NO. _____

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

MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI AND CONSIDERATION OF THIS MOTION

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Under Supreme Court Rule 21, Petitioner Robert M. Kerr moves for expedited consideration of his petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and for expedited consideration of this motion.

Four days ago, this Court granted certiorari to "reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983." *Health and Hospital Corp. of Marion County* v. *Talevski*, No. 21-806 (certiorari granted May 2, 2022). As the decisions below in this case emphasize, the Court's caselaw on that issue "remains plagued by confusion and uncertainty." App.28a (Richardson, J., concurring). And "clarity" is badly needed. *Ibid.*

Unfortunately, clarity in this area is far from guaranteed given *Talevski*'s lingering mootness concerns and its lack of a circuit split on the specific Medicaid Act provisions at issue there. Br. in Opp'n at 11–12, 18, *Talevski*, No. 21-806 (March 11, 2022). Granting the instant petition and considering it alongside *Talevski* would ensure the Court has the best possible opportunity to provide lower courts the clarity they so desperately need.

This petition raises the same underlying private-right-of-action question: whether Spending Clause statutes ever give rise to privately enforceable rights under § 1983, and if so, what is the proper framework for deciding when they do? Pet. for Writ of Cert. at i, *Talevski*, No. 21-806 (Nov. 23, 2021); Pet. for Writ of Cert. at i, *Kerr* v. *Edwards*, No. __-___ (May 6, 2022). And it also would allow the Court to consider in tandem a related but different question on which the lower courts have deeply split: whether the specific Medicaid Act provision at issue here creates a privately enforceable right. Pet. for Writ of Cert. at i, *Kerr* v. *Edwards*, No. __-___ (May 6, 2022). The two main differences between the two cases make this one a better, more secure vehicle for resolving the questions presented in both. First, this petition challenges a final judgment order affirmed on appeal, negating any mootness concerns. And second, the Medicaid Act provision at issue here involves an "important and

recurring" question at the heart of a deep circuit split: whether individual Medicaid recipients have a privately enforceable right to demand a provider of their choice. *Gee* v. *Planned Parenthood of Gulf Coast, Inc*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari).

In *Talevski*, all three Circuits that have considered the specific issue in the second question presented there have reached the same result—finding privately enforceable rights under certain provisions of the Federal Nursing Home Reform Act. Pet. for Writ of Cert. at 29, *Talevski*. By contrast, the lower courts are sharply divided over the second question presented here. Five Circuits—including the Fourth Circuit below—have held that the Medicaid Act's any-qualified-provider provision gives recipients a privately enforceable right to challenge a state's determination that a provider is not qualified to provide certain medical services. App.14a (second Fourth Circuit decision below); App.59a (first Fourth Circuit decision below); *Planned Parenthood of Kan. & Mid-Mo.* v. *Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018); *Planned Parenthood Ariz. Inc.* v. *Betlach*, 727 F.3d 960, 965–66 (9th Cir. 2013); *Planned Parenthood of Ind., Inc.* v. *Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 968, 972–74 (7th Cir. 2012); *Harris* v. *Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006). And two Circuits have held that the same provision does *not* create a privately enforceable right to challenge a state's qualification decision under § 1983. *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 350 (5th Cir. 2020) (en banc); *Does* v. *Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017).

This Court has "in many instances recognized" the value of such percolation: deciding a case against the backdrop of "diverse opinions" from the lower courts often produces "a better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). And as the instant petition shows, Pet. for Writ of Cert. at 14–29, *Kerr*, the "confusion" and

"uncertainty" this Court's cases have sown can best be understood—and resolved—by examining the deep circuit split that has developed over the any-qualified-provider provision as "courts have relied on the same set of opinions," *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278 (2002), to reach very different results.

