No. 21-1431

In the Supreme Court of the United States

ROBERT M. KERR, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, *et al.*

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

BRIEF IN OPPOSITION

ALICE CLAPMAN
CARRIE Y. FLAXMAN
HELENE T. KRASNOFF
Planned Parenthood Federation of America
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005

NICOLE A. SAHARSKY
Counsel of Record
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
nsaharsky@mayerbrown.com

AVI M. KUPFER
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606

Counsel for Planned Parenthood South Atlantic and Julie Edwards

QUESTION PRESENTED

Planned Parenthood affiliates provide essential medical care to low-income individuals through state Medicaid programs. South Carolina terminated the Medicaid provider agreement of a Planned Parenthood affiliate without cause. The affiliate and one of its patients sued under 42 U.S.C. 1983. The patient invoked the Medicaid Act's free-choice-of-provider provision, which states that "any individual eligible for medical assistance" "may obtain such assistance from any institution" that is "qualified to perform the service or services required" and "undertakes to provide [the individual] such services." 42 U.S.C. 1396a(a)(23)(A). The question presented is:

Whether the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. 1396a(a)(23)(A), confers a right enforceable under 42 U.S.C. 1983.

RULE 29.6 STATEMENT

Planned Parenthood South Atlantic is a North Carolina non-profit corporation. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 27 F.4th 945. The opinion of the district court (Pet. App. 31a-42a) is reported at 487 F. Supp. 3d 443.

A prior relevant opinion of the court of appeals (Pet. App. 43a-88a) is reported at 941 F.3d 687. A prior relevant order of the district court (Pet. App. 89a-109a) is reported at 326 F. Supp. 3d 39.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2022. The petition for a writ of certiorari was filed on May 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Planned Parenthood South Atlantic (PPSAT) provides essential medical services, including birth control, cancer screenings, and physical exams, to low-income South Carolina residents through the state's Medicaid program. South Carolina terminated PPSAT's participation in that program, even though it does not dispute that PPSAT "is perfectly competent to provide * * * healthcare." Pet. App. 4a. PPSAT and one of its patients, who relies on PPSAT for care that is critical for preserving her health, sued under 42 U.S.C. 1983. They contended that the termination violates the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. 1396a(a)(23)(A), which gives Medicaid recipients the right to choose to receive their medical care from any qualified and willing provider. Pet. App. 6a, 8a.

The district court preliminarily enjoined the director of the state health department (petitioner) from terminating PPSAT's participation in the Medicaid program, Pet. App. 89a-109a, and the court of appeals affirmed, *id.* at 82a. The district court then granted summary judgment to PPSAT and the patient, *id.* at 29a-42a, and the court of appeals again affirmed, *id.* at 27a. All judges who heard the case agreed that the Medicaid Act's free-choice-of-provider provision unambiguously gives patients a right enforceable under Section 1983. *Id.* at 17a-25a, 54a-65a, 95a-99a.

1. Medicaid is the national health insurance program for persons of limited financial means. Pet. App. 5a. It provides federal funding for medical care for children, needy families, the elderly, the blind, the disabled, and pregnant women. See 42 U.S.C. 1396d(a).

Medicaid is a joint federal-state effort, Pet. App. 5a, in which a state must comply with various federal requirements to participate, see *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323 (2015). One such requirement is the free-choice-of-provider provision, which states that the state's Medicaid plan "must" provide that "any individual eligible for medical assistance * * * may obtain such assistance" from any provider who is "qualified to perform the service or services required" and "who undertakes to provide him such services." 42 U.S.C. 1396a(a)(23)(A). That is the provision at issue in this case.

2. PPSAT and its predecessors have provided healthcare to low-income residents of South Carolina for four decades. Pet. App. 49a. PPSAT operates two health centers in the state, one in Charleston and one in Columbia. *Id.* at 6a. Both are in medically underserved communities. See Resp. C.A. Br. 4. Those centers serve hundreds of Medicaid patients each year. Pet. App. 49a.

PPSAT's health centers provide essential medical care through Medicaid. They offer a range of services, including physical exams; cancer screenings; contraception; pregnancy testing and counseling; and screening for conditions such as diabetes, depression, anemia, cholesterol, thyroid disorders, and high blood pressure. Pet. App. 6a-7a; Resp. C.A. Br. 4. The health centers provide abortion services, but Medicaid does not pay for abortion except in the very limited circumstances required by federal law. Pet. App. 7a.

Patients insured through Medicaid choose PPSAT for many reasons. PPSAT provides non-judgmental, high-quality medical care. Resp. C.A. Br. 5. It also has designed its services to help low-income patients overcome barriers to accessing care. *Ibid.* For

example, PPSAT offers extended hours and flexible scheduling; same-day appointments and short wait times; comprehensive contraceptive care in a single appointment; and interpreter services for patients who do not speak English. *Ibid.* PPSAT has continued to offer high-quality medical care during the COVID-19 pandemic, including through telemedicine. *Id.* & n.1. That has ensured continuity of care for low-income patients and has lessened the burdens on other parts of the health care system. *Id.* & n.2.

