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

REPLY BRIEF FOR PETITIONER

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There can be no real dispute that a 5-2 circuit split exists over the private enforceability of the Medicaid Act's any-qualified-provider provision. Pet.2, 14. The Fourth, Sixth, Seventh, Ninth, and Tenth Circuits are on one side, and the Eighth and Fifth Circuits are on the other. Pet.21–29. The Fourth Circuit below has acknowledged the split twice: joining "five of [its] six sister circuits," Pet.App.59a, and then choosing to "remain on the majority of a rather lopsided circuit split," Pet.App.15a. Meanwhile the Fifth joined the Eighth in "disagree[ing]" with the "five other circuits." *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 364 (5th Cir. 2020) (en banc). And before all that, three members of this Court said these cases "present a conflict on a federal question with significant implications." *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018) (Thomas, J., dissenting from denial of certiorari).

Respondents can't seriously deny the split exists, so they try various tacks to get around it. None work. The split is real, and this Court should resolve it.

As for the broader issue raised by the first question presented—the proper framework for deciding when Spending Clause statutes create privately enforceable rights—Petitioner has squarely raised it at every stage. He has *not* principally argued that Spending Clause statutes can *never* create rights enforceable under § 1983. Contra Opp.9–12. But if the Court were to decide that in *Health and Hospital Corp. of Marion County* v. *Talevski*, No. 21-806 (certiorari granted May 2, 2022), that obviously would apply here, too.

The only remaining question is what the Court should do with this petition given its decision to review *Talevski*. The best course is to also grant this petition to expressly resolve a longstanding circuit split that has left "patients in different States—even patients with the same providers—[with] different rights to challenge their State's provider decisions." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting).

If the Court reverses in *Talevski*, a GVR here might solve the problem in the Fourth Circuit, but it would leave the Sixth, Seventh, Ninth, and Tenth Circuits' decisions on the books, cabining state action in ways Congress did not intend. And if the Court affirms in *Talevski*, that would not necessarily control the outcome here due to a second, independent circuit split over the scope of the alleged right. Pet.31–32.

An expedited briefing schedule would still allow this Court to hear the cases together on November 8, 2022. Alternatively, the Court could set an ordinary briefing schedule and issue both opinions together later in the Term. Either outcome is preferable to leaving the circuit split in place.

At a minimum, the Court should hold this case and ask the parties to submit supplemental briefing after *Talevski* issues. No matter how the Court rules there, it would not serve the "70 million Americans [] on Medicaid" or the many States affected by the acknowledged circuit conflict to leave that split in place. *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting); contra Opp.25. This Court's review is crucial to resolving the "important and recurring" questions raised by this appeal. *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting).

ARGUMENT

I. There is no serious dispute that a 5-2 circuit split exists over the any-qualified-provider provision's enforceability under § 1983.

Courts of appeals are split 5-2 over the second, narrower question presented here: whether Medicaid recipients have a private right of action to challenge a state's determination that a provider is not qualified to provide certain medical services. As noted above, everyone except Respondents concedes the split is deep and mature. And none of Respondents' attempts to talk their way around the split holds any water.

1. Respondents first try to waive away the split. Opp.18–19. They insist that "[a]ny differences in the courts of appeals do not warrant this Court's review." Opp.18. And that phrasing mirrors a similar euphemism they used below when they argued that "another court weighing in on the other side of an *inter-circuit disagreement* does not establish clear error." Resp. Br. for Appellees 25–26 (emphasis added). Apparently, this Court need not bother with resolving "[a]ny differences" between the circuits because "[n]early every court of appeals that has considered the issue"—meaning every court but two—has found a privately enforceable right. Opp.18.

But a 5-2 split does not mean the split doesn't exist or should be left unresolved. Indeed, if Petitioner is correct that Medicaid recipients do *not* have a right that is privately enforceable under § 1983, that just means more courts have gotten it wrong.

