No. 21-1431

IN THE
Supreme Court of the United States

ROBERT M. KERR, in his official capacity as Director, South Carolina Department of Health and Human Services,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, *et al.*,

Respondents.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). The ACLJ is committed to the constitutional principles of federalism and state sovereignty, both of which are threatened by the Fourth Circuit's decision holding that individual Medicaid recipients have a private right of action under 42 U.S.C. § 1396a(a)(23) (2010) to challenge a state's disqualification of a Medicaid provider.

SUMMARY OF THE ARGUMENT

For reasons grounded in both separation of powers and federalism, this Court has increasingly refused to recognize statutory private rights of action not expressly authorized by Congress. Hauling sovereign states into federal court, without express statutory authorization, violates federalism principles as much as telling states what they can and cannot do.

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*Counsel of record for the parties received notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In finding a privately enforceable right in § 1396a(a)(23) of the Medicaid Act, the Fourth Circuit violated the federalism principles that this Court's precedents require. Medicaid is a Spending Clause program that intrudes upon traditional areas of state sovereignty—health care regulation and allocation of state taxpayer dollars. The Medicaid Act must therefore be interpreted to least invade state sovereignty.

Judicial creation of a private cause of action under Section 1983 to enforce Spending Clause program conditions is a double assault on the states' power, as independent sovereigns, to adopt valid policies reflecting the values of their citizens. First, states are exposed to the specter of legal assault by potentially countless Spending Clause program beneficiaries. Second, the judiciary effectively grants nullification power to providers and aid recipients over state fiscal policy in potentially sensitive areas of state concern, like taxpayer subsidization of Planned Parenthood. Stealth conditions, invented by judges, and untethered to statutory text, invade state sovereignty and result in federal coercion of state policy.

Review in this case is especially warranted given the Court's recent certiorari grant in *Health and Hospital Corp. of Marion County v. Talevski*, No. 21-806 (certiorari granted May 2, 2022). *Talevski* asks this Court to "reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983." Deciding this case in tandem with *Talevski* is optimal for giving clear guidance to the lower courts and ensuring that respect for federalism governs determinations

whether Spending Clause program conditions are privately enforceable under Section 1983.

ARGUMENT

I. This Court Should Grant Review to Reaffirm the Centrality of Federalism in Determining Whether Spending Clause Statutes Authorize Private Enforcement Rights.

For at least two decades, this Court has repeatedly declined to recognize a private cause of action that Congress did not expressly authorize to enforce a federal law. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015); *Comcast Corp. v. Nat'l Assn. of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020). The Court firmly grounded these holdings on the principle that implying private rights of action that Congress has not created trenches upon the separation of legislative and judicial power. *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020).

This Court's earlier decisions in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) and *Wright v. Roanoke Redevelopment and Housing*, 479 U.S. 418, 419 (1987) violated these federalism principles. *Wilder* and *Wright* located privately enforceable rights in Spending Clause statutes, "virtually ignoring the text of the statute itself." *Wilder,* 496 U.S. at 527 (Rehnquist, J., dissenting); *Wright*, 479 U.S. at 434 (O'Connor, J., dissenting) (noting that nothing in the "face of the statute" suggests that Congress intended to create a privately enforceable right). *Wright* and

Wilder also flouted this Court's admonition in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) that Spending Clause program conditions on the states must be unambiguously expressed.

Gonzaga and *Armstrong* repudiated the reasoning in *Wilder* and *Wright* and restored the importance of federalism in analyzing whether Spending Clause program conditions are privately enforceable. *Gonzaga*, 536 U.S. at 286 (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."). Yet in finding a privately enforceable right in the Medicaid Act's "any-qualified-provider" provision, 42 U.S.C. § 1396a(a)(23), the Fourth Circuit ignored the heightened solicitude for federalism that pervades this Court's recent Tenth Amendment and other Spending Clause decisions.[1] Implying a private right of action for a Spending Clause program condition with no direct textual support directly assaults federalism, undermining the States' status as independent sovereigns.

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[1] As discussed in the Petition for Certiorari, four other Circuits have made the same error. *See Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Department of Health*, 699 F.3d 962 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018).

A. The Fourth Circuit's Decision Conflicts with this Court's Recent Precedents Highlighting Federalism Principles where Federal Statutes Intrude upon State Sovereignty.