Respondent Julie Edwards is a Medicaid patient who has received care at PPSAT. Pet. App. 7a. She suffers from diabetes. *Ibid.* Because doctors have advised her that complications from diabetes would make it dangerous for her to carry a pregnancy to term, she sought access to safe and effective birth control. *Ibid.* After having difficulty finding a doctor who would treat her, she obtained care at PPSAT. *Ibid.* PPSAT doctors provided her with birth control and also informed her that her blood pressure was elevated, so she could obtain follow-up care for that issue. *Ibid.* Ms. Edwards was impressed with PPSAT and intends to obtain future gynecological and reproductive health care there. *Ibid.*

3. In July 2018, South Carolina's Department of Health and Human Services (SCDHHS) terminated PPSAT's participation in the state Medicaid program. Pet. App. 8a, 33a. The termination was prompted by the Governor, who issued two executive orders designed to withdraw state funding from any organization that provides abortions, purportedly based on a twenty-five-year-old statute. *Id.* at 7a-8a, 51a; see S.C. Code Ann. § 43-5-1185.

Relying on those orders, SCDHHS terminated PPSAT's state Medicaid agreement. Pet. App. 8a.

SCDHHS did not find that PPSAT is unqualified to provide care. *Id.* at 50a. Instead, it terminated PPSAT's participation in Medicaid "solely because [PPSAT] performed abortions outside of the Medicaid program." *Ibid.* As a result of the termination, PPSAT's health centers immediately had to begin turning away Medicaid patients. *Id.* at 51a.

4. Respondents sued under 42 U.S.C. 1983. Pet. App. 8a. They alleged, *inter alia*, that the termination violates the Medicaid Act's free-choice-of-provider provision. *Ibid.* They sought preliminary injunctive relief, so that Ms. Edwards and other patients could continue to receive care from their chosen provider. *Ibid.*

The district court entered a preliminary injunction. Pet. App. 89a-109a. It first held that the Medicaid Act's free-choice-of-provider requirement is privately enforceable under Section 1983. *Id.* at 95a-99a. Applying the factors this Court set out in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), the court held that the statute contains "clear language" that "unambiguously confers a right" on Medicaid patients to "obtain assistance from any qualified and willing provider." *Id.* at 97a.

On the merits, the district court concluded that petitioner likely violated the Medicaid Act because he had no legitimate basis to terminate PPSAT's participation in Medicaid. Pet. App. 101a-104a. The court found it "undisputed" that PPSAT is "qualified" to provide medical care, as the statute requires. *Id.* at 101a-102a (citing 42 U.S.C. 1396a(a)(23)(A)). The court also had "no trouble" finding that respondents would face irreparable injury absent an injunction. *Id.* at 104a.

5. The court of appeals affirmed the preliminary injunction. Pet. App. 43a-88a. Like the district court, the court of appeals concluded that a Medicaid patient may sue under Section 1983 to enforce the free-choice-of-provider requirement. *Id.* at 57a-61a.

Applying this Court's precedents, the court of appeals recognized that a federal statute creates a right enforceable under Section 1983 "only when the underlying statute itself unambiguously 'confers an individual right' on the plaintiff." Pet. App. 57a (quoting *Gonzaga*, 536 U.S. at 284-285). The court noted that it was "not at liberty to imply private rights of action willy-nilly," especially in legislation enacted under the Spending Clause. *Id.* at 66a. But, the court explained, the statute here is "exceptionally clear" in creating a privately enforceable right. *Id.* at 59a-60a. "If th[is] language does not suffice to confer a private right, enforceable under § 1983," the court stated, "it is difficult to see what language would be adequate." *Id.* at 65a.

All three judges agreed on this point. Although Judge Richardson concurred, he agreed that the statute at issue "unambiguously create[s] a right privately enforceable under § 1983." Pet. App. 83a-88a.

Petitioner filed a petition for a writ of certiorari, which the Court denied. *Baker* v. *Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020).

6. While the certiorari petition was pending, the district court granted summary judgment to PPSAT and Ms. Edwards. Pet App. 31a-42a. The court again held that the Medicaid Act's free-choice-of-provider provision is privately enforceable under Section 1983. *Id.* at 37a. It then held that petitioner violated the Medicaid Act by terminating PPSAT's participation in

the state Medicaid program, because petitioner did not dispute that PPSAT is a "medically and professionally qualified provider," and so petitioner had no basis for the termination. *Ibid.*

7. The same panel of the court of appeals affirmed. Pet. App. 1a-27a. The court first addressed petitioner's suggestion, raised for the first time in his reply brief on appeal, that the case is moot because Ms. Edwards had not "used Planned Parenthood's services since filing her complaint." *Id.* at 12a. The court rejected the claim, because Ms. Edwards has "concrete plans" to obtain "gynecological or reproductive care" from PPSAT in the future, and if petitioner's view prevailed, she would not be able to receive that care. *Id.* at 13a-14a.

The court of appeals then "reaffirm[ed]" its prior holding (in the preliminary-injunction appeal) that Medicaid's free-choice-of-provider provision confers a right enforceable under Section 1983. Pet. App. 17a-27a. The court found its prior holding binding, *id.* at 14a-17a, but explained that even if it were considering the issue afresh, it would reach the same conclusion, *id.* at 17a.