2. Respondents next try to distinguish away the split. Opp.20–21. But that doesn't work either. They claim the Fifth and Eighth Circuits' decisions are distinguishable because Texas and Arkansas made "specific factual findings" invoking "health [and] safety" concerns about the disqualified providers, whereas South Carolina disqualified Planned Parenthood to ensure compliance with a state statute that prohibits taxpayer funding of abortion. Opp.20–21; see Pet.6–7. But those alleged factual differences do not make the cases *legally* distinguishable.

To support their claim to the contrary, Respondents cobble together phrases from different parts of the Fifth Circuit's opinion. Opp.20 ("prima facie evidence," "generally accepted standards of medical practice," "right to question," and "factual determination") (quoting *Kauffman*, 981 F.3d at 351, 352, 357, 358). But the Fifth Circuit did *not* base its decision on specific factual justifications for Texas's disqualification decision. The court said its "inquiry [was] at an end" once it determined individual Medicaid recipients do not have a right "to challenge a determination that a Medicaid provider is not 'qualified.'" *Kauffman*, 981 F.3d at 354. And to support its conclusion, the Fifth Circuit observed that none of the "closely related federal statutes . . . suggest that Medicaid patients have a right to challenge whether, as either a factual *or legal* matter, a State's exclusion or removal of a provider is permitted or mandated." *Id.* at 360 (emphasis added). Nothing in the court's opinion suggests the result would have been different if the providers had been disqualified for reasons more analogous to those here.

Indeed, as Judge Higginson pointed out in his partial dissent, Texas terminated two of the providers "based solely on their legal affiliation" with a different provider that had engaged in questionable conduct. *Kauffman*, 981 F.3d at 386 (Higginson, J., dissenting in part) (cleaned up). To the partial dissent, that affiliation "fail[ed] to determine that these providers [were] not qualified," *id.*, because mere affiliation with *other* providers "had no bearing on whether" the providers themselves "were qualified," *id.* at 387. But that factual difference did not affect the majority's conclusion that the individual Medicaid recipients could not "bring a § 1983 suit to contest the State's determination that the Providers were not 'qualified' providers within the meaning of 42 U.S.C. § 1396(a)(23)." *Id.* at 353.

Relatedly, in overruling the prior panel opinion in *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), the en banc Fifth Circuit "disavow[ed] the conclusion in *Gee* that a state agency or actor cannot legitimately find that a Medicaid provider is not 'qualified' unless under state or federal law the provider would be unqualified to provide treatment or services to the general public." *Kauffman*, 981 F.3d at 368. Respondents claim it matters that Planned Parenthood was "medically" and "professionally" qualified to deliver services despite the State's disqualification decision. Opp.15 (cleaned up). Accord *id.* 20–22. But as the en banc Fifth Circuit concluded, that's a distinction without a difference given "the lack of unambiguous provisions in § 1396a(a)(23) conferring a right to challenge a State's determination that a provider is not 'qualified.'" *Kauffman*, 981 F.3d at 369.

Respondents also claim *Does* v. *Gillespie*, 867 F.3d 1034 (8th Cir. 2017), "is distinguishable for the same reason" because Arkansas "terminated the provider's participation in the state's Medicaid program 'for cause' based on ostensible 'evidence [of] unethical' action and 'wrongful conduct.'" Opp.20–21 (quoting *Does*, 867 F.3d at 1038).

What Respondents fail to mention is that those agreements were terminated based on "the release of controversial video recordings involving *other* Planned Parenthood affiliates." *Does*, 867 F.3d at 1037 (emphasis added). The videos prompted the Arkansas Governor to "direct[]" the relevant department "to terminate its Medicaid provider agreements with Planned Parenthood." *Id.* at 1038. And like Respondents here, when Planned Parenthood and three patients challenged that decision, they argued the department had wrongfully excluded Planned Parenthood "for a reason unrelated to its fitness to provide medical services." *Id.* That makes *Does* factually *indistinguishable* from this case. Yet the Eighth Circuit still held that the any-qualified-provider provision "does not unambiguously create a federal right for individual patients that can be enforced under § 1983." *Id.* at 1037. The deep circuit split over that question could not be clearer.

