No. 21-1431

In the Supreme Court of the United States

ROBERT M. KERR, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HIS OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, ET AL.,

Respondent.

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

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Americans United for Life (AUL) is the original national pro-life legal advocacy organization. Founded in 1971, AUL has committed over fifty years to protecting human life from conception to natural death. AUL attorneys regularly evaluate and testify on various bioethics bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with State legislators to enact constitutional pro-life laws, including legislation that allocates public funds away from the subsidization of elective abortion providers and toward comprehensive and preventative women's healthcare.

It is AUL's long-time policy position that State-appropriated or controlled funds should not be allocated to elective abortion providers. AUL has filed *amicus* briefs in this Court in support of a writ of certiorari on behalf of South Carolina previously in this litigation, *Baker v. Planned Parenthood South Atlantic*, 141 S. Ct. 550 (2020) (cert. den.), Kansas (*Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 139 S. Ct. 638 (2018) (cert. den.)), and Louisiana (*Gee v. Planned Parenthood of the Gulf Coast*, 139 S. Ct. 408 (2018) (cert. den.)), as well as similar cases before the Ninth Circuit (*Planned Parenthood of Ariz., Inc. v.*

[1] No party's counsel authored any part of this brief. No person other than *Amicus* contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice of the intent to file and have given written consent to this brief's filing.

Betlach, 727 F.3d 960 (9th Cir. 2013)), and Fifth Circuit (*Planned Parenthood of the Gulf Coast v. Smith*, 913 F.3d 551 (5th Cir. 2019)). AUL has represented parties before this Court in cases involving Congress' constitutional authority and the right of States not to use public funds to subsidize elective abortions or abortion providers. *See*, *e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980).

SUMMARY OF ARGUMENT

The Supreme Court's decision in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), first, was a determination that the federal Medicaid statute does not grant Medicaid patients a right to legal process in federal court to challenge federal or State provider qualifications. Second, *O'Bannon* held that Medicaid's any-qualified-provider provision (42 U.S.C. § 1396a(a)(23) (2021)) is a State plan requirement mandating that patients receive a range of choices among providers deemed qualified by Medicaid officials, not a substantive right to challenge a State's disqualification decision in federal court. As such, several circuits have erred in holding that § 1396a(a)(23) confers a private right of action upon Medicaid patients to challenge individual provider qualification determinations in a federal venue. Currently, different States are subject to different requirements under the same Act of Congress. The Fourth, Sixth, Seventh, Ninth, and Tenth Circuits have given Medicaid beneficiaries an implied private right to enforce § 1396a(a)(23) of the Medicaid Act, while the Fifth (en banc) and Eighth

Circuits have found no private right of action under § 1396a(a)(23).[2] The Court should grant the petition to resolve the circuit split and correct the majority jurisdictions' error of federal statutory interpretation of the any-qualified-provider provision.

ARGUMENT

I. THE SUPREME COURT CONSTRUED THE ANY-QUALIFIED-PROVIDER PROVISION *AGAINST* RESPONDENTS' POSITION IN *O'BANNON V. TOWN COURT NURSING CENTER*.

In *O'Bannon v. Town Court Nursing Center*, Medicaid recipients attempted to secure a federal due process right to a qualification determination for their chosen Medicaid provider. The Supreme Court decided *O'Bannon* before it radically expanded the jurisprudence of implied rights of action to encompass Spending Clause provisions in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). *O'Bannon* provided a substantive interpretation of the any-qualified-

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[2] If the circuit conflict is characterized as a difference in the appellate courts' interpretation of *O'Bannon*, the split is 5-3, insofar as the Second Circuit interpreted *O'Bannon* in *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), in the same manner as the Fifth and Eighth Circuits. *See Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc); *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017).

provider provision, 42 U.S.C. § 1396a(a)(23), that renders Respondents' position untenable. Thus, the Fifth Circuit en banc correctly concluded in *Kauffman* that "[t]he Supreme Court's decision in *O'Bannon* resolves this case." *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347, 357 (5th Cir. 2020) (en banc) (citing *Does v. Gillespie*, 867 F.3d 1034, 1047 (8th Cir. 2017) (Shepherd, J., concurring) ("*O'Bannon* controls the outcome of this case.")).