The court of appeals again recognized, at the outset, that this Court has "warned against readily finding statutory rights of action under § 1983." Pet. App. 18a. But, applying the factors identified by this Court in *Blessing* and *Gonzaga*, the court determined that this statute "unmistakably evinces Congress's intention to confer on Medicaid beneficiaries a right to the free choice of their provider." *Id.* at 19a-20a. First, the court noted that the statute "unambiguously gives Medicaid-eligible patients an individual right" to choose from any qualified and willing Medicaid provider. *Id.* at 20a (internal quotation marks omitted). Second, the court

determined that the statute is not "so 'vague and amorphous' as to preclude judicial enforcement," *ibid.* (quoting *Blessing*, 520 U.S. at 340); all a court must determine is whether the provider is qualified to provide the medical services at issue and willing to offer those services, *id.* at 21a. Third, the court observed that the statute is written in mandatory terms. *Id.* at 22a. Finally, the court determined that the Medicaid Act does not provide a comprehensive enforcement scheme that shows Congress's intent to foreclose private enforcement. *Id.* at 23a-25a.

The court of appeals noted that petitioner "d[id] not dispute [its] analysis of the *Blessing* factors." Pet. App. 22a. Instead, petitioner's primary argument was that *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), controls this case. *Id.* at 25a-27a; see Pet. C.A. Br. 22-27. The court rejected that argument, explaining that *O'Bannon* concerned an "entirely different question": whether nursing home residents had a right under the Due Process Clause to a hearing before their home was decertified. Pet. App. 26a. The court explained that the *O'Bannon* Court simply had "no reason" to address whether the free-choice-of-provider provision is enforceable under Section 1983. *Ibid.*

Judge Richardson concurred in the judgment, again agreeing that the statute here "unambiguously create[s] a right privately enforceable under § 1983." Pet. App. 28a.

ARGUMENT

Petitioner asks this Court (Pet. 13) to grant review to address two questions: (1) whether legislation enacted under the Spending Clause may ever give rise to rights enforceable under 42 U.S.C. 1983, and (2) if it may, whether the Medicaid Act's free-choice-of-

provider provision, 42 U.S.C. 1396a(a)(23)(A), is privately enforceable under 42 U.S.C. 1983. He notes that this Court currently is considering the first question in *Health and Hospital Corporation of Marion County* v. *Talevski*, cert. granted, No. 21-806 (oral argument scheduled for Nov. 8, 2022), and asks this Court to grant review in this case as well and consolidate the two cases for briefing and argument. Pet. 2-3.

This Court's review is not warranted on either question. Petitioner never presented any argument on the first question to the district court or the court of appeals, despite two trips to both courts. He therefore has forfeited any argument based on the first question. On the second question, the court of appeals faithfully applied this Court's precedents, and its conclusion is consistent with that of nearly every court that has considered the issue. This Court has repeatedly denied petitions presenting that question,[1] and it should do the same here. Further review is therefore unwarranted.

I. THE SPENDING CLAUSE ISSUE IS NOT PRESENTED IN THIS CASE

Petitioner's principal argument is that statutes Congress enacted pursuant to its Spending Clause power cannot create rights enforceable under Section 1983. Pet. 12-31. The Court has granted review in *Talevski* to address whether Spending Clause

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[1] *Baker* v. *Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020) (No. 19-1186); *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408 (2018) (No. 17-1492); *Andersen* v. *Planned Parenthood of Kan. & Mid-Mo.*, 139 S. Ct. 638 (2018) (No. 17-1340); *Betlach* v. *Planned Parenthood Ariz., Inc.*, 134 S. Ct. 1283 (2014) (No. 13-621); *Secretary of Ind. Fam. & Soc. Servs. Admin.* v. *Planned Parenthood of Ind., Inc.*, 569 U.S. 1004 (2013) (No. 12-1039).

legislation can give rise to rights enforceable under Section 1983. *Id.* at i, 29. Petitioner asks the Court to grant certiorari in this case as well to consider that issue.

The problem is that petitioner never made that Spending Clause argument below – not in two proceedings in the district court, not in two trips to the court of appeals, and not in the certiorari petition he previously filed in this Court. Until now, at every stage of the litigation, petitioner has assumed that a Spending Clause statute *can* give rise to a privately enforceable right, and then argued that this particular statute does not give rise to a privately enforceable right for various statute-specific reasons.

For example, at the preliminary-injunction stage in the district court, petitioner argued that, if the "provision at issue is a Spending Clause provision," whether the provision is privately enforceable depends on the factors this Court identified in *Gonzaga*. Pet. D. Ct. Prelim. Inj. Br. in Opp. 6, 8. Petitioner acknowledged that if the *Gonzaga* factors are met, a private action is "available" under a Spending Clause statute. Pet. D. Ct. Mot. to Dismiss 15. In his appeal of the preliminary injunction, petitioner again argued that a Spending Clause statute can give rise to a right enforceable through Section 1983 if the factors identified by this Court in *Blessing* and *Gonzaga* are satisfied. See, *e.g.*, Pet. C.A. Prelim. Inj. Br. 22 (arguing that the "standard" for recognizing such a right is "very high"); Pet. C.A. Prelim. Inj. Reply Br. 3-10 (similar).

