow States to Defund Planned Parenthood 1–6. And numerous family policy councils explained how the current circuit-majority approach undermines the Medicaid framework and harms its intended beneficiaries: low-income families. Br of Family Policy Councils 10–12. When states are forced to siphon critical funding away from healthcare to pay their attorneys to defend them against a stream of private litigants, only the attorneys win. *Id.*

Finally, at the apex of the Covid crisis, well over 100 Congressional members found time to ask this Court to hold once and for all that Spending Clause legislation does not give rise to third-party suits "absent an expressly granted right *and* remedy." Br. for 137 Members of Congress 3. As these amici rightly observe, contract principles in vogue when Congress passed § 1983 prove that its original public meaning would not have allowed third-party beneficiaries to sue to enforce Spending Clause statutes, which are in the nature of a contract between two governments. *Id.* at 7–9. This Court misinterpreted § 1983 and "opened the door to third-party lawsuits" in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 419 (1987), more than 100 years after § 1983 was passed. *Id.* at 10. And the Court has been unable to "articulate a clear, predictable test" ever since. *Id.* In *Armstrong* v. *Exceptional Child Center, Inc.*, a plurality came one vote short of correcting that decades-old and circuit-splitting mistake. 575 U.S. 320, 332 (2015) (plurality). This case presents another opportunity. The petition should be granted.

II. The Fourth Circuit's analysis is wrong.

The heart of Respondents' opposition is a merits discussion. Opp. 9–17. As noted above, the circuits' heated disagreement over the merits of the first question presented is a reason to grant the petition, not to deny it. Moreover, the Fourth Circuit's opinion cannot be reconciled with this Court's precedents.

Respondents begin by asserting that the "court of appeals carefully applied this Court's settled precedents." Opp. 11. Not so. For starters, the Fourth Circuit relied primarily on the three-factored test from *Blessing* v. *Freestone*, 520 U.S. 329 (1997). Pet.App.16a–23a. Yet in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), this Court did not apply *Blessing's* test, *id.* at 286, instead criticizing it and the "confusion" it created. *Id.* at 282–83, 286.

The Fourth Circuit also cited *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), as proof that this "Court has already held that the Medicaid Act's administrative scheme" does not "foreclose a private right of action." Pet.App.21a. But "that paradigm" deserves "little stock . . . after *Armstrong*'s express disavowal of *Wilder*'s mode of analysis." *Does* v. *Gillespie*, 867 F.3d 1034, 1042 (8th Cir. 2017).

The panel majority below also dismissed Congress's chosen remedy—withholding state funding—as a "drastic" and "illogical" means of "vindicating the interests of individual Medicaid beneficiaries." Pet.App.21a. That is the opposite of what this Court wrote in *Armstrong* when the Court relied on that very remedy's exclusivity and rejected the "dissent's complaint" that withholding funding is "too massive to be a realistic source of relief." 575 U.S. at 331.

Finally, the Fourth Circuit read the any-qualified provider provision broadly. But this Court's decision in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), proves that the provision's "right" is quite narrow: "the right to choose among a range of qualified providers." *Gillespie*, 867 F.3d at 1046 (Shepherd, J., concurring).

How could the Fourth Circuit make so many mistakes? Because this Court's precedents remain conflicting and confusing. Petitioner does not contest that the panel below made a good-faith effort. "But when binding precedents present [lower courts] with a bit of 'a mess of the issue,'" their "job becomes particularly challenging." Pet.App.40a–41a (Richardson, J., concurring) (quoting *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari)).

To bolster their claim that reconciling this Court's precedents isn't so hard, Respondents insist that "[a]ll three judges" below "agreed that the" any-qualified-provider provision "*unambiguously* creates a private right in favor of the individual plaintiff," and "[t]his was not a close call." Opp. 11. But that's not what the concurrence says. Judge Richardson clarifies that such is the necessary conclusion "applying existing Supreme Court precedents," and cognizant of lower courts' reticence to "lightly conclude that the Supreme Court has overruled its prior cases," a job that "is for the Supreme Court alone." Pet.App.40a–41a (Richardson, J., concurring). Still, he spends several pages discussing the conflicting messages this Court has sent and the "confusion" and "uncertainty" it has created—ending in an expression of "hope" that this Court will provide "clarity" soon. Pet.App.40a–45a.