In *O'Bannon*, the federal Secretary of Health, Education and Welfare (HEW, now Health and Human Services or HHS) disqualified Town Court Nursing Center, a Pennsylvania skilled nursing facility, based on a Pennsylvania Department of Public Welfare (DPW) survey, which found that the facility failed numerous federal statutory requirements. 447 U.S. at 776 n.3 (citations omitted). Pennsylvania likewise disqualified Town Court, citing federal rules that mandated that a State agency follow suit when the federal secretary has disqualified a provider. *Id*. at 776 n.4 (citation omitted).

The home and several of its Medicaid patients brought a federal court action asserting the right to an evidentiary hearing on the disqualification decision before Medicaid could be discontinued. Much like the plaintiffs' complaint herein, the *O'Bannon* plaintiffs alleged that terminating Medicaid payments would force Town Court's closure and cause the individual plaintiffs to suffer "immediate and irreparable psychological and physical harm" due to

moving to a different Medicaid provider. *Id*. at 777; *see Planned Parenthood S. Atl. v. Kerr*, No. 21-1043, slip op. at 10 (4th Cir. Mar. 8, 2022) ("If Planned Parenthood is not able to provide this care under Medicaid, Edwards will be forced to look elsewhere and she will experience a concrete, particularized injury.").

Although the district court declined to find a right to a hearing existed, the Third Circuit reversed on the ground that the Medicaid statute and regulations created a constitutionally protected property interest in continued residency at the home, specifically through the any-qualified-provider provision, 42 U.S.C. § 1396a(a)(23), and regulations prohibiting certified facilities from transferring patients except for certain specified reasons, and reducing or terminating a recipient's financial assistance without a hearing. *O'Bannon*, 447 U.S. at 779–780 (citations omitted); *see Town Court Nursing Ctr., Inc. v. Beal*, 586 F.2d 280 (3d Cir. 1978). The circuit majority relied on the "general due process maxim that, whenever a governmental benefit may be withdrawn only for cause, the recipient is entitled to a hearing as to the existence of such cause." *O'Bannon*, 447 U.S. at 780. Over a strong dissent authored by Chief Judge Seitz, six judges applied this reasoning in *Town Court*, holding that the patients were entitled to a pretermination hearing on the issue of whether Town Court's Medicare and Medicaid provider agreements should be renewed. *Town Court*, 586 F.2d. at 282–83.

The Supreme Court reversed with only a single

dissenting vote by Justice Brennan (*O'Bannon*, 447 U.S. at 805–806), "essentially for the reasons stated by Chief Judge Seitz in his dissent." *O'Bannon*, 447 U.S. at 783. The Court found "unpersuasive" the plaintiffs' argument that the any-qualified-provider provision and other Medicaid provisions relied upon by the court of appeals conferred on them a property right to remain in the home of their choice absent good cause for transfer, and, therefore, entitled them to a federal hearing on whether good cause existed:

> *Whether viewed singly or in combination*, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the home of one's choice. Title 42 U.S.C. § 1396a(a)(23) . . . gives recipients *the right to choose among a range of qualified providers*, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified.

Id. at 785 (emphases added). The Supreme Court held that "enforcement by HEW and DPW of their valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id*. at 790.

In crediting Chief Judge Seitz's analysis, the Court quoted at length with approval his response to the Third Circuit majority's position:

> The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U.S.C. § 1396a(a)(23), a Medicaid recipient may obtain medical care "from any institution . . . qualified to perform the service or services required." *Clearly, what the majority characterizes as a recipient's right to obtain medical care from a "freely selected provider" is limited to a choice among institutions which have been determined by the Secretary to be "qualified."*

Id. at 782 n.13 (emphasis added). And the Supreme Court disagreed with Justice Blackmun's concurring view, which likewise interpreted § 1396a(a)(23) to "vest[] each patient with a broad right to resist governmental removal, which can be disrupted only when the Government establishes the home's noncompliance with program participation requirements." *Id.* at 791 (Blackmun, J., concurring in the judgment).

The Court also adopted Chief Judge Seitz's view that "since decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are

irrelevant." *Id.* at 785–86. On this basis, the *O'Bannon* Court set aside the plaintiffs' impact evidence. "[S]ome may have difficulty locating other homes they consider suitable or may suffer both emotional and physical harm as a result of the disruption associated with their move. Yet none of these patients would lose the ability to finance his or her continued care in a properly licensed or certified institution." *Id.* at 787.