Then in his petition for a writ of certiorari at the preliminary-injunction stage, petitioner sought to present two questions: (1) Whether the Medicaid Act's free-choice-of-provider provision confers a right enforceable under Section 1983; and (2) "What is the

proper framework for deciding whether a statute creates a private right enforceable under" Section 1983. Pet. App. 10a; Prelim. Inj. Pet. i. Petitioner expressly acknowledged that some "spending statutes" do create "enforceable federal rights," Prelim. Inj. Pet. 24, and he asked this Court to clarify "*when* Spending Clause statutes create private rights," Prelim. Inj. Cert. Reply Br. 3 (emphasis added). Thus, during the preliminary-injunction stage of the case, petitioner never argued that Spending Clause statutes cannot give rise to privately enforceable rights under Section 1983. In fact, he repeatedly stated the opposite.

Petitioner did not make this argument at the summary-judgment stage, either. In opposing summary judgment, he simply asserted that 42 U.S.C. 1396a(a)(23) is not privately enforceable for the reasons "set forth" in his preliminary-injunction brief. Pet. D. Ct. Summary J. Br. 9. (Petitioner then made other arguments about ripeness, exhaustion of administrative remedies, and whether respondents satisfied the summary-judgment standard. *Id.* at 4-9.) In his second appeal, petitioner again assumed that Spending Clause legislation can give rise to privately enforceable rights. See Pet. C.A. Br. 22-30. He "d[id] not dispute [the court of appeals'] analysis of the *Blessing* factors," Pet. App. 22a, and instead argued that *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), established that the statute here creates no privately enforceable right, Pet. App. 25a-27a; see Pet. C.A. Br. 22-27. Petitioner mentioned the Spending Clause only twice in his appellate briefs, where he noted in passing that Medicaid is "Spending Clause legislation." Pet. C.A. Br. 2; see *id.* at 29. That is all he said about the Spending Clause.

The court of appeals did not address the argument that Spending Clause legislation cannot give rise to privately enforceable rights, because petitioner never presented that argument. This Court should not address the argument in the first instance, especially when petitioner made no effort to raise it below. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

To be sure, petitioner is wrong to say that Spending Clause legislation cannot give rise to rights enforceable under Section 1983. This Court has long held that it may. See Br. in Opp. at 7-11, *Health and Hosp. Corp. of Marion Cnty.* v. *Talevski*, No. 21-806 (Mar. 11, 2022). But there is no reason for the Court to even get that far because petitioner has forfeited this argument. And because petitioner forfeited the argument, the Court should not grant certiorari in this case as a companion to *Talevski* or hold this case pending the outcome in *Talevski*. Unlike in *Talevski*, petitioner never argued below that Spending Clause legislation cannot give rise to privately enforceable rights; he argued only that *this statute* does not do so.[2] Permitting petitioner to raise the argument now, when he actually took the opposite position below, would reward gamesmanship and encourage sandbagging.

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[2] Consolidating this case with *Talevski* would not make sense anyway, because the briefing in that case is underway and the case is scheduled for oral argument during the November sitting. And although petitioner originally suggested that there were "lingering mootness concerns" in that case, Pet. 2-3, he has since abandoned that argument, Letter from Counsel for Petitioner to Clerk of the Court, U.S. Supreme Court (May 19, 2022).

II. THE FREE-CHOICE-OF-PROVIDER ISSUE DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner also contends (Pet. 33-36) that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. 1396a(a)(23)(A), is not privately enforceable under 42 U.S.C. 1983. He is wrong, and the issue does not warrant the Court's review.

A. The court of appeals' decision is correct.

1. Section 1983 authorizes "any citizen of the United States or other person within [its] jurisdiction" to sue any person who, "under color of" state law, "depriv[ed]" him or her "of any rights, privileges, or immunities secured by" federal law. 42 U.S.C. 1983. A person deprived of a right created by a federal statute by a state actor may sue under Section 1983. See *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980).

The federal statute at issue here gives a Medicaid patient the right to obtain care from the qualified and willing provider of his or her choice. It states:

> A State plan for medical assistance must * * * provide that * * * any individual eligible for medical assistance * * * may obtain such assistance from any institution * * * qualified to perform the service or services required * * * [that] undertakes to provide him such services.

42 U.S.C. 1396a(a)(23)(A).

Congress enacted this provision to ensure that Medicaid recipients, like other individuals, could make deeply personal choices about where to obtain medical care free from state interference. See, *e.g.*, S. Rep. No. 90-744, at 183 (1967). Congress reiterated the importance of this right in the family-planning context, providing that even when a state uses a managed-care system, the state cannot limit a

patient's free choice of provider for family-planning services. See 42 U.S.C. 1396a(a)(23)(B) (cross-reference to 42 U.S.C. 1396d(a)(4)(C)).

2. In a careful and thorough opinion authored by Judge Wilkinson, the court of appeals faithfully applied this Court's precedents and concluded that the Act's free-choice-of-provider provision is privately enforceable under Section 1983. Pet. App. 14a-27a. The court recognized that a federal statute creates a right enforceable under Section 1983 "only when the underlying statute itself unambiguously 'confers an individual right' on the plaintiff," *id.* 57a (quoting *Gonzaga*, 536 U.S. at 284-285), and that it should be "especially cautious" in its analysis and should not "imply private rights of action willy-nilly," *id.* at 66a-67a. But all three judges agreed that the particular statute here is "clear and unambiguous" in conferring a privately enforceable right. *Id.* at 23a; see *id.* at 28a (Richardson, J., concurring in the judgment). This was not a close call: The court found it "difficult to imagine a clearer or more affirmative directive" than in the statute here. *Id.* at 20a.