Outside the bounds of the Supremacy Clause, States enjoy broad autonomy under the Tenth Amendment to pursue legislative objectives reflecting the policy preferences of their citizens. *Shelby Cty. v. Holder*, 570 U.S. 529, 543 (2013). "Federalism secures the freedom of the individual" as well as the prerogatives of state governments. *Bond v. United States*, 564 U.S. 211, 221 (2011). The "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Id.* Protecting state government prerogatives fosters an environment where local policies can reflect the diverse needs of a heterogeneous society. *Id.* Federalism "permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Federalism principles therefore play a central role in interpreting ambiguities in federal statutes that intrude upon traditional areas of state sovereignty, such as regulation of the health care field. Respect for state authority requires federal courts "to be certain of Congress' intent before finding that federal law overrides" the "usual constitutional balance of federal

and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory*, 501 U.S. at 460).

Such certainty does not exist without a "clear statement" from Congress that it intended to intrude on traditional areas of state sovereignty. *Id.* at 858; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (Congress must be "explicit" when it "adjusts the balance of state and national authority"). Thus, for example, a state's surrender of its sovereign immunity from suit "will be strictly construed, in terms of its scope, in favor of the sovereign." *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

This preservation of the balance of power between the states and the federal government is essential to promote political accountability. If a state adopts a policy only because the federal government dictates it, "responsibility is blurred." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (holding that a federal law banning states from authorizing sports gambling violated the anti-commandeering doctrine). In the absence of federal preemption, "dictat[ing] what a state legislature may and may not do" is a "direct affront to state sovereignty." *Id.* (noting that "[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals").

Thus, when state action mandated by the federal government is unpopular with state citizens, such as allocating taxpayer funds to abortion providers, the citizens may blame state officials, while the federal officials who dictated the action escape responsibility.

Id. (citing *New York v. United States*, 505 U.S. 144, 169 (1992)).

The foregoing principles pervade this Court's recent Spending Clause cases. The "clear statement" rule, *Bond*, 572 U.S. at 858, requires that states must have been "clearly told" about Spending Clause program conditions. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (holding that states were not clearly told that expert fees were recoverable as costs in lawsuits brought under the Individuals with Disabilities Education Act, notwithstanding contrary indications in the statute's legislative history). Because Spending Clause legislation operates based on consent, the "legitimacy of Congress' power" to enact such laws rests not on its sovereign authority, but on "whether the [recipient] voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Cummings v. Premier Rehab Keller, P.L.L.C.* No. 20-219, 2022 U.S. LEXIS 2230, at *12 (April 28, 2022) (cleaned up).

The states cannot be deemed to "voluntarily and knowingly" accept the conditions attached to federal funds. *Pennhurst*, 451 U.S. at 17, unless those conditions are set forth "*unambiguously*." *Gonzaga*, 536 U.S. at 283 (emphasis added); *Armstrong*, 575 U.S. at 332. "Respecting this limitation 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. v. Sebelius*, 567 U.S. 519, 577 (2012) ("*NFIB*"); *see also id.* at 676 (Scalia, Alito, Kennedy, Thomas, JJ., dissenting) (cleaned up) (Otherwise, the Spending Clause power would "obliterate distinctions between

national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.").

Springing "post-acceptance" or "retroactive" conditions on states is inherently coercive. *NFIB*, 567 U.S. at 584 (opinion of Roberts, C.J.) (quoting *Pennhurst*, 452 U.S. at 25). State sovereignty concerns are at their zenith where post hoc conditions—such as a judicially invented private right of action under § 1983 for Medicaid beneficiaries—are imposed in massive Spending Clause programs, like Medicaid, because the states' option to decline participation is more theoretical than real. Medicaid spending accounts for over a fifth of the average state's total budget, and federal funds supply anywhere from half to four-fifths of those costs. *NFIB*, 567 U.S. at 581–82 (holding that the threatened loss of over ten percent of a state's overall budget left the states with a Hobson's choice between accepting the post hoc condition and suffering a devastating blow to state fiscal solvency); *see also id.* at 683 (Scalia, J., dissenting) (noting that "a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue.").

In implying a § 1983 private enforcement right in § 1396a(a)(23) that is not in the statute and that South Carolina did not accept, the Fourth Circuit encroached upon South Carolina's sovereign authority over health care regulation and allocation of taxpayer funds.

B. The Medicaid Act's Any-Qualified-Provider Provision Does Not Clearly Tell the States that Medicaid Beneficiaries Can Bring a Private Right of Action under § 1983 to Challenge State Decisions Disqualifying Providers.

The Fourth Circuit's reading of § 1396a(a)(23) disregards the renewed emphasis on federalism running through *Gonzaga*, *Armstrong*, and many other of this Court's recent decisions. As a result, the Fourth Circuit wrongly cabined South Carolina's broad authority over Medicaid provider disqualification decisions.

There is no question that states opting out of Medicaid by establishing their own health care programs can exclude categories of health care providers from participation. States enjoy wide latitude in choosing among competing demands for limited public funds. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

> The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487.