3. Finally, Respondents try to simply will the split away. Opp.23–24. They claim the courts of appeals "consistently apply the factors set out by this Court in *Blessing* and *Gonzaga*," and that "Petitioner has not identified any ways in which the courts of appeals are applying different legal tests." *Id.* But that's wrong even by Respondents' own admission.

Just two pages earlier, Respondents argue that "the Eighth Circuit's decision [in *Does*] is an outlier in approach" because the court there "failed to use the analysis set out by this Court in *Blessing*, *Gonzaga*, and similar cases." Opp.21. Both things can't be true. If *Does* is "an outlier in approach" for failing to apply the analysis in those cases, Opp.21, then Respondents are wrong to say the courts of appeals "consistently apply the factors set out" in those same cases, Opp.23.

Moreover, *Does* was an outlier when it was decided due mainly to "an evolution" in this Court's caselaw. *Does*, 867 F.3d at 1043. That helps explain the earlier "decisions of other courts" on the other side of the split. *Id.* And it explains why, more recently, the en banc Fifth Circuit reversed course, joining the Eighth Circuit in holding that the any-qualified-provider provision "does *not* unambiguously create a federal right for individual patients that can be enforced under § 1983." *Kauffman*, 981 F.3d at 363 (quoting *Does*, 867 F.3d at 1037) (emphasis added).

Both courts declined to apply *Blessing*'s three-factored test. *Kauffman*, 981 F.3d at 361 (citing *Blessing* v. *Freestone*, 520 U.S. 329 (1997), once but not applying it); *Does*, 867 F.3d at 1039 (stating that more recent decisions "show that the governing standard for identifying enforceable federal rights in spending statutes is more rigorous" than the test applied in *Blessing*). Accord *Kauffman*, 981 F.3d at 371 (Elrod, J., concurring) (explaining how this Court "changed course" in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002)). And that different approach led them to reach different results than the other courts of appeals. Meanwhile, the Fourth Circuit simply doubled down on the discredited approach. Pet.27–29.

* * * * *

Respondents' remaining arguments on the second question presented go to the merits of the Fourth Circuit's opinion. Opp.13–18. And the conflicts between that opinion and *Gonzaga* and *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), could not be more stark.

The any-qualified-provider provision, like the provision in *Gonzaga*, is "two steps removed" from the benefitted individuals. *Gonzaga*, 536 U.S. at 287. It appears in a lengthy list—the same list containing the provision in *Armstrong*—describing what State plans must contain. 42 U.S.C. 1396a(a). 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); accord *Gonzaga*, 536 U.S. at 287. And its reference to benefitted individuals is made in the context of what states are required to do to receive federal funding. *Gonzaga*, 536 U.S. at 288.

Equally important, Congress here provided a different enforcement mechanism: the HHS Secretary's power to withhold federal funding. See 42 U.S.C. 1396c; *Gonzaga*, 536 U.S. at 282–83, 289; *Armstrong*, 575 U.S. at 331–32 (plurality). And providers can always pursue state administrative appeals. 42 U.S.C. 1396a(a)(4), (39); 42 C.F.R. 1002.213. Allowing beneficiary lawsuits in addition to these remedies creates the "potential for parallel litigation and inconsistent results," which makes for "a curious system for review" of a State's disqualification decision. *Does*, 867 F.3d at 1041–42.

Here, Respondent Planned Parenthood has used a lawsuit by one of its clients instead of the administrative appeals process South Carolina provided—trying "an end run around" the enforcement tools Congress and South Carolina have chosen. *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting). This Court should grant review and reject that gambit.

II. The first question presented is preserved.

The first question presented asks the Court to decide "the proper framework for deciding when," if ever, Spending Clause statutes give rise to privately enforceable rights. Pet.i. Unresolved questions about that framework drive the 5-2 circuit split at issue here, and Petitioner has litigated those questions at every stage of the case, including in his first petition for certiorari, see Pet. for a Writ of Cert. at i (second question presented), 2, 12–33, *Baker* v. *Planned Parenthood S. Atl.*, No. 19-1186 (Mar. 27, 2020), and again here, Pet.14–29.