Justice Brennan in his *O'Bannon* dissent and Judge Adams of the Third Circuit both urged that it "begs the question" to hold that § 1396a(a)(23) expressly gives the patients only a right to stay in "qualified" facilities, *id.* at 782 (citing *Town Court*, 586 F.2d at 287 (Adams, J., concurring)), implying that the only way to avoid a circular argument over the definition of "qualified" is to find that federal courts have authority to decide whether a provider is "qualified to provide the services required." But if the question is "begged", only "a strained reading of § 1396a(a)(23)" would allow a Medicaid patient to challenge whether the provider is "qualified." *Kauffman*, 981 F.3d at 358. As the en banc Fifth Circuit held:

> Where is the language in § 1396a(a)(23) that grants a right to a Medicaid patient, either independent of the provider's right or exercised in tandem with the provider, to have a particular provider declared "qualified"? It is not there, and that is why the Supreme Court held as it did in *O'Bannon*. A Medicaid patient may choose among qualified and willing

> providers but has no right to insist that a particular provider is "qualified" when the State has determined otherwise.

Id. All that *O'Bannon* said about what "qualified" means is that § 1396a(a)(23) does not grant federal courts the authority to make that decision. "[W]hile a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that [Medicaid authorities] ha[ve] determined to be unqualified." *O'Bannon*, 447 U.S. at 786.

A. *O'Bannon*'s Due Process Analysis Presupposed the *Absence* of Any Implied Federal Right for Respondents.

The Fourth and other Circuits have incorrectly dismissed *O'Bannon* as a due process case.[3] As the full Fifth Circuit described regarding a due process challenge to whether a Medicaid provider is

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[3] *See*, *e.g.*, *Kerr*, slip op. at 23 ("The [Supreme] Court simply rejected the procedural due process claim brought by the [*O'Bannon*] plaintiffs . . . *O'Bannon* therefore has little to do with this case."); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 977 (7th Cir. 2012) (distinguishing *O'Bannon* on the basis that "the free-choice-of-provider statute was raised in the context of a due-process claim" and that "[t]his is not a due-process case"); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1231 (10th Cir. 2018) ("[W]e note that the nursing home residents in *O'Bannon* asserted procedural due-process rights, not substantive rights, as the patients do here.").

"qualified," there must be "an underlying *substantive* right that would permit the residents to challenge a State's determination that a provider is not qualified." *Kauffman*, 981 F.3d at 366 (emphasis in original). According to the Fifth Circuit:

> [T]he Supreme Court confirmed that the Due Process Clause does not confer a "right to a hearing" in the abstract; rather, it does so only as a prerequisite to a deprivation of "life, liberty, or property." Accordingly, for the *O'Bannon* beneficiaries to prevail on their due process claim, they had to show that the termination of the nursing home's Medicaid agreement "amount[ed] to a deprivation of an [ ] interest in life, liberty, or property."

Id. at 355–356 (citing *O'Bannon*, 447 U.S. at 788, 790); accord *Gillespie*, 867 F.3d at 1048 (Shepherd, J., concurring) ("The plaintiffs' argument also exhibits a fundamental misunderstanding of due process rights. Any right to due process, whether asserted as a procedural or substantive claim, exists only when there is an underlying substantive right at issue.").

Thus, even though the *O'Bannon* plaintiffs "contend[ed] that, under the Due Process Clause, they 'were entitled to an evidentiary hearing on the merits of the decertification decision before the Medicaid payments were discontinued," the Supreme Court rejected this argument. *Kauffman*, 981 F.3d at 355–356. Under § 1396a(a)(23), "while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no

enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified." *O'Bannon*, 447 U.S. at 786. Even if facility decertification imposes "an immediate, adverse impact on some residents . . . that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty, or property." *Id.* at 787. Thus, "the Supreme Court made clear that § 1396a(a)(23) *does not confer a right to contest, collaterally attack, or litigate a State's determination that a provider is not 'qualified.'*" *Kauffman*, 981 F.3d at 367 (emphasis in original). "The central holding in *O'Bannon* was that regardless of whether the State's qualification decision was correct, the individual beneficiaries did not have a right that would allow them to 'demand a hearing' to challenge that determination.'" *Id.* (citing *O'Bannon*, 447 U.S. at 785).