Both state and federal governments are free to discourage abortion, including through allocation of taxpayer dollars. *Rust v. Sullivan*, 500 U.S. 173, 200–01 (1991) (upholding 1988 federal regulations prohibiting the use of Title X money to perform, promote, refer for, or support abortion as a method of family planning); *Maher v. Roe*, 432 U.S. 464, 465–66 (1977) (upholding state regulation denying payments for non-therapeutic abortions to Medicaid recipients); *California v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (en banc) (upholding 2018 federal regulations prohibiting the use of Title X money to perform, promote, refer for, or support abortion as a method of family planning); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908 (6th Cir. 2019) (en banc) (upholding Ohio law that prohibited abortion organizations from participating in six state health education programs).

"When an issue involves policy choices . . . , the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" *Maher*, 432 U.S. at 479–80 (quoting *Mo., K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904)).

Congress therefore had to unambiguously restrict state authority over Medicaid service providers to abrogate South Carolina's sovereign authority to ensure that taxpayer funds do not subsidize Planned Parenthood South Atlantic. *See Gonzaga*, 536 U.S. at 283. It did not do so. Reading the any-qualified-provider provision in § 1396a(a)(23) to confer a private right of action on Medicaid recipients unquestionably limits the states' authority over Medicaid providers,

and thus over allocation of taxpayer funds—both areas of traditional state sovereignty. *See, e.g.*, *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000) (noting that health care regulation is within traditional state domain).

Section 1396a(a)(23)(A) provides: "[A]ny individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23)(A). The provision requires states to offer Medicaid beneficiaries a choice of service providers, but § 1396a(p)(1) empowers states to determine the service providers among whom beneficiaries can choose. 42 U.S.C. § 1396a(p)(1). Medicaid regulations further mandate state authority over appeals from service provider disqualification decisions. 42 C.F.R. § 1002.213 (2017). Neither § 1396a(a)(23)(A) nor § 1396a(p)(1) confer an enforceable right on Medicaid patients to force the states to continue to do business with specific providers.

Section 1396a(a)(23) is a directive to the Secretary of Health and Human Services, not a conferral of a cause of action on Medicaid beneficiaries. A statute addressing federal officials who monitor the state recipients of federal funding "does not confer the sort of '*individual* entitlement' that is enforceable under § 1983." *Gonzaga*, 536 U.S. at 287; *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Kauffman,* 981 F.3d 347, 360 (5th Cir. 2020); *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017).

Moreover, the only enforcement authority § 1396a(a)(23) confers on the Secretary of Health and Human Services is to withhold federal funds. *See* 42 U.S.C. § 1396c. Congress clearly intended the withholding of federal funds to be the sole remedy for noncompliance with the any-qualified-provider provision. *See Armstrong*, 135 S. Ct. at 1385; *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others"); *Gillespie*, 867 F.3d at 1041.

Section 1396 is clear: Congress did not authorize a private right of action to enforce the any-qualified-provider provision. But even if the text were ambiguous, the Fourth Circuit ignored the cardinal rule that ambiguities in federal statutes must be resolved in a manner that least treads upon state sovereignty. *Bond*, 572 U.S. at 860. There is no "more direct affront to state sovereignty," *Murphy*, 138 S. Ct. at 1477, than reading § 1396a(a)(23) as Congressional authorization for states to: 1) be hauled into federal court; 2) have potentially hundreds of their Medicaid service provider disqualification decisions second-guessed; and 3) have their limited Medicaid budgets drained of the substantial funds inevitably associated with hundreds of federal lawsuits. *See Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari) (locating a private right of action under § 1983 subjects states to the "threat of a federal lawsuit – and its attendant costs and fees – whenever it changes providers of medical products or services for its Medicaid recipients").

Congress may, as a condition of receipt of federal Medicaid funds, restrict the states' power to disqualify abortion providers as Medicaid contractors, but only if it clearly and unambiguously does so. *Gonzaga*, 536 U.S. at 283. The any-qualified-provider provision does not do so, nor does it clearly inform the states that decisions disqualifying service providers are subject to § 1983 challenges by Medicaid recipients. The Fourth Circuit's contrary conclusion effectively coerces states to allocate taxpayer monies to Planned Parenthood irrespective of the citizenry's opposition to such allocation.

This Court should grant review and consolidate this case with *Health and Hospital Corp. of Marion County v. Talevski*, No. 21-806 (certiorari granted May 2, 2022) to ensure consistency in how federalism undergirds the framework for determining whether Spending Clause programs create privately enforceable rights.

CONCLUSION

Amicus respectfully requests this Court to grant review.

Respectfully submitted,

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