Respondents excerpt the first question presented as follows, omitting the "proper framework" language: "whether legislation enacted under the Spending Clause may ever give rise to rights enforceable under 42 U.S.C. 1983." Opp.8. Respondents then spend pages arguing this *portion* of the question presented is not properly preserved. Opp.9–12. Not so.

To be sure, Petitioner has *also* asked whether Spending Clause legislation may "ever give rise to privately enforceable rights." Pet.i. That question mirrors the first question presented in the recently granted *Talevski* petition and, when answered, will necessarily have implications here.

But "parties are not limited to the precise arguments they made below," provided the new arguments pertain to a properly preserved issue. *Yee* v. *City of Escondido*, 503 U.S. 519, 534–35 (1992). And to be clear, Petitioner does not argue it would be impossible for Congress to make Spending Clause legislation privately enforceable. He simply takes the same position as the more than 100 Members of Congress who have filed two briefs in support of his petition: "if Congress intends to allow private parties to enforce Spending Clause legislation, it should explicitly create a private right *and* a private remedy." Pet.30 (quoting Br. for 137 Members of Cong. as Amici Curiae at 20, *Baker v. Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020) (No. 19-1186)). Accord Br. for 128 Members of Cong. as Amici Curiae at 21, *Kerr v. Planned Parenthood S. Atl.*, No. 21-1431 (May 16, 2022).

Respondents do not contest that Petitioner preserved the issue of whether the any-qualified-provider provision creates rights that are privately enforceable under § 1983. Nor do they contest that Petitioner has preserved the broader issue of the proper framework to decide that question. And there is nothing improper about Petitioner making an additional argument in support of his position on those issues.

III. This is an ideal vehicle to answer the questions presented.

Respondents do not meaningfully contest that the questions presented are recurring and of great national importance. Pet.33. Nor do they contest that this case provides a clean record and a clear decision that ensures the Court will be able to resolve the deep circuit conflict.

Instead, in a few short paragraphs, Respondents assert that while *they* "do not believe the case is moot," it should give the Court "significant pause" that Petitioner suggested below that it "*may* be moot." Opp.25 (emphasis added). But as Petitioner already explained, mootness is no longer an issue. Pet.31.

It came to Petitioner's attention below—through Appellees' brief—that Respondent Edwards had not yet sought medical care from Planned Parenthood since filing her complaint. That called into question whether she intended to do so in the future or whether she had changed her mind about making Planned Parenthood her regular provider. So Petitioner raised that issue with the court of appeals in a supplemental filing. In response, Respondents produced a supplemental declaration in which Edwards explained she had recently "made an appointment for future care with Planned Parenthood." Pet.App.12a. Petitioner had no reason to contest that representation, and the Fourth Circuit relied on it to hold that Edwards had "made just the 'concrete plans'" required to "present[] a live case or controversy." Pet.App.14a (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992)). Petitioner has not challenged that conclusion, and he also has not done an "about-face" on the issue. Contra Opp.25.

Finally, this Court should grant this petition in addition to *Talevski* because this case presents an ideal vehicle "to resolve a secondary [3-1] circuit split over the meaning of this Court's decision" in *O'Bannon* v. *Town Ct. Nursing Ctr.*, 447 U.S. 773, 785 (1980), "and the scope of the alleged right to choose a qualified provider." Pet.13, 31–32.

Respondents claim there is no conflict between the Fourth Circuit and the en banc Fifth Circuit in their application of *O'Bannon*, again citing allegedly different factual predicates. Opp.21–22. But the Fifth Circuit expressly declared—twice—that the Fourth Circuit's reading of *O'Bannon* is "demonstrably incorrect." *Kauffman*, 981 F.3d at 365–66. Yet, "even after the Fifth Circuit explicitly pointed out its earlier error, the Fourth Circuit stood by its erroneous reading of *O'Bannon*." Pet.32 (citing Pet.App.25a).

The Court should grant the petition and hold that the any-qualified-provider provision does not create a privately enforceable right to challenge a State's disqualification decision. Alternatively, the Court should make that holding explicit in *Talevski* and GVR here.

CONCLUSION

For these reasons and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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