B. *O'Bannon* Substantively Construed the Any-Qualified-Provider Provision to Mandate Only that State Medicaid Plans Offer Patients a Broad Range of Choices Among Qualified Providers, Not a Right to a Federal Court Hearing on Whether a Particular Provider Is Qualified.

Presuming for argument's sake that § 1396a(a)(23) impliedly gives a private right of action, the Court nonetheless "must examine the precise contours of that right." *Gillespie*, 867 F.3d at 1046 (Shepherd, J., concurring) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002). The *O'Bannon* Court

"clearly stated that it was defining the contours of the 'substantive right . . . conferred by the statutes and regulations.'" *Id.* at 1048. In the words of Judge Shepherd, "the Court carefully delineated the limits of the right conferred by [§ 1396a(a)(23)]; there is no enforceable right of continued care from a provider determined by the state to be unqualified." *Id.* at 1047. There is a complete dearth of guidance in the provision; § 1396a(a)(23) says nothing about which qualifications are permissible, nor about which governmental agency—federal or State—has the statutory authority to make the qualification decision in a particular instance or a disqualification decision afterward. Thus, no substantive individual right can be derived from the provision.

Similarly, circuits and judges have misread *O'Bannon* to be limited to circumstances involving a provider that is disqualified for health and safety reasons, based upon their supposition that § 1396a(a)(23) provides a definition of "qualified" that is strictly limited to an ability to deliver medical services.

> [T]he [*O'Bannon*] plaintiffs had no right to reside in an unqualified facility *when the disqualification decision was connected to the state's enforcement of its health and safety regulations*. The language of the freedom-of-choice provision supports this understanding because the word "qualified" is modified by the phrase "to perform the service or services required."

Gillespie, 867 F.3d at 1053 (Melloy, J., dissenting) (citations omitted) (most alterations in original); *see also Betlach*, 727 F.3d 960; *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1231 (10th Cir. 2018) ("*O'Bannon* addressed a different situation—one where *no one contested that the nursing home was unqualified to perform the services*. . . .[U]nlike in *O'Bannon,* the Providers in the case before us remained qualified to perform the medical services.").

This view reads into the provision a common-usage definition of "qualified," imported from outside the Medicaid statute. As Judge Melloy argues, "'[t]he provision thus indexes the relevant 'qualifications' not to any Medicaid-specific criteria (whether imposed by the federal government or the states), but to factors external to the Medicaid program; the provider's competency and professional standing as a medical provider generally.'" *Gillespie*, 867 F.3d at 1053 (Melloy, J., dissenting) (citing *Betlach*, 727 F.3d at 969).

In rejecting this extra-statutory definition, the Eighth Circuit explicated the important distinction between a "qualified" Medicaid provider and "qualified" to provide medical services:

> The dissent's attempt to distinguish *O'Bannon* fails because it assumes that Planned Parenthood was somehow *wrongfully* disqualified as a Medicaid provider. The dissent claims to find proof of this wrongful termination in the fact that Planned

> Parenthood remains licensed to serve other patients. So according to the dissent, a Medicaid recipient has the right to challenge the merits of a provider's decertification when the State permits that provider to continue providing care to other patients. But this interpretation is plainly wrong. "Under federal statutory and regulatory provisions, a State may terminate a provider's Medicaid agreement on many grounds, and it is not a prerequisite for such terminations that the State preclude a provider from providing services to any and all patients."

Gillespie, 867 F.3d at 1048–49 (citation omitted) (emphasis in original).

This "common usage" reading of § 1396a(a)(23) amounts to a "drive by" definition for a key operative concept in the Medicaid statute, in spite of the fact that federal and State qualification authority is the subject of numerous other more explicit provisions, *e.g.*, 42 U.S.C. § 1396a(p)(1) (2021), and authority which is cited and discussed below. As the Fifth Circuit observed, "the text of § 1396a(a)(23) does not unambiguously grant Medicaid patients the right to be involved in or to contest a state agency's determination that a provider is not 'qualified.'" *Kauffman*, 981 F.3d at 358.

