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.

JULIE EDWARDS, on her behalf and on behalf of all others similarly situated, et al.,

Respondents.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

SUPPLEMENTAL ARGUMENT SUMMARY

The Court has been holding this petition pending a decision in *Health and Hospital Corporation of Marion County* v. *Talevski*, No. 21-806. But unlike *Talevski*, this petition asks the Court to resolve a mature circuit split over whether the provision at the center of *this* case, the Medicaid Act's any-qualified-provider provision, 42 U.S.C. 1396a(a)(23)(A), creates a privately enforceable right. Pet.i.

The Court's opinion in *Talevski* did not resolve that split. The circuits remain divided 5-2 over whether Congress "unambiguously conferred" "individual rights" in the any-qualified-provider provision. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283, 285–86 (2002). See Pet.12–29; Reply.3–9. The circuits also remain divided 3-1 over the meaning of this Court's decision in *O'Bannon* v. *Town Ct. Nursing Ctr.*, 447 U.S. 773 (1980), and the scope of the alleged right to choose a specific provider. Pet.13, 31–32; Reply.11–12.

Whether the any-qualified-provider provision creates a privately enforceable right is a recurring question of great importance, impacting more than "70 million Americans." *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari). As things stand, "patients in different States—even patients with the same providers—have different rights to challenge their State's provider decisions." *Ibid.* And a GVR would only delay the inevitable: no matter what happens on remand, the two circuit splits would persist. So the Court should grant certiorari outright and resolve either or both of those splits now.

ARGUMENT

I. Post-*Talevski*, a 5-2 circuit split over the enforceability of the any-qualified-provider provision under § 1983 remains unresolved.

All nine Justices in *Talevski* agreed that the first question in determining whether a statute creates § 1983-enforceable rights is whether the relevant provisions "*unambiguously* confer individual federal rights." *Talevski*, 599 U.S. __, 2023 WL 3872515, at *8 (June 8, 2023) (citing *Gonzaga*, 536 U.S. at 280); *id.* at *14 (Barrett, J., concurring) (same); *id.* at *32 (Alito, J., dissenting) (same); *id.* at *14 (Gorsuch, J. concurring) (explaining that his reasoning "largely track[s] Justice Barrett's"). *Talevski* also reaffirmed that "*Gonzaga* sets forth [the Court's] established method for ascertaining unambiguous conferral": "[c]ourts must employ traditional tools of statutory construction to assess whether Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs." *Id.* at *9 (quoting *Gonzaga*, 536 U.S. at 283, 285–86).

That "test is satisfied where the provision in question is 'phrased in terms of the persons benefitted' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefitted class.'" *Talevski*, 2023 WL 3872515, at *9 (quoting *Gonzaga*, 536 U.S. at 284, 287). Conversely, the Court has "rejected § 1983 enforceability where the statutory provision 'contain[ed] no rights-creating language'; had 'an aggregate, not individual, focus'; and 'serve[d] primarily to direct the [Federal Government's] distribution of public funds.'" *Ibid.* (quoting *Gonzaga*, 536 U.S. at 290).

"None of this is new ground." *Talevski*, 2023 WL 3872515, at *32 (Alito, J., dissenting). Nor should it come as a surprise that the "two FNHRA provisions" at issue in *Talevski* "demonstrate what it takes to satisfy" *Gonzaga*'s "demanding standard." *Ibid.* (Alito, J., dissenting but agreeing with the majority on this point). Both those provisions "use clear 'rights-creating language.'" *Id.* at *11 (quoting *Gonzaga*, 536 U.S. at 290). Indeed, every circuit to have ruled on the issue agreed that the FNRHA provisions create privately enforceable rights. Br. in Opp'n at 11–12, *Talevski*, No. 21-806 (Mar. 11, 2022).

