No. 23-1275

In the Supreme Court of the United States

EUNICE MEDINA, Interim Director, South Carolina Department of Health and Human Services,
Petitioner,
v.
PLANNED PARENTHOOD SOUTH ATLANTIC, ET AL.,
Respondents.

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

BRIEF FOR LIBERTY COUNSEL AS AMICUS CURIAE SUPPORTING PETITIONER

ANITA L. STAVER
HORATIO G. MIHET
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776
court@lc.org

Counsel for Amicus

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a nonprofit public interest legal organization that advances religious liberty, the freedom of speech, and the sanctity of human life. Liberty Counsel attorneys have represented clients before the United States Supreme Court, federal courts of appeals, and federal and state trial courts nationwide. As part of its mission, Liberty Counsel engages in advocacy efforts addressing the misuse of taxpayer funds to support organizations, such as Planned Parenthood, that fail to meet ethical and professional standards.

Liberty Counsel also represents Sandra Merritt, a pro-life advocate whose undercover investigative work with the Center for Medical Progress (CMP) exposed Planned Parenthood's involvement in the sale of fetal tissue. CMP's undercover videos documented senior Planned Parenthood officials discussing selling baby body parts for profit and modifying abortion procedures to maximize tissue collection. Merritt's work played a pivotal role in shedding light on Planned Parenthood's practices, leading to congressional investigations and criminal referrals.

Relevant here, the revelations contributed to Texas's and Arkansas's disqualification of Planned Parenthood affiliates from their Medicaid programs—decisions upheld by the Fifth Circuit in *Planned Parenthood of Greater Texas Family Planning & Preventative Health Services, Inc.* v. *Kauffman*, 981 F.3d

[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

347 (5th Cir. 2020) (en banc), and the Eighth Circuit in *Does* v. *Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017). Amicus has an interest in ensuring that States retain their authority to exclude providers that engage in unethical or illegal practices, consistent with their obligations under state and federal law, and to ensure that taxpayer dollars are not used to indirectly subsidize the horrific and grotesque practices of such organizations.

SUMMARY OF ARGUMENT

As Petitioner aptly sets forth in her opening brief, the Medicaid Act's any-qualified-provider provision does not unambiguously confer a private right enforceable under 42 U.S.C. § 1983. That is because 42 U.S.C. § 1396a(a)(23) does not give Medicaid beneficiaries a right to challenge a State's determination that a provider is unqualified. See *O'Bannon* v. *Town Ct. Nursing Ctr.*, 447 U.S. 773, 786 (1980) ("[W]hile a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified."); accord *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 358 (5th Cir. 2020) (en banc) ("A Medicaid patient may choose among qualified and willing providers but has no right to insist that a particular provider is 'qualified' when the State has determined otherwise.").

Amicus writes separately to highlight that Planned Parenthood's documented reprehensible practices illustrate the need for state discretion in defining

"qualified" providers. Due to the investigative work by the Center for Medical Progress, Planned Parenthood has been accused of selling baby body parts in violation of federal law and engaging in fraudulent billing methods. These revelations led to public outrage and raised serious concerns about Planned Parenthood's compliance with professional healthcare standards. States like South Carolina have a compelling interest in ensuring that Medicaid funds do not subsidize—either directly or indirectly—providers engaged in such practices. And Congress anticipated these scenarios by granting States explicit authority under 42 U.S.C. § 1396a(p)(1) to exclude providers that fail to meet professional and ethical standards.

Allowing private enforcement of the any-qualified-provider provision would incentivize litigation over compliance with state laws governing ethical healthcare. Indeed, Planned Parenthood has repeatedly exploited Section 1396a(a)(23) to challenge States' disqualification decisions and compel continued funding despite its documented violations of state and federal law. Such litigation imposes significant burdens on states, diverts resources from essential healthcare services, and erodes public trust in Medicaid.

Finally, judicial expansion of Section 1983 liability undermines Medicaid's enforcement framework. Congress intended disputes over compliance to be resolved through administrative remedies, not private litigation. The Act provides no clear rights-creating language that would support a private cause of action. Expanding Section 1983 liability conflicts with Congress's intent, forcing states to fund providers they reasonably deem unfit or unethical. Allowing

beneficiaries—and Planned Parenthood by proxy—a private right of action to challenge State disqualification decisions undermines the balance of power between federal and state governments and jeopardizes the cooperative federalism model at the heart of the Medicaid program.