The second question presented here also implicates a second circuit split over the meaning of this Court's decision in *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980), and the scope of the alleged right to choose a specific Medicaid provider, Pet. for Writ of Cert. at 31–32, *Kerr*. In *O'Bannon*, this Court held that the any-qualified-provider provision "gives recipients the right to choose among a range of *qualified* providers, without government interference." 447 U.S. at 785. "But it clearly does not . . . confer a right on a recipient to continue to receive benefits for care [from a provider] that has been decertified." *Ibid.* Three Circuits—including the Fourth Circuit below—have refused to accept *O'Bannon*'s limited description of the scope of the alleged right at issue here. App.25a–27a (second Fourth Circuit decision below); App.74a–75a (first Fourth Circuit decision below); *Andersen*, 882 F.3d at 1231–32 (Tenth Circuit); *Planned Parenthood of Ind.*, 699 F.3d at 977 (Seventh Circuit). Meanwhile, the en banc Fifth Circuit reached the exact opposite result, labeling the other Circuits' decisions "demonstrably incorrect." *Kauffman*, 981 F.3d at 365, 366. *See also Does*, 867 F.3d at 1046 (Shepherd, J., concurring) (*O'Bannon* "tells us the right created by § 23(A) is far more narrow: the right to choose among a range of qualified providers."). Accordingly, this petition's second question presented also offers the Court an opportunity to resolve an important 3-1 circuit split over the scope of the alleged right under the any-qualified-provider provision and the proper reading of this Court's decision in *O'Bannon*. That issue will remain unresolved if the Court limits its analysis to the far less disputed provisions at issue in *Talevski*.

In sum, expedited consideration is needed so the Court can consider this case in time to grant the petition, consolidate it with *Talevski*, and order a single briefing schedule for the two cases. Deciding this case alongside *Talevski* would protect against the possibility of *Talevski* being rendered moot by its proceeding to final judgment in the district court while the case proceeds on appeal. It would allow the Court to take full advantage of the deep percolation in the lower courts on the specific provision at issue here. It would increase the likelihood that this Court's opinion will provide the necessary clarity and substantive guardrails for lower courts applying whatever framework the Court adopts by giving the Court the opportunity to apply that framework in two different statutory contexts. And it would allow the Court to resolve a second circuit split over the meaning of this Court's decision in *O'Bannon*.

Accordingly, Petitioner respectfully requests expedited consideration of his petition and of this motion so the Court can consider the petition at its June 2, 2022 conference. Specifically, Petitioner moves the Court to direct Respondents to respond to this motion by May 10, 2022. If the motion is granted, Petitioner requests that Respondents be directed to file their response to the petition by May 16, 2022—in time for the May 17, 2022 distribution date for the June 2, 2022 conference. To ensure that the petition reaches conference as quickly as possible, Petitioner waives the right to the 14-day waiting period before distribution under Rule 16.

Respondents do not consent to the Court granting this motion. But Respondents will not be prejudiced by expedited consideration because they already filed a brief in opposition the last time this case came before the Court. Br. in Opp'n, *Baker* v. *Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020) (No. 19-1186). The Fourth Circuit mainly just "reaffirm[ed]" its prior decision when the case came before it again on appeal of the district court's permanent injunction, App.14a–15a, 17a, 25a–27a, and the petition raises substantially the same issues and arguments as raised in the petition following the district court's grant of a preliminary injunction.

If the Court elects not to expedite, pushing consideration of the petition until the Long Conference, the petition should not be held pending the outcome in *Talevski* but should instead be granted to resolve the mature circuit split at issue in the second question presented, an issue that *Talevski* does not raise.

Respectfully submitted,

May 6, 2022

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AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that all parties required to be served, have been served, on this 6th day of May, 2022, in accordance with U.S. Supreme Court Rule 29.3, three (3) copies of the foregoing **MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI AND CONSIDERATION OF THIS MOTION** by placing said copies in FEDERAL EXPRESS, PRIORITY OVERNIGHT, postage prepaid, addressed as listed below.

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Signed and sworn to (or affirmed) before me on 6th day of May, 2022.

KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2025.