This Court's precedents identify several factors to help determine whether a federal statute creates a right enforceable under Section 1983. The Court asks (1) whether Congress clearly "intended that the provision in question benefit the plaintiff"; (2) whether the asserted right is "not so vague and amorphous that its enforcement would strain judicial competence"; (3) whether the obligation created by the statute is "mandatory"; and (4) whether Congress has otherwise expressly or impliedly evidenced an intention to foreclose private enforcement. *Blessing*, 520 U.S. at 340-341 (internal quotation marks omitted); see *Gonzaga*, 536 U.S. at 284-285 & n.4.

The court of appeals correctly identified (Pet. App. 19a, 23a) and applied (*id.* at 19a-25a) those factors. First, it concluded that the plain text of the statute "unambiguously gives Medicaid-eligible patients an individual right to their choice of qualified provider." *Id.* at 20a (internal quotation marks omitted). The statute specifically defines the intended class of beneficiaries ("any individual eligible for medical assistance" under Medicaid) and gives them a particular right (the right to "obtain care from any qualified provider"). *Ibid.* There is no question *whom* Congress intended to benefit in this statute, or *what* benefit Congress intended to give them. *Ibid.*

Second, the court of appeals determined that Congress defined the right using clear and administrable terms. Pet. App. 18a-19a. The statute provides that an individual has a right to use any willing provider that is "qualified to perform the service or services required." 42 U.S.C. 1396a(a)(23)(A). As the court explained, "qualified to perform the service or services required" has a clear ordinary meaning – "medical[ly] qualifi[ed]" to perform the required services. Pet. App. 21a; see *id.* at 69a. The court noted that determining qualification in this case is particularly easy, because South Carolina "does not * * * contest the fact that [PPSAT] is professionally qualified to deliver the services that the individual plaintiff seeks." *Id.* at 21a; see *id.* at 61a n.3 ("PPSAT's qualifications are simply not in dispute.").

Third, the court of appeals determined that the free-choice-of-provider provision "clearly imposes a definite obligation on state governments" because it uses mandatory language. Pet. App. 22a. The statute specifies that states "must" include the free-choice-of-

provider right in their Medicaid plans. *Ibid.*; see 42 U.S.C. 1396a(a).

Finally, the court of appeals found no indication in the statutory text that Congress intended to foreclose a Section 1983 remedy. Pet. App. 23a-25a. No language expressly rejects that remedy, *id.* at 24a, and the Medicaid Act lacks a comprehensive enforcement scheme that would indicate that Congress did not intend for individual enforcement under Section 1983. *Id.* at 24a-25a (citing *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 521-523 (1990)).

3. Petitioner offers a few criticisms of the court of appeals' decision. Pet. 27-29, 33-36. None has merit.

First, petitioner claims (Pet. 33-34) that the court of appeals "misapplied *Gonzaga*" because this Court abandoned *Blessing* in *Gonzaga*. Far from it. The *Gonzaga* Court repeatedly cited *Blessing* with approval, and concentrated its analysis on the two *Blessing* factors relevant in that case – the statute's lack of "rights creating" language and its congressionally created enforcement mechanism. *Gonzaga*, 536 U.S. at 287-289. Those same factors distinguish *Gonzaga* from this case.

The court of appeals here recognized and repeated *Gonzaga*'s principal teaching – that a statute must "unambiguously confer" a private right for that right to be enforceable under Section 1983, 536 U.S. at 283-285. Pet. App. 18a, 23a, 25a. It "took pains to heed *Gonzaga*'s instruction," and it only recognized a privately enforceable right here because the text "unmistakably evinces Congress's intention to confer" that right. *Id.* at 20a, 23a. Petitioner's argument simply ignores the court's actual opinion.

Second, petitioner asserts (Pet. 35) that the court of appeals "relied heavily on" *Wilder*. Not so. The

court cited *Wilder* once, for the proposition that the Medicaid Act's remedial scheme "does not foreclose remedies under § 1983." Pet. App. 24a (citing *Wilder*, 496 U.S. at 521-522). That is what *Wilder* said, and that statement has not been called into question by this Court. In fact, the Court "approvingly cited *Wilder* on this point" in *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 122 (2005). *Id.* at 25a. To the extent this Court has questioned *other* parts of *Wilder*, the court of appeals accounted for that when it explained that this Court "has made clear we should not rely on *Wilder*'s mode of analysis in determining whether a statute confers a private right enforceable under § 1983." *Id.* at 24a-25a (citing *Gonzaga*, 536 U.S. at 283).[3] The court of appeals accordingly did not rely on *Wilder* for that analysis.

Third, petitioner reads *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), to foreclose private enforcement of any part of the Medicaid Act. Pet. 28, 35-36. That is wrong for several reasons. As an initial matter, *Armstrong* did not address whether the plaintiffs there could sue under Section 1983; the issue was whether they could imply a right of action under the Supremacy Clause or general principles of

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[3] Petitioner asserts in passing (Pet. 6) that PPSAT was required to exhaust state administrative remedies. But patients such as Ms. Edwards – the people with the free-choice-of-provider right – cannot participate in this administrative review process. And even if Ms. Edwards could use that process, both the district court and court of appeals found that doing so would be "futile." Pet. App. 64a n.4. Besides, it is well-established that a person is not required to exhaust administrative remedies before filing suit under Section 1983. *Patsy* v. *Board of Regents of State of Fla.*, 457 U.S. 496, 516 (1982); see Pet. App. 64a n.4.

equity. 575 U.S. at 324-329.[4] And to the extent *Armstrong* addressed the issue, it said the *opposite* of what petitioner claims. *Id.* at 328 ("The provision for the Secretary's enforcement by withholding funds" did not "*by itself* * * * preclude the availability of equitable relief" through individual enforcement actions.). The court of appeals explained why the federal government's ability to withhold funds does not show that Congress intended to preclude private enforcement of the free-choice-of-provider provision, Pet. App. 23a-25a, and its analysis was correct.