The opposite is true of the Medicaid Act's any-qualified-provider provision. That provision does *not* contain any "rights-creating language," much less unambiguously confer federal rights. *Talevski*, 2023 WL 3872515, at *11 (quoting *Gonzaga*, 536 U.S. at 290). The provision is not "'phrased in terms of the persons benefited,'" it does not use "explicit rights-creating terms," and the relevant statutory scheme has an aggregate rather than an individual focus. *Id.* at *14 (Barrett, J., concurring). Yet while seven courts of appeal have considered whether the any-qualified-provider provision creates privately enforceable rights under *Gonzaga*, they are and will remain hopelessly divided over whether the provision meets that demanding test. The need for the Court's guidance undeniably remains post-*Talevski*.

Start with the Fourth Circuit here. The panel said that it "took pains to heed *Gonzaga*'s instruction that there must be an 'unambiguously conferred right to support a cause of action brought under § 1983.'" Pet.App.23a (quoting *Gonzaga*, 536 U.S. at 283). "Because Congress's intent is clear and unambiguous

here," the court continued, "we conclude that the [any-qualified]-provider provision confers on Medicaid recipients an individual right." *Ibid.* This aligned the Fourth Circuit with the "majority" of what the panel described as "a rather lopsided circuit split." Pet.App.15a & n.2.

Each of the Sixth, Seventh, Ninth, and Tenth Circuits have conducted a *Gonzaga* analysis and, like the Fourth Circuit, concluded that the any-qualified-provider provision confers private rights that are enforceable in a § 1983 action:

- Sixth: "[I]n giving 'any individual eligible for medical assistance' a free choice over the provider of that assistance, the statute uses the kind of 'individually focused terminology' that 'unambiguously confer[s]' an 'individual entitlement' under the law. And by saying that '[a] State plan … must … provide' this free choice, the statute uses the kind of 'rights-creating,' 'mandatory language,' that the Supreme Court and our court have held establishes a private right of action." *Harris* v. *Olszewski*, 442 F.3d 456, 461–62 (6th Cir. 2006) (quoting *Gonzaga*, 536 U.S. at 283, 287, and *Westside Mothers* v. *Haveman*, 289 F.3d 852, 863 (6th Cir. 2002)).

- Seventh: The any-qualified-provider provision "explicitly refers to a specific class of people—Medicaid-eligible patients—and confers on them an individual entitlement—the right to receive reimbursable medical services from any qualified provider. We agree with the district court that § 1396a(a)(23) unambiguously cre-

ates private rights 'presumptively enforceable by § 1983.'" *Planned Parenthood of Ind., Inc.* v. *Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012) (quoting *Gonzaga*, 536 U.S. at 284).

- Ninth: "That Congress intended the [any-qualified]-provider requirement to create an individual right is evident …. The statutory language unambiguously confers such a right upon Medicaid-eligible patients, mandating that all state Medicaid plans provide that '*any individual* eligible for medical assistance … may obtain such assistance from any institution … qualified to perform the service or services required." And use of the word "individual" is "sufficient" for "finding a right for § 1983 purposes." *Planned Parenthood Ariz. Inc.* v. *Betlach*, 727 F.3d 960, 966–67 (9th Cir. 2013) (citing *Ball* v. *Rodgers*, 492 F.3d 1094, 1108 (9th Cir. 2007), and *Gonzaga*, 536 U.S. at 284).
- Tenth: "[W]e have no trouble concluding that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients," and Kansas does not contest the portion "of the *Blessing/Gonzaga* analysis" requiring that the statute be "couched in mandatory … terms." *Planned Parenthood of Kan.* v. *Andersen*, 882 F.3d 1205, 1225, 1228 (10th Cir. 2018) (citing *Betlach*, 727 F.3d at 966).