The Court should reverse the decision below and reaffirm the principle that Spending Clause statutes must clearly and unambiguously confer enforceable rights. Doing so will preserve Medicaid's integrity, respect state discretion, and ensure the program continues to serve its intended purpose.

ARGUMENT

I. Planned Parenthood's Abortion Practices Highlight the Need for State Discretion in Defining "Qualified" Providers.

Ten years ago, a series of undercover videos revealed Planned Parenthood's illegal trafficking of fetal tissue—conduct so appalling it sparked national outrage, congressional investigations, and criminal referrals. The State of Texas subsequently determined that, consistent with its duty to safeguard public funds, it could not allow Medicaid dollars to flow to affiliates of an entity so mired in ethical and legal controversy. See *Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 358 (5th Cir. 2020) (en banc). So, too, did Arkansas. See *Does* v. *Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017) ("The Arkansas Department of Human Services terminated its Medicaid provider agreements with Planned Parenthood of Arkansas and Eastern Oklahoma after the release of

controversial video recordings involving other Planned Parenthood affiliates.").

In the same vein, South Carolina's decision reflects a straightforward application of its duty to safeguard public funds and maintain the integrity of its Medicaid program. Indeed, South Carolina has a compelling interest in excluding such providers, and it is not for the courts to second-guess a State's determination that providers implicated in illegal or unethical practices are both unqualified to provide healthcare and unfit to receive taxpayer dollars.

A. Planned Parenthood doctors and executives have been involved in unethical and illegal practices, including aborting children and providing fetal tissue to organ procurement companies.

Federal law makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce." 42 U.S.C. § 289g-2(a). The law does not prohibit "reasonable payments associated with the transportation, implantation, processing, preservations, quality control, or storage." *Id.* § 289g-2(e)(3). Although Section 289g-2's purpose was to enable donations of fetal tissue for research and permit those involved in facilitating the transfer to recoup "reasonable" costs, a market developed for brokering fetal tissue. Tissue brokers and abortion providers were profiting from Section 289g-2(e)(3)'s "reasonable payments" exception by fraudulently marking up the costs of processing aborted fetuses. The growing market consequently influenced

the timing and method for how abortions are being performed—with potential risks to the mother's health—and has resulted in the shadowy proliferation of fetal tissue trafficking.

In 2015, the Center for Medical Progress (CMP) released the results of an extensive hidden camera investigation into Planned Parenthood's ongoing fetal tissue trafficking with procurement companies. Like testers who ferret out discriminatory housing practices, CMP's founder, David Daleiden, along with Amicus's client, Sandra Merritt, sought to document how Planned Parenthood participated in the harvesting and trafficking of aborted fetal organs and tissue for profit in violation of Section 289g-2. To that end, Daleiden and Merritt posed as tissue procurement company representatives for assignments in California, Colorado, Texas, and Maryland. With video cameras hidden on their persons, Daleiden and Merritt conducted interviews at the National Abortion Federation's (NAF) annual tradeshow conference in San Francisco in April 2014; at restaurants in Los Angeles and Pasadena in July 2014 and February 2015 with Planned Parenthood doctors; and at NAF's annual conference in Baltimore in April 2015. Other hidden-camera interviews took place in Texas, Colorado, and Florida. In all, the footage from the undercover interviews confirmed that Planned Parenthood and tissue procurement companies were illegally harvesting and trafficking fetal tissue.

One of the most striking moments caught on video occurred during a meeting with Dr. Mary Gatter, a Planned Parenthood executive. During the conversation, Dr. Gatter nonchalantly suggested that prices for fetal tissue could be negotiated, remarking, "I

want a Lamborghini." See generally Declaration of David Daleiden, *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 402 F. Supp. 3d 615 (N.D. Cal. 2019) (No. 16-cv-00236-WHO), ECF No. 722-2. This comment—made in the context of what appeared to be price haggling—sparked widespread outrage and became emblematic of public concerns about Planned Parenthood's potential profiteering from the sale of baby body parts.