III. Respondents' vehicle objections fall flat.

Given the obvious need to resolve the circuit split, Respondents claim the vehicle is "unsuitable" because the issue is rarely litigated, this is an interlocutory, preliminary-injunction appeal, and further developments in the law are possible. Opp. 19, 23–26. These are unsatisfactory reasons to deny the petition.

Start with Respondents' counterintuitive proposition that improperly finding implied private rights in Spending Clause statutes and letting private individuals sue to vindicate those "rights" will not increase litigation against the states. Opp. 19–20. As it turns out, states have the exact opposite experience, in a variety of statutory contexts. Br. for Nebraska, Indiana, and 17 Other States 19–22 (cataloguing a "by no means comprehensive" list of examples).

Next, Respondents point to this case's procedural posture and claim that this Court "normally does not review interlocutory orders." Opp. 24 (citing *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 791 (2020) (Gorsuch, J., concurring in denial of certiorari); *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., concurring in denial of certiorari); and *Va. Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari)). But the Court refuses interlocutory review mainly when a case needs more development or when obvious errors might still be corrected below. In *Guedes*, Justice Gorsuch hoped that the court of appeals' misplaced reliance on *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "might yet be corrected before final judgment" and noted that a multiplicity of appeals courts were

looking at the challenged regulation. 140 S. Ct. at 791. In *Abbott*, the Chief Justice highlighted that a key issue had been "remanded [to the district court] for further consideration." 137 S. Ct. at 613. And *Virginia Military Institute* involved a court of appeals order that vacated a judgment and remanded for determination of an appropriate remedy. 508 U.S. at 946.

In contrast, the district court here has reached its conclusions: Petitioner "had no legitimate basis to terminate" Planned Parenthood from the state's Medicaid program, Planned Parenthood's inclusion "results in neither the direct nor indirect use of State funds to pay for abortions," and "respondents demonstrated irreparable injury." Opp. 6–7. Further proceedings will change none of that.

In fact, this Court routinely reviews interlocutory petitions in postures that are identical or very similar to the posture of this case. *E.g.*, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020) (reviewing appeal from a court of appeals opinion affirming the grant of a preliminary injunction); *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (same); *Roman Catholic Archdiocese of San Juan, Puerto Rico* v. *Feliciano*, 140 S. Ct. 696 (2020) (per curiam) (reviewing Puerto Rico Supreme Court reinstatement of preliminary injunction); *Nielsen* v. *Preap*, 139 S. Ct. 954 (2019) (reviewing appeal from a court of appeals opinion affirming the grant of a preliminary injunction); *Nat'l Inst. of Family and Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018) (reviewing appeal from a court of appeals opinion denying a motion for preliminary injunction). There is no reason to depart from that practice here.

Finally, Respondents urge this Court to wait for further developments, either from the Department of Health and Human Services, which indicated it "*may* provide further guidance" on its views regarding the any-qualified-provider provision back in January 2018, Opp. 25 (emphasis added), or from the en banc Fifth Circuit, which has been sitting on a similar case since hearing oral argument in May 2019, Opp. 25–26. But there is no indication when either the Department or the Fifth Circuit will act, this Court does not need the Department to interpret the statutory provision, and the Fifth Circuit previously split on the issue 7-7, *Planned Parenthood of Gulf Coast, Inc.* v. *Gee*, 876 F.3d 699 (5th Cir. 2017) (per curiam), so another decision from that court is unlikely to add much, regardless of the outcome.

* * *

Courts make it harder for Congress and states to work together to provide services to citizens when courts read private rights of action into silent statutory text. Doing so allows private parties to sue to enforce contracts between two governments and makes it impossible for Congress and states to predict the terms of their agreement. When arguably binding precedents present lower courts "with a bit of 'a mess of the issue,'" though, the lower-court judge's "job becomes particularly challenging." Pet.App.40a–41a (Richardson, J., concurring) (quoting *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari)). The time to rectify that mess is now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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