The en banc Fifth Circuit and the Eighth Circuit conducted the same analysis under *Gonzaga*—but reached the opposite result:

- Fifth: "The right asserted by the Individual Plaintiffs is not unambiguously conferred …. The Individual Plaintiffs can only *infer*, at best, that if they have a right to obtain assistance from a 'qualified' provider, then they have a right to contest a State's determination that a particular provider is not 'qualified' to perform the necessary services. But such an inference is not 'an unambiguously conferred right.'" *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 359–60 & n.68 (5th Cir. 2020) (en banc) (citing *Gonzaga*, 536 U.S. at 283).
- Eighth: "A statute [like the any-qualified-provider provision] that speaks to the government official who will regulate the recipient of federal funding 'does not confer the sort of '*individual* entitlement' that is enforceable under § 1983.'" *Does* v. *Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017) (quoting *Gonzaga*, 536 U.S. at 287). Moreover, "[b]ecause other sections of the Act provide mechanisms to enforce the State's obligation …, it is reasonable to conclude that Congress did not intend to create an enforceable right for individual patients under § 1983." *Ibid.* (citing *Suter* v. *Artist M.*, 503 U.S. 347, 360–61, 363 (1992), and *Gonzaga*, 536 U.S. at 281). In addition, "statutes with an 'aggregate' focus do not give rise to individual rights." *Id.* at 1042 (citing *Gonzaga*, 536 U.S. at 288). The Sixth, Seventh, and Ninth Circuits gave "insufficient weight to *Gonzaga*'s requirement of unambiguous intent." *Ibid.*

This Court's decision in *Talevski* does not mention this sharp conflict, much less purport to resolve it. As a result, that means either that states in five circuits are being unlawfully subjected to private lawsuits, or states in two circuits are unlawfully prohibiting beneficiaries from enforcing their federal rights. Either way, the result is untenable and unjust. And it will persist unless and until the Court acts. This Court's immediate review is necessary.

II. Post-*Talevski*, a separate 3-1 circuit split persists over the proper reading of this Court's decision in *O'Bannon*.

The 5-2 circuit split over the private enforceability of the any-qualified-provider provision is only one of two circuit splits implicated by Petitioner's second question presented. Three circuits, including the Fourth Circuit below, have held not only that a private right of action exists, but also that the scope of the alleged right to choose a qualified provider includes a broad right "to select the willing and competent provider of [one's] choice," instead of from among a range of qualified providers selected by the state. Pet.App.76a. Accord Pet.App.10a; *Andersen*, 882 F.3d at 1231–32; *Comm'r of Ind. State Dep't Health*, 699 F.3d at 977.

Quoting this Court's decision in *O'Bannon*, the en banc Fifth Circuit held that any such right is much narrower in scope: it "gives [Medicaid] recipients the right to choose among a range of *qualified* providers." *Kauffman*, 981 F.3d at 356–57 (quoting *O'Bannon*, 447 U.S. at 785). But it "does not give Medicaid beneficiaries a right to question a State's determination that a provider is unqualified." *Id.* at 357. As this

Court put it in *O'Bannon*, "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*." *Id.* at 356 (emphasis added).

The Fourth, Seventh, and Tenth Circuits all read *O'Bannon* differently. In its initial decision below, the Fourth Circuit distinguished *O'Bannon* based on that court's mistaken belief that "all parties agreed" that the nursing home there "was professionally 'unqualified' to render patient care." Pet.App.75a. The Tenth Circuit adopted a similar misreading, insisting that "no one contested that the nursing home was unqualified to perform the services." *Andersen*, 882 F.3d at 1231.

As the Fifth Circuit made clear, "those statements are demonstrably incorrect." *Kauffman*, 981 F.3d at 365. "[N]either the nursing home nor its residents agreed" with the State's assessment that the nursing home was unqualified. *Ibid.* (footnote omitted). And "the Medicaid patients [had] sought to challenge [that] determination." *Ibid.*

Similarly, the Fourth, Seventh, and Tenth Circuits have tried to limit *O'Bannon* based on their assertion that the issue there "involved only whether there was a right to due process," not "whether the individuals receiving Medicaid assistance had substantive rights under § 1396a(a)(23)." *Kauffman*, 981 F.3d at 366. "But this, too, is demonstrably incorrect," as the Fifth Circuit observed. *Ibid.*

This Court "made plain" in *O'Bannon* that it had to decide whether the any-qualified-provider provision grants "an underlying *substantive* right" to challenge a state's qualification decision before the Court could "resolve whether the right to due process entitled the Medicaid nursing home residents to a hearing." *Kauffman*, 981 F.3d at 366. "The Court held that there is no such substantive right." *Ibid.* (citing *O'Bannon*, 447 U.S. at 785–86). And the lower court had erred in concluding that there was. *O'Bannon*, 447 U.S. at 786.