B. Any differences in the courts of appeals do not warrant this Court's review.

1. Nearly every court of appeals that has considered the issue has held that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. 1396a(a)(23)(A), is privately enforceable under Section 1983.[5] And nearly every district court that

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[4] The provision in *Armstrong*, 42 U.S.C. 1396a(a)(30)(A), also was materially different from the provision here. That provision required states to adopt rate-setting plans in accordance with certain "broad and nonspecific" standards. *Armstrong*, 575 U.S. at 333 (Breyer, J., concurring). Unlike the provision here, it did not identify specific individuals to benefit or describe an individual right in specific and administrable terms. *Id.* at 328-329, 333.

[5] See *Planned Parenthood of Kan. & Mid-Mo.* v. *Andersen*, 882 F.3d 1205, 1229 (10th Cir.), cert. denied, 139 S. Ct. 638 (2018); *Planned Parenthood Ariz., Inc.* v. *Betlach*, 727 F.3d 960, 966-968 (9th Cir. 2013), cert. denied, 571 U.S. 1198 (2014); *Planned Parenthood of Ind., Inc.* v. *Commissioner of Ind. State Dep't of Health*, 699 F.3d 962, 974-975 (7th Cir. 2012), cert. denied, 569 U.S. 1004 (2013); *Harris* v. *Olszewski*, 442 F.3d 456, 461-462 (6th Cir. 2006); see also *Silver* v. *Baggiano*, 804 F.2d 1211, 1216-1218 (11th Cir. 1986) (noting in passing that "Medicaid recipients do have enforceable rights under § 1396a(a)(23)"), abrogated on other grounds by *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*,

has considered the issue has agreed with that conclusion.[6]

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535 U.S. 613, 618 (2002). But see *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 358 (5th Cir. 2020) (en banc); *Does* v. *Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017).

[6] See *Miracles House Inc.* v. *Senior*, No. 17-cv-23582, 2017 WL 5291139, at *3 (S.D. Fla. Nov. 9, 2017); *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Smith*, 236 F. Supp. 3d 974, 978 (W.D. Tex. 2017), vacated sub nom. *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc); *Planned Parenthood Se., Inc.* v. *Dzielak*, No. 16-cv-454, 2016 WL 6127980, at *1 (S.D. Miss. Oct. 20, 2016), vacated on other grounds sub nom. *Planned Parenthood Se., Inc.* v. *Snyder*, No. 16-60773, 2021 WL 4714605 (5th Cir. Oct. 8, 2021); *Planned Parenthood of Kan. & Mid-Mo.* v. *Mosier*, No. 16-cv-2284, 2016 WL 3597457, at *15 (D. Kan. July 5, 2016), aff'd in part, vacated in part sub nom. *Planned Parenthood of Kan. & Mid-Mo.* v. *Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Bader* v. *Wernert*, 178 F. Supp. 3d 703, 718-720 (N.D. Ind. 2016); *Planned Parenthood Gulf Coast, Inc.* v. *Kliebert*, 141 F. Supp. 3d 604, 637-642 (M.D. La. 2015), aff'd sub nom. *Planned Parenthood of Gulf Coast, Inc.* v. *Gee*, 862 F.3d 445 (5th Cir. 2017), cert denied, 139 S. Ct. 408 (2018); *Planned Parenthood Se., Inc.* v. *Bentley*, 141 F. Supp. 3d 1207, 1217 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla.* v. *Selig*, No. 15-cv-566, 2015 WL 13710046, at *6 (E.D. Ark. Oct. 5, 2015), vacated sub nom. *Does* v. *Gillespie*, 867 F.3d 1034 (8th Cir. 2017); *Planned Parenthood Ariz., Inc.* v. *Betlach*, 922 F. Supp. 2d 858, 864 (D. Ariz.), aff'd, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc.* v. *Commissioner of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 902 (S.D. Ind. 2011), aff'd in part, rev'd in part, 699 F.3d 962 (7th Cir. 2012); *G. ex rel. K.* v. *Hawai'i Dep't of Hum. Servs.*, No. 08-cv-551, 2009 WL 1322354, at *12 (D. Haw. May 11, 2009); *Women's Hosp. Found.* v. *Townsend*, No. 07-cv-711, 2008 WL 2743284, at *8 (M.D. La. July 10, 2008); *Kapable Kids Learning Ctr., Inc.* v. *Arkansas Dep't of Hum. Servs.*, 420 F. Supp. 2d 956, 962 (E.D. Ark. 2005); *L.F.* v. *Olszewski*, No. 04-cv-73248, 2004 WL 5570462, at *7 (E.D. Mich. Nov. 1, 2004), rev'd on other grounds and remanded sub

2. The Fifth and Eighth Circuit reached contrary results, but their decisions are distinguishable.

The Fifth Circuit's decision in *Planned Parenthood of Greater Texas Family Planning & Preventative Health Services, Inc.* v. *Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc), is unlike this case. There, the Texas Health and Human Services Commission terminated several providers' participation in the state's Medicaid program based on what the Commission said was "prima facie evidence" that the providers violated "generally accepted standards of medical practice." 981 F.3d at 351-352. The court of appeals held that there was no privately enforceable right in that instance because a Medicaid patient had no "right to question" the Office's "factual determination" that the providers violated generally accepted standards of medical practice. *Id.* at 357-358.