Another revealing exchange captured on video featured Dr. Deborah Nucatola, Planned Parenthood's Senior Director of Medical Services, discussing how abortion techniques could be adjusted to better preserve fetal organs for sale. Over a casual lunch, Nucatola matter-of-factly explained the process: "We've been very good at getting heart, lung, liver, because we know, so I'm not gonna crush that part—I'm gonna basically crush below, I'm gonna crush above, and I'm gonna see if I can get it all intact." See *Dr. Deborah Nucatola Lunch Meeting - 25 July 2014*, The Center for Medical Progress (July 25, 2014), at 12:46:55–12:47:05.[2] Nucatola further described using ultrasound guidance to flip a baby in the womb to feet-first breech position, in order to extract the baby intact and harvest whole, fresh organs: "So if you do it starting from the breech presentation, there's dilation that happens as the case goes on, and often, the last, you can evacuate an intact calvarium at the end… And, we've been pretty successful with that. I'd say." See *id.* This practice, which closely resembles prohibited partial-birth abortion, see 18 U.S.C. § 1531, not only raises profound ethical concerns regarding the

[2] Available at https://youtu.be/rGqTKfxirZs.

grotesque termination of an innocent human life but also increases risks to the mother—all in the name of harvesting more marketable fetal tissue. What is most chilling is the clinical tone of Dr. Nucatola as she discusses dismembering *living* babies.

At a recent congressional hearing titled "Investigating the Black Market of Baby Organ Harvesting," Representative Marjorie Taylor Greene (R-GA), joined by Representatives Chip Roy (R-TX) and Mary Miller (R-IL), exposed previously suppressed undercover videos revealing the brutality of Planned Parenthood's fetal tissue practices. See Press Release, Rep. Marjorie Taylor Greene, *WRAP UP: Hearing Investigating the Black Market of Baby Organ Harvesting* (July 30, 2024).[3] The footage, recorded by CMP and subpoenaed by Rep. Greene, captured Planned Parenthood officials openly discussing the dismemberment of viable, living babies for organ harvesting. In one particularly gruesome exchange, Planned Parenthood Gulf Coast's chief medical officer detailed a method by which she delivers the lower half of a still-living child before forcibly tearing off its legs—an effort to obtain intact organs while skirting prosecution under the federal Partial-Birth Abortion Ban Act. See *supra* note 3. She explained: "If I'm seeing that I'm in fear that it's about to come to the umbilicus [navel], I might ask for a second set of forceps to hold the body at the cervix and pull off a leg or two, so it's not PBA [partial birth abortion]." *Id.* In another video, a Planned Parenthood executive euphemistically described babies as arriving "more intact," clarifying

[3] Available at https://greene.house.gov/news/documentsingle.aspx?DocumentID=801.

that "[o]ther days it's [the baby] like more intact where it's like maybe only like an arm that's disarticulated." *Id*. The term "disarticulated" is a calculated attempt to sanitize the reality—these abortionists are quite literally ripping the arms and legs off still-living, partially delivered children.

Planned Parenthood's disregard for human life was not limited to offhand comments over lunch or at conferences—it extended to the very research that relied on fetal organs harvested under deeply disturbing circumstances. For example, during the preliminary hearing in California's criminal prosecution of Daleiden and Merritt, Dr. Theresa Deisher, a research scientist from Stanford University, testified that, after reviewing medical research studies involving human fetal hearts procured from Planned Parenthood, she determined that the only way these studies could have been conducted was if the hearts were still beating at the time they were harvested—without anesthesia and without legal consequence. See Prelim. Hrg. Tr. 1302:15–19*, People* v. *Merritt*, No. 17006621 (Cal. Super. Ct. Sept. 2019).

The hidden camera investigation prompted a national outcry, congressional investigations, and even criminal prosecutions. The Senate Judiciary Committee released a report condemning Planned Parenthood,[4] as did a House Select Investigative Panel of the Committee on Energy and Commerce,[5]

---

[4] MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 114TH CONG., MAJORITY REPORT ON HUMAN FETAL TISSUE RESEARCH: CONTEXT AND CONTROVERSY (Comm. Print 2016).

[5] SELECT INVESTIGATIVE PANEL OF THE ENERGY & COM. COMM., 114TH CONG., FINAL REPORT xviii-xix (Comm. Print 2017).

which led to criminal referrals. The undercover investigation also spurred the successful prosecution of a tissue procurement company by the Orange County District Attorneys' Office, which credited Daleiden's and Merritt's undercover work for its success. The tissue procurement company was liable for $7.8 million and shuttered its doors.