In sum, the majority circuits have improperly conflated a "right" and a private right of action. § 1396a(a)(23) intended to benefit Medicaid patients by ensuring that State plans secure a right for

patients to choose among qualified providers. It does not *a fortiori* mean that Congress intended to bestow on them a private right of action to enforce that provision in federal court, a principle this Court has made clear in numerous cases. *See*, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Suter v. Artist M*, 503 U.S. 347 (1992); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015).

II. THE SECOND, FIFTH AND EIGHTH CIRCUITS' READING OF *O'BANNON* ACCORDS WITH THE MEDICAID ACT'S STATUS AS A SPENDING CLAUSE "CONTRACT" WITH THE STATES AND THIS COURT'S ANALYSIS IN *ARMSTRONG V. EXCEPTIONAL CHILD CENTER*.

A. Congress Has Made No "Clear Statement" that States Are Subject to Suit in Federal Court to Enforce § 1396a(a)(23).

The Constitution created a system of "dual sovereignty" between the States and the federal government. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). Notably, "[t]he Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Id.* at 1475 (citation omitted). Consequently, "[t]he Constitution confers on Congress not plenary legislative power but only certain enumerated powers." *Id.* at 1476. The authority to regulate in areas occupied jointly by Congress and State governments—including the police power to regulate the health and welfare of citizens—is reserved to the States. While States can

surrender their sovereign authority to the federal government through Congress via Spending Clause legislation, any purported surrender of a State's sovereign power must be interpreted strictly in favor of the State. *See*, *e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 285 (2011). Thus, the Medicaid Act, including § 1396a(a)(23), must be construed strictly against the assertion of surrender of State power.

In light of this system of dual sovereignty, "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.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (citation omitted). For Spending Clause legislation specifically, "'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'" *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. ___, slip op. at 5 (Apr. 28, 2022) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Congress must "speak with a clear voice [in order to] enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17 (describing what is known as the "*Pennhurst* clear statement rule"). Courts similarly must "construe the reach of Spending Clause conditions with an eye toward 'ensuring that the receiving entity of federal funds [had] notice that it will be liable." *Cummings*, slip op. at 4–5 (citation omitted) (alterations in original).

Because of the *Pennhurst* clear statement rule,

States accepting congressional funds via Spending Clause legislation must be aware of the conditions attached to the receipt of those funds so that they can be said to have "voluntarily and knowingly accept[ed] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) ("The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." (quotation marks omitted)). "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.*, 567 U.S. at 577.

In the Medicaid Act, Congress established a careful balance between the States and federal agencies, giving States "flexibility in designing plans that meet their individual needs" and "considerable latitude in formulating the terms of their own medical assistance plans." *Addis v. Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998) (citation omitted). This flexibility and wide latitude reflect the fact that establishing qualifications for medical providers is a traditional State function, and that under the Medicaid Act, States are acting within their core or natural sphere of operation. *See*, *e.g.*, *Pa. Med. Soc'y v. Marconis*, 942 F.2d 842, 847 (3d Cir. 1991) ("The licensing and regulation of physicians is a state function . . . . Thus, the state regulation is presumed valid. To rebut this presumption, appellants must show that Congress intended to displace the state's police power

function."). As this Court has explained, "[where] Congressional interference [with a core state function] would upset the usual constitutional balance of federal and state powers[,] . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). For this reason, the Medicaid statute expressly prohibits federal interference with the practice of medicine or the manner in which medical services are provided, or the exercise of any supervision or control over the operation of any institution providing health services. 42 U.S.C. § 1395 (1965).

Given the *Pennhurst* clear statement rule, one would expect to encounter explicit constraints on the States' authority to determine Medicaid provider qualifications if that were truly Congress' intent. But the opposite is true; State authority is recognized and affirmed through the warp and woof of the Medicaid Act. As Judge Elrod concludes: "[b]ecause the states have not committed to a federal definition of 'qualified,' they have wide latitude in determining who is 'qualified' and who is not, so long as they identify a regulation implicating safety, legality, or ethics and rely on substantial evidence showing that the provider violated that regulation." *Kauffman*, 981 F.3d at 378 (Elrod, J., concurring).