In reaching that holding, the Fifth Circuit expressly distinguished that case from this one. It stated that it is "not clear" that the Fourth Circuit would disagree with its holding, because Texas disqualified the providers based on specific factual findings of a state administrative agency, whereas South Carolina did not claim any health or safety basis for disqualifying PPSAT. 981 F.3d at 365. The Fifth Circuit distinguished decisions from three other courts of appeals on similar grounds. *Id.* at 365, 367.

The Eighth Circuit's decision in *Does* v. *Gillespie*, 867 F.3d 1034 (8th Cir. 2017), is distinguishable for the same reason. In that case, the Arkansas Department of Human Services terminated the

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nom. *Harris* v. *Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Martin* v. *Taft*, 222 F. Supp. 2d 940, 979 (S.D. Ohio 2002). But see *M.A.C.* v. *Betit*, 284 F. Supp. 2d 1298, 1307 (D. Utah 2003).

provider's participation in the state's Medicaid program "for cause" based on ostensible "evidence [of] unethical" action and "wrongful conduct." *Id.* at 1038. Like the Fifth Circuit, the Eighth Circuit had no reason to address whether a patient may challenge the termination of a provider's Medicaid contract when the provider's medical qualifications are undisputed.

Further, the Eighth Circuit's decision is an outlier in approach. That court failed to use the analysis set out by this Court in *Blessing*, *Gonzaga*, and similar cases, which focuses on whether the specific language at issue includes the necessary "rights-creating language." *Gonzaga*, 536 U.S. at 290. And rather than analyze the specific text of 42 U.S.C. 1396a(a)(23)(A), the Eighth Circuit instead focused on the fact that the provision exists within a set of requirements for state Medicaid plans. *Gillespie*, 867 F.3d at 1041. The Medicaid Act itself refutes that reasoning, because it expressly instructs that a provision of the Act "is not to be deemed unenforceable because of its inclusion in a section of [the Act] * * * specifying the required contents of a State plan." 42 U.S.C. 1320a-2. The court also treated the mere possibility of federal enforcement as precluding private enforcement, a view Congress rejected, see *ibid.* And the Eighth Circuit's decision in *Gillespie* is out of step with its own precedent, because in other private-right-of-action cases, that court has faithfully applied the factors set out in *Blessing* and *Gonzaga*. See, *e.g.*, *Spectra Comm'cns Grp.* v. *City of Cameron, Mo.*, 806 F.3d 1113, 1120 (8th Cir. 2015); *Lankford* v. *Sherman*, 451 F.3d 496, 508-509 (8th Cir. 2006).

Relatedly, petitioner asserts (Pet. 31-32) that the Fourth and Fifth Circuit disagree on whether *O'Bannon* v. *Town Court Nursing Center*, 447 U.S.

773 (1980), holds that the free-choice-of-provider provision does not confer a privately enforceable right. Again, this argument ignores that the Fifth Circuit considered the termination of providers for cause, whereas the Fourth Circuit considered the termination of a provider without cause. The different outcomes in the cases are explained by different facts.

Specifically, *O'Bannon* rejected nursing home residents' attempt to challenge the termination of an *unqualified* provider. 447 U.S. at 776-777 & nn.3-4, 785. Here, South Carolina agreed that PPSAT is a medically *qualified* provider. Pet. App. 21a, 61a n.3, 70a. In that circumstance, *O'Bannon* said that the patient *does* have a right "to choose among a range of *qualified* providers without government interference." *Id.* at 26a (quoting *O'Bannon*, 447 U.S. at 785); see *O'Bannon*, 447 U.S. at 785 n.18. So, as the Fourth Circuit recognized, Pet. App. 25a-27a, if *O'Bannon* applies at all, it leads to different results in this case and the Fifth Circuit case because those cases involved different facts.

3. Petitioner suggests (Pet. 33) that the court of appeals' decision will lead to additional litigation. But that assertion has been disproven by the experience in the many circuits that have permitted individuals to bring those claims. Since the first appellate decision permitting enforcement of the free-choice-of-provider provision under Section 1983 (the Sixth Circuit's decision in *Harris* in March 2006), respondents are aware of only eleven district court decisions involving lawsuits challenging the termination of Medicaid providers through the free-choice-of-provider provision and Section 1983, see note 6, *supra* (first eleven cases), plus a handful of cases challenging other state policies using those statutes, see, *e.g.*, *id.* (next five cases).