And relevant here, the State of Texas cancelled Medicaid provider contracts with Planned Parenthood after determining—based on Daleiden's and Merritt's work—that a local affiliate "violated federal regulations relating to fetal tissue research by altering abortion procedures for research purposes or allowing the researchers themselves to be involved in performing abortions." *Kauffman*, 981 F.3d at 352.

Planned Parenthood's fetal procurement and tissue transfer practices underscore the importance of States having the discretion to assess whether providers meet the professional and ethical qualifications necessary to participate in Medicaid. Cf. *Kauffman*, 981 F.3d at 386 (Higginson, J., concurring in part and dissenting in part) ("Allegations of this nature, which we must accept at this stage as valid on their face, go to whether [Planned Parenthood Gulf Coast] provides Medicaid services in a safe, competent, legal, and ethical manner."). The evidence of Planned Parenthood's unlawful practices is not just ammunition for the latest round in the culture wars; it is an erosion of trust that directly impacts the public's confidence in Medicaid's integrity as a program intended to provide competent care to vulnerable populations. The Fifth Circuit acknowledged this in *Kauffman*, where the court of appeals upheld Texas's decision to exclude Planned

Parenthood from its Medicaid program. See 981 F.3d at 352.

B. States have a compelling interest in excluding Medicaid providers that engage in unethical or illegal practices.

The Medicaid Act's any-qualified-provider provision grants beneficiaries the right to choose their providers—but only from those deemed "qualified" under state law. 42 U.S.C. § 1396a(a)(23). By its terms, the provision does not guarantee unrestricted access to any provider willing to participate in Medicaid. Instead, through a scheme of "cooperative federalism," *Harris* v. *McRae*, 448 U.S. 297, 308 (1980), it leaves the determination as to whether a provider is "qualified" to the States. The Act explicitly empowers States to exclude providers from Medicaid for reasons such as fraud, abuse, or failure to meet professional standards. See 42 U.S.C. § 1396a(p). This reflects Congress's recognition that States are uniquely positioned to safeguard the integrity of their respective Medicaid programs and to ensure public funds are directed toward ethical and competent providers. Accordingly, States are not mere intermediaries in Medicaid administration but play an active role in defining *and* enforcing standards that reflect their public policy and cultural values.

South Carolina's decision to exclude Planned Parenthood from its Medicaid program exemplifies this discretion. The State acted based on a compelling interest in ensuring that Medicaid funds do not indirectly subsidize abortion—a procedure that the legislature and many South Carolina taxpayers find morally objectionable. See S.C. Code Ann. § 43-5-1185

("State funds appropriated for family planning must not be used to pay for an abortion."). By excluding providers whose practices are inseparable from abortion, the State advances its interest in promoting life and respecting its citizens' deeply held convictions.

South Carolina's interests, however, are not limited to abortion. The State also has a compelling interest in ensuring that its Medicaid program does not support providers engaged in fraudulent, unlawful, or unethical practices. As revealed in CMP's investigative reports and undercover videos, Planned Parenthood failed to comply with ethical and professional standards when it engaged in unlawful fetal tissue trafficking. The revelations from these videos prompted significant public outrage and government scrutiny, leading Texas to investigate and ultimately disqualify Planned Parenthood from its Medicaid program. See *Kauffman*, 981 F.3d at 347. In upholding that decision, the Fifth Circuit noted that "[f]ederal law expressly allows States to terminate a provider's Medicaid agreement on many grounds, including those articulated in the Medicaid Act." *Id*. at 368. The court of appeals thus implicitly recognized Texas's interest in ensuring that taxpayer dollars are not used to support providers engaged in conduct that undermines public trust and violates federal law. Indeed, given the grotesque, abhorrent, and unconscionable practices demonstrated in CMP's videos, it is hard to fathom a scenario more deserving of a State's decision to exclude Planned Parenthood from getting anywhere near a copper penny of taxpayer dollars.

South Carolina's interest in excluding Planned Parenthood from its Medicaid program is not merely a matter of policy preferences. It reflects a bedrock

principle: taxpayer dollars should not, under any circumstances, subsidize practices that violate federal law and offend basic human decency. Accord *Flynn* v. *Holder*, 684 F.3d 852, 861 (9th Cir. 2012) ("While there is reportedly a large international market for the buying and selling of human organs, in the United States, such a market is criminal and the commerce is generally seen as revolting." (footnote omitted)). The grotesque and illegal trafficking of human body parts—conduct in which Planned Parenthood has been credibly implicated—falls squarely within the scope of activities the State has a compelling interest in defunding and prohibiting.