Congress explicitly reserved to States the power to exclude any provider from participating in the State's program "for any reason for which the Secretary could exclude the [provider] from

participation." 42 U.S.C. § 1396a(p)(1). The Medicaid Act provides dozens of reasons why the Secretary, and likewise the States, may—and sometimes, must—exclude a provider from participation in a State Medicaid program. Many of these reasons have nothing to do with a Medicaid provider's ability or willingness to perform medical services. If a court defines "qualified" as "'capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner,' . . . [then] this vague definition is susceptible to more-specific interpretations that would conflict with the Medicaid Act's text and structure." *Kauffman*, 981 F.3d at 377 (Elrod, J., concurring) (citation omitted).

For example, 42 U.S.C. § 1320a-7 (2019) provides that a State may exclude providers for convictions of program-related crimes or crimes relating to patient abuse; convictions related to fraud, including health care fraud, or controlled substances; overcharging, charging for unnecessary services, or failing to furnish necessary services; default on health education loans or scholarship obligations; and false statements or misrepresentation of material facts. Under 42 U.S.C. § 1395cc(b)(2) (2020), a State may exclude a provider that fails to comply substantially with the provisions of the Medicaid provider agreement, the provisions of the title and regulations thereunder, or a required corrective action, or a provider who has been convicted of a felony under federal or State law for an offense the State determines to be detrimental to the best interests of

the program or program beneficiaries.[4]

States may also exclude providers from the program on their own initiative, irrespective of any federal government action, 42 C.F.R. § 1002.1(b) (2017), and they have discretion to determine the period of time for exclusion. *Id.* § 1002.210 (2017). In fact, Congress explicitly affirmed that States retain their power to exclude providers for *any reason* authorized by State law. For instance, § 1396a(p)(1) of the Medicaid Act acknowledges that the extensive statutory grounds for exclusion set forth above are merely "[i]n addition to any other authority" the States may have. 42 U.S.C. § 1396a(p)(1). When Congress added § 1396a(p)(1) to the Medicaid Act in 1987, it purposefully did not make this provision subject to the already-existing "choice of provider" provision. The legislative history of § 1396a(p)(1) makes clear that States retain the power to exclude providers for *any bases* under State law: "This provision is not intended to preclude a State from establishing, *under State law, any other bases for excluding individuals or entities from its Medicaid program*." S. Rep. No. 100-109, at 20 (1987) (emphasis added). Likewise, Part 1002.3 of the governing regulations explicitly states the Medicaid Act is not to be read narrowly to limit States' power

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[4] It is also worth noting that Congress gave the HHS Secretary power to waive the State plan requirements listed in 42 U.S.C. § 1396a (2021), including § 1396a(a)(23), demonstrating that Congress did not intend State Medicaid programs to necessarily include all providers who are able and willing to provide services. 42 U.S.C. § 1396n(b) (2018).

of exclusion: "*Nothing* contained in [these regulations] should be construed to limit a State's own authority to exclude an individual or entity from Medicaid *for any reason or period authorized by State law*." 42 C.F.R. § 1002.3(b) (2017) (emphasis added). As the First Circuit explained, the broad language of Medicaid's exclusion provision "was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law." *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (emphasis in original). This authority has been exercised broadly for many reasons that advance State law and policy. *See*, *e.g.*, *Guzman v. Shewry*, 552 F.3d 941, 950 (9th Cir. 2009) (fraud); *First Med. Health Plan*, 479 F.3d at 49 (conflicts of interest); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 578–79 (2d Cir. 1989) (industrial pollution); *Triant v. Perales*, 491 N.Y.S.2d 486, 488 (N.Y. App. Div. 1985) (inadequate recordkeeping).

In sum, Congress has not made a clear statement about the definition of "qualified," but rather, left wide latitude to the States to determine qualified providers. The Fourth Circuit's constrained definition of "qualified," not only violates the clear statement rule, but also contradicts the Medicaid Act's text.

B. The Minority Circuits' Construction of § 1396a(a)(23) Accords with the Supreme Court's Modern Refusal to "Readily Imply" Private Causes of Action in Medicaid Provisions.

In *Armstrong v. Exceptional Child Center,* claimants sued State officials in federal court, asserting the State violated a similar provision to § 1396a(a)(23), 42 U.S.C. § 1396a(a)(30)(A) (2021),[5] by reimbursing providers of habilitation services at inadequate rates. 575 U.S. at 324. The Ninth Circuit affirmed judgment for the claimants, holding that the providers possessed an implied right of action under the Supremacy Clause to challenge State actions inconsistent with its § 1396a(a)(30)(A) obligations. The Supreme Court reversed, holding that § 1396a(a)(30)(A) cannot be construed to grant a right of action either under the Supremacy Clause or

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[5] 42 U.S.C. § 1396a(a)(30)(A) (2021), in the same statutory section of the Medicaid Act as the any-qualified-provider provision, mandates that in order to be approved by the federal secretary, State plans must:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. . . .