Here, assuming that the any-qualified-provider provision creates a private right, it only creates a right to "choose among a range" of providers that the State has decided are qualified to provide the services Respondent Edwards required. *O'Bannon*, 447 U.S. at 785. It does not allow her to challenge the State's decision to disqualify a specific provider. *Id.* at 786 (rejecting the argument the provision "create[s] a substantive right to remain [with the provider] of one's choice absent specific cause for transfer").

In its two decisions below, the Fourth Circuit has twice allowed Edwards to do exactly that based on its continued misreading of *O'Bannon*. Pet.App.25a–27a, 70a–75a. Because *Talevski* does not even cite, much less discuss, *O'Bannon*, the 3-1 circuit split over that question remains. The Court should instead grant the petition now.

III. Rather than a GVR, a straight-up grant of this case is warranted in the unique circumstances presented here.

This Court will often GVR pending petitions for reconsideration by the lower courts. But for multiple reasons, an outright grant, rather than a GVR, is warranted here.

First, *Talevski* merely reaffirmed the test set forth in *Gonzaga*. And the Fourth Circuit has already declared that it "took pains to *heed* [that] instruction," i.e., to follow the *Gonzaga* rubric, when parsing the any-qualified-provider provision. Pet.App.23a (emphasis added).

Second, a GVR would likely delay the inevitable. No matter whether the Fourth Circuit stayed the course or changed its mind, the two circuit splits—the first regarding whether the any-qualified-provider provision grants privately enforceable rights, and the second regarding the scope of those rights—would persist and require this Court's resolution, needlessly wasting valuable lower-court and party resources on remand.

Third, principles of federalism and separation of powers warrant this Court's review now. The lack of clarity regarding the any-qualified-provider provision "undermines" these principles. 128 Members of Congress Amici Br. 19. As the Amici States explain, "[a]llowing *private* suits to enforce Medicaid plan requirements and other conditions upends Congress's enforcement program, undermines incentives for federal-state cooperation, and vitiates the federal government's accountability in enforcing Medicaid." Br. of Ind. 8.

Fourth, Respondents are wrong on the merits. When Congress intends to create a private right to choose a specific healthcare provider, it says so. *E.g.*, 42 U.S.C. 1396r(c)(1)(A)(i) (under a section titled, "Requirements relating to residents' *rights*," requiring nursing facilities to "protect and promote" the "*right* to choose a personal attending physician") (emphasis added). Converting a holistic, substantial-compliance regime focused on providers' qualifications rather than individual rights into one that invites private lawsuits challenging every state qualification decision "conflict[s] with the statute's text and structure as well as [this Court's] precedent." *Kauffman*, 981 F.3d at 373 (Elrod, J., concurring).

Finally, this Court's analysis of the any-qualified-provider provision—a provision that has resulted in a deep, mature circuit conflict—would be of considerable benefit to lower courts as they determine whether other Spending Clause statutes provide privately enforceable rights under *Gonzaga*.

* * *

Nearly five years ago, when the circuit split was merely 5-1, three Justices were prepared to grant certiorari and decide whether the any-qualified-provider provision creates privately enforceable rights. *Gee*, 139 S. Ct. at 408–09 (Thomas, J., dissenting from denial of certiorari). After the Fifth Circuit's en banc decision in *Kauffman* agreed with the Eighth Circuit, the split has deepened to 5-2. The *Talevski* opinion does not resolve that split nor the separate, 3-1 circuit conflict over *O'Bannon*. Full merits review, rather than a GVR, is warranted.

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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