Make no mistake: CMP's undercover videos are damning. Planned Parenthood officials were caught on tape discussing the sale of fetal tissue, haggling over prices, and explaining how abortion procedures could be altered to ensure intact organs for sale. And, some of these conversations took place while the abortionist casually drank wine and ate a salad as if the discussion of dismembering living children was of no concern. Such conduct is not only a flagrant violation of federal law but also abhorrent. Each State has every right—and indeed a duty—to ensure that its Medicaid dollars do not subsidize an organization engaged in such inhumane and unlawful practices. Accord *Alexander* v. *Choate*, 469 U.S. 287, 303 (1985) ("The Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients.'" (quoting 42 U.S.C. § 1396a(a)(19)).

In sum, given that Medicaid is a taxpayer-funded program, public trust in its integrity is paramount.

South Carolina has determined that funneling state funds to Planned Parenthood—an entity implicated in the unlawful sale of fetal tissue with executives filmed callously and indifferently discussing ripping the limbs off of living children—undermines the program's integrity and betrays the trust of the citizens who fund it. This is not a decision made lightly or arbitrarily; it is rooted in the State's compelling interest in not subsidizing so-called healthcare providers that engage in fraudulent or otherwise unlawful conduct. South Carolina has every right to ensure that its citizens' taxpayer dollars are not distributed to organizations who employees and officials possess a moral compass so lacking that it permits them to dismember living children for profit and describe it to others as if the subject of their abhorrent, grotesque, and unlawful practices was not another living human being. One would search in vain for a more compelling reason to exclude an organization from Medicaid's program.

C. Planned Parenthood's near-exclusive focus on abortion undermines its claim to be a qualified healthcare provider.

To the extent that Planned Parenthood and its allies argue that defunding the organization cuts off access to critical healthcare, Planned Parenthood's own data shows that its "services" are overwhelmingly focused on abortion, with declining attention to actual healthcare.

Indeed, Planned Parenthood touts itself as a leading healthcare provider, but its own numbers tell a different story. According to its 2022-2023 Annual Report, abortions comprised an astounding 97.1% of its pregnancy-related services in 2021-2022, while prenatal

services accounted for a paltry 1.6%, and miscarriage care and adoption referrals made up an even smaller fraction—0.9% and 0.4%, respectively. See *Annual Report 2022-2023*, Planned Parenthood (2024) (hereinafter Annual Report).[6] These figures are not the hallmarks of a healthcare provider genuinely dedicated to comprehensive care for women. Planned Parenthood performed 392,715 abortions from 2021 to 2022, an increase of 5% from the previous year and a staggering 20% increase over the past decade. See *id.* For every adoption referral, Planned Parenthood performed 228 abortions—a ratio that reflects a prioritization of abortion over other pregnancy-related services. See *id.*

The report further reveals a steady decline in Planned Parenthood's actual healthcare offerings. According to an analysis by the Charlotte Lozier Institute, total services have dropped by 17% over the past decade, with cancer screenings and prevention services plummeting by 71%. See *Fact Sheet: Planned Parenthood's 2022-2023 Annual Report*, Charlotte Lozier Institute (Apr. 17, 2024).[7] Pap tests and breast exams fell by 74% and 72%, respectively. See *id.* Prenatal services, already a negligible portion of its activities, have decreased by 80% since 2009. See *id.* Even contraceptive services—once a cornerstone of Planned Parenthood's original eugenicist and population-control mission, see Brief for Frederick Douglass

---

[6] Available at https://www.plannedparenthood.org/uploads/filer_public/ce/f6/cef6efdb-919a-4211-bb5c-ce0d61fda7f5/2024-ppfa-annualreport-c3-digital.pdf (last accessed Jan. 24, 2024).

[7] Available at https://lozierinstitute.org/fact-sheet-planned-parenthoods-2022-23-annual-report/#_ftnref8.

Foundation et al. as Amici Curiae Supporting Petitioners at 14–21, *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392)—fell by 39%. See *supra* note 5. Meanwhile, the organization has expanded its focus on gender "transition" procedures, including puberty blockers and cross-sex hormones. See *id*.