§ 1983. Regarding the § 1983 claim, the Court explained that *Gonzaga* expressly rejects the notion that the Court "permit[s] anything short of an unambiguously conferred right to support a cause of action brought under § 1983," noting that the "ready implication of a § 1983 action" exemplified in *Wilder* has been "plainly repudiate[d]" by the Court's later opinions. *Armstrong*, 575 U.S. at 331 n.*. And the Court saw the claimants' attempt to employ the Supremacy Clause as an attempted end run around their lack of a private right of action to enforce § 1396a(a)(30)(A). "In our view the Medicaid Act implicitly precludes private enforcement of § 30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement." *Id*. at 328.

Armstrong concluded that two aspects of § 1396a(a)(30)(A) established Congress's intent to foreclose equitable relief. First was the fact that "the *sole remedy* Congress provided for a State's failure to comply with Medicaid's requirements . . . is the withholding of Medicaid funds." *Id.* at 328 (emphasis added). The Court's use of the phrase "sole remedy" precludes a finding that there was any other remedy Congress intended for breach of a Medicaid provision, *i.e*., that there was no intention to create a § 1396a private right of action. Second was the fact that "[s]ection 30(A) lacks the sort of rights-creating language needed to imply a private right of action." *Id*. at 331.

> It is phrased as a directive to the federal agency charged with approving state Medicaid plans,

> not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid. *The Act says that the "Secretary shall approve any plan which fulfills the conditions specified in subsection (a)," the subsection that includes § 30(A). 42 U.S.C. § 1396a(b). We have held that such language "reveals no congressional intent to create a private right of action*."

Id. at 331 (emphasis added).

To imply a private right of action in a federal statute, claimants must demonstrate that Congress intended that the provision benefit the plaintiff, and that it be stated in "mandatory rather than precatory terms." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (citation omitted). As with § 1396a(a)(30)(A), the focus of § 1396a(a)(23) is on the States—the agency being regulated. *See Gillespie*, 867 F.3d at 1041 (explaining that § 1396a(a)(23) focuses on the agency doing the regulating, not the individuals protected, or the funding recipients being regulated). In context, the provision at issue appears in a section that directs the HHS Secretary to approve any State plan for medical assistance that fulfills eighty-three conditions. *See* 42 U.S.C. § 1396a(b) (2021) ("The Secretary shall approve any plan which fulfills the conditions specified in subsection (a)."). One of those eighty-three conditions includes § 1396a(a)(23).

Consequently, the focus is "two steps removed" from individual recipients and "clearly does not confer the sort of '*individual* entitlement' that is enforceable under § 1983." *Gonzaga*, 536 U.S. at 287 (citing *Blessing*, 520 U.S. at 343) (emphasis in original). Like the provision at issue in *Armstrong*, the language of § 1396a(a)(23) is not focused on the rights of Medicaid beneficiaries. It is "phrased as a directive to the federal agency charged with approving State Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." *Armstrong*, 575 U.S. at 331 (plurality opinion). *Compare* the provision at issue in *Gonzaga*, 20 U.S.C. § 1232g(b)(1) (2013) ("No funds shall be made available . . . ."), *and* the provision at issue here, 42 U.S.C. § 1396a(a)(23) ("A State plan for medical assistance must . . . provide . . . ."), *with* Title VI, 42 U.S.C. § 2000d (1964) ("No *person* in the United States *shall* . . . .") (emphasis added), *and* Title IX, 20 U.S.C. § 1681(a) (1986) ("No *person* in the United States *shall* . . . .") (emphasis added). Since § 1396a(a)(23) is not "phrased in terms of the persons benefited," it fails to meet the necessary prerequisite to find a private right of action for a § 1983 claim. *Gonzaga*, 536 U.S. at 284.

CONCLUSION

The petition should be granted to resolve a circuit conflict that improperly expands private enforcement under the Medicaid statute in disregard of Supreme Court precedent.

Respectfully submitted,

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