Further, all but two of the eleven cases are efforts by states to target Planned Parenthood in ways courts have recognized are unwarranted and politically motivated. See, *e.g.*, *Bader* v. *Wernert*, 178 F. Supp. 3d 703, 724 (N.D. Ind. 2016). They involve pretextual termination attempts lacking any legal basis or evidentiary support. A typical decision to terminate a provider, by contrast, is based on valid standards and supporting evidence and would not lead to litigation. See, *e.g.*, U.S. Amicus Br. at 15-16, *Planned Parenthood Gulf Coast, Inc.* v. *Gee*, 862 F.3d 445 (5th Cir. 2017) (No. 15-30987), cert. denied, 139 S. Ct. 408 (2018).

Finally, it would be wrong to assume that Medicaid recipients – some of the poorest members of our society – are enthusiastic about the prospect of bringing lawsuits against states under Section 1983. They would much prefer that states follow the rules and allow them to obtain health care from qualified and willing providers.

4. Petitioner contends more generally that the Court should grant review to address "the appropriate framework for determining when a cause of action is available under § 1983." Pet. 12. That is not a separate question that the Court should consider in the abstract, since *Blessing* and *Gonzaga* instruct courts to examine particular statutory language to determine whether it creates a privately enforceable right.

Nor has petitioner established that any differences exist in the courts of appeals' approaches that might warrant this Court's review. When the courts of appeals address whether a federal statute confers a right enforceable under Section 1983, they consistently apply the factors set out by this Court in *Blessing* and *Gonzaga*, and they recognize that a

statute must unambiguously confer the private right.[7] Petitioner has not identified any ways in which the courts of appeals are applying different legal tests (for example, by disagreeing about the relevant factors, or by instructing that the statutory text need not be unambiguous). And as noted, the particular statutory language here is exceptionally clear. See Pet. App. 20a, 22a-23a; *id.* at 28a (Richardson, J., concurring in the judgment).[8]

Thus, this would not be a good statute for the Court to use to provide further guidance about which statutes confer private rights enforceable under Section 1983, if such guidance were needed. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (Where the "present litigation plainly does not present a borderline question," this Court ordinarily "express[es] no views about where it would

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[7] See, *e.g.*, *Carey* v. *Throwe*, 957 F.3d 468, 479 (4th Cir. 2020), cert. denied, 141 S. Ct. 1054 (2021); *Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097-1098 (D.C. Cir. 2017); *DeCambre* v. *Brookline Hous. Auth.*, 826 F.3d 1, 10 (1st Cir. 2016); *Briggs* v. *Bremby*, 792 F.3d 239, 242 (2d Cir. 2015); *Crowley* v. *Nevada*, 678 F.3d 730, 734-735 (9th Cir. 2012); *Delancey* v. *City of Austin*, 570 F.3d 590, 593 (5th Cir. 2009); *Doe* v. *Pennsylvania Bd. of Prob. & Parole*, 513 F.3d 95, 103-104 (3d Cir. 2008); *Mandy R. ex rel. Mr. & Mrs. R.* v. *Owens*, 464 F.3d 1139, 1146-1147 (10th Cir. 2006), cert. denied, 549 U.S. 1305 (2007); *31 Foster Children* v. *Bush*, 329 F.3d 1255, 1270 (11th Cir.), cert. denied sub nom. *Reggie B.* v. *Bush*, 540 U.S. 984 (2003).

[8] See also *Planned Parenthood of Kan. & Mid-Mo.*, 882 F.3d at 1225-1226 (court had "no trouble concluding that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients"); *Planned Parenthood of Ind.*, 699 F.3d at 974-975 (explaining that Medicaid patients are the "obvious" and "unmistakabl[e]" intended beneficiaries of a mandatory right that "falls comfortably" within the judiciary's competence to administer).

be appropriate to draw the line." (internal quotation marks omitted)).

C. This case would be a particularly unsuitable vehicle for further review. Before the court of appeals, petitioner argued that the case may be moot. Pet. App. 12a. As a result, Ms. Edwards filed a supplemental declaration with the court of appeals stating her continued intent to use PPSAT's services. Edwards Supp. Decl.

Petitioner now says that the supplemental declaration "resolved any potential mootness concerns." Pet. 31. But that is the opposite of what he told the court of appeals. See Pet. C.A. Resp. to Mot. to File Surreply 3 (arguing that Ms. Edwards' "*intent* to receive healthcare at Planned Parenthood is [not] enough" to survive a mootness challenge); *id.* at 2 (arguing that the supplemental declaration "raise[d] more questions than [it] answer[ed]").

Respondents do not believe the case is moot. But petitioner's about-face on this issue should give the Court significant pause.

D. Because the court of appeals' decision is correct and petitioner forfeited the argument pressed in *Talevski*, the petition should be denied rather than held for *Talevski*. But if the Court believes that its decision in *Talevski* may shed light on the application of the factors identified in *Blessing* and *Gonzaga* (and thus the second issue presented in the petition), it could hold this case pending its decision in *Talevski*, and then grant the petition and remand the case for further consideration (which would include an analysis of the effect of petitioner's forfeiture). But the better course, for all of the reasons stated above, would be simply to deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ALICE CLAPMAN
CARRIE Y. FLAXMAN
HELENE T. KRASNOFF
Planned Parenthood Federation of America
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005

NICOLE A. SAHARSKY
Counsel of Record
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
nsaharsky@mayerbrown.com

AVI M. KUPFER
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606

Counsel for Planned Parenthood South Atlantic and Julie Edwards

AUGUST 2022