In sum, Planned Parenthood's claims of being a comprehensive healthcare provider are unsupported by its own data. In reality, Planned Parenthood is singularly focused on abortion with dwindling attention to the broad spectrum of healthcare that low-income women and families need through Medicaid.

II. Planned Parenthood's Exploitation of the Any-Qualified Provider Provision Undermines Pro-Life States' Interests.

Rather than adhering to the administrative appeals process provided by the Medicaid Act, see 42 U.S.C. § 1396a(a)(3), Planned Parenthood takes to the courts, using litigation to override the States' rightful authority to protect public funds and enforce ethical standards. This strategy drains state resources, circumvents the statutory framework, and transforms Medicaid's cooperative federalism into an endless courtroom brawl—all to shield Planned Parenthood from the consequence of its status as the United States's leading provider of abortions. See Michael J. New, *More Abortions, More Taxpayer Dollars, and Fewer Health Services*, National Review (Apr. 17, 2024).[8]

[8] Available at https://www.nationalreview.com/corner/more-abortions-more-taxpayer-dollars-and-fewer-health-services/.

A. Planned Parenthood uses any-qualified provider provision as a backdoor to override pro-life state policies through litigation.

Planned Parenthood's response to accountability is as predictable as it is troubling: scorched-earth litigation. When citizen journalists exposed its involvement in the grotesque trafficking of fetal tissue, Planned Parenthood promptly attacked the messengers, waging lawfare to silence those who shed a light on its unlawful practices. See, *e.g.*, *Planned Parenthood Fed'n of Am., Inc.* v. *Newman*, 51 F.4th 1125 (9th Cir. 2022); *Merritt* v. *Planned Parenthood Fed'n of Am., Inc.*, 144 S. Ct. 87 (2023) (denying certiorari).

The same tactics are deployed to punish States that seek to exclude Planned Parenthood from their Medicaid programs. Cf. *Kauffman*, 981 F.3d at 376 (Walker, J., concurring) ("The providers in the instant case—by launching a lawsuit brought by their patients instead of going through the appropriate administrative appeals processes—attempt to make 'an end run around' the enforcement tools that Congress, HHS, and the state of Texas have chosen." (quoting *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 586 U.S. 1057, 1058 (2018) (Thomas, J., dissenting from denial of certiorari)).

Indeed, Planned Parenthood's pattern of weaponizing Section 1396a(a)(23) to undermine States' legitimate interests in excluding providers whose practices conflict with public policy is evident in numerous cases. Here, Planned Parenthood challenged South Carolina's determination that it was not a qualified Medicaid provider. See *Planned Parenthood S. Atl.* v.

Kerr, 95 F.4th 152 (4th Cir. 2024). Similarly, in *Planned Parenthood of Gulf Coast, Inc.* v. *Gee*, 862 F.3d 445 (5th Cir. 2017), Planned Parenthood successfully contested its exclusion from Louisiana's Medicaid program, though the Fifth Circuit later overruled that decision in *Kauffman*. See 981 F.3d at 347. The same tactic has been deployed in the Seventh Circuit in *Planned Parenthood of Ind., Inc.* v. *Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012), the Eighth Circuit in *Does* v. *Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017), the Ninth Circuit in *Planned Parenthood Ariz. Inc.* v. *Betlach*, 727 F.3d 960 (9th Cir. 2013), and the Tenth Circuit in *Planned Parenthood of Kan.* v. *Andersen*, 882 F.3d 1205 (10th Cir. 2018). The volume of litigation is the proof in the pudding that Planned Parenthood systematically uses the provision to sue pro-life States that determine that an abortion syndicate and illegal fetal tissue trafficker is not a "qualified" Medicaid provider.

To be clear, these lawsuits seek to override the will of the States and their citizens. For instance, South Carolina excluded Planned Parenthood as part of a broader effort to ensure that taxpayer funds align with the State's moral and ethical values, including its compelling interest in protecting unborn life. See *Kerr*, 95 F.4th at 156–57. Yet Planned Parenthood's legal challenges aim to dismantle these policy decisions, effectively forcing states to subsidize the organization despite clear opposition from lawmakers and voters. At bottom, the any-qualified-provider provision was never intended to serve as a backdoor for circumventing state authority. Instead, it was designed to ensure that Medicaid beneficiaries could receive

care from qualified providers as determined by the States.

B. Planned Parenthood's Section 1396(a)(23) lawfare burdens States and undermines Medicaid.

Planned Parenthood's relentless litigation strategy imposes immense burdens on the States, draining resources and undermining their statutory authority to manage Medicaid. As Members of this Court have rightly observed, "a State faces the threat of a federal lawsuit—and its attendant costs and fees—whenever it changes providers of medical products or services for its Medicaid recipients." *Gee*, 586 U.S. at 1058 (Thomas, J., dissenting from denial of certiorari). These lawsuits do more than drain the public's coffers; they discourage state officials from making decisions in the public interest, knowing full well that even inaction could lead to federal litigation. See *id.* (citing cases).

As the Eighth Circuit noted in *Gillespie*, accepting such litigation tactics would result in a "curious system" where state decisions are endlessly relitigated. 867 F.3d at 1041–42. Federal law already requires states to provide providers with administrative appeal and judicial review in state courts when their Medicaid qualifications are terminated. *E.g.*, 42 U.S.C. §§ 1396a(a)(4), (39); 42 C.F.R. § 1002.213. But under Planned Parenthood's approach, while a provider is litigating in state courts—or even after losing there—individual patients could relitigate the exact same issue in federal court under Section 1983. Accord *Gillespie*, 867 F.3d at 1038 ("Planned Parenthood * * * declined to exercise its appeal rights under

Arkansas law and instead identified three patients who were willing to join the organization in a federal lawsuit."). This duplicative system not only invites inconsistent results but also burdens the States with the constant threat of parallel litigation. As the Eighth Circuit rightly recognized, such a scheme undermines Medicaid's structure and suggests Congress never intended to create an enforceable private right for patients to challenge state determinations. See *id.* (citing *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment)).

But that is not how Medicaid was designed to function. By granting providers a shortcut to federal court, and circumventing the administrative appeals process prescribed by state law, these lawsuits undermine the cooperative federalism that Medicaid was built upon. As Justice Thomas warned, such suits give Medicaid providers "an end run around the administrative exhaustion requirements in [the] state's statutory scheme." *Gee*, 586 U.S. at 1058 (Thomas, J., dissenting from denial of certiorari) (citation omitted). Planned Parenthood's nationwide approach exemplifies this abuse, forcing States into courtrooms instead of allowing them to manage their Medicaid programs in accordance with federal law.

III. Allowing Private Rights of Action Undermines Cooperative Federalism.

The Medicaid Act was enacted as a cooperative federal-state program, relying on a balance of power between the federal government's oversight and the States' discretion in implementing the program. See *Harris*, 448 U.S. at 308. This balance is a hallmark of Spending Clause legislation, where states agree to

federal conditions on the use of funds in exchange for flexibility to tailor programs to their needs. Accord *New York* v. *United States*, 505 U.S. 144, 168 (1992) ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

Expanding Section 1983 liability to enforce ambiguous provisions like the any-qualified-provider clause disrupts this delicate balance. As this Court's precedents make clear, for legislation enacted pursuant to Congress's spending power, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981).

A. Expanding Section 1983 liability interferes with the balance of power between federal and state governments under the Spending Clause.

This Court has emphasized that Spending Clause statutes operate as contracts between the federal government and states, and thus they require clear and unambiguous terms to impose obligations on States. See *Pennhurst*, 451 U.S. at 17. This principle ensures that States can make informed decisions about whether to accept federal funding and the conditions attached to it. See *id.* ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.").

The any-qualified-provider provision of the Medicaid Act lacks the clear rights-creating language required to meet this standard. See 42 U.S.C. § 1396a(a)(23). Allowing beneficiaries to enforce the provision through Section 1983, despite the absence of clear rights-creating language, imposes obligations on States that Congress did not explicitly intend. "If Congress wanted a more precise definition of 'qualified,' it could have said so." *Kauffman*, *supra*, 981 F.3d at 378 (Elrod, J., concurring). "But the contract that Congress entered with the states contained no such definition." *Ibid*. That being so, expanding Section 1983 liability to enforce the any-qualified-provider clause not only upends the carefully calibrated balance of cooperative federalism but also contravenes the plain limits Congress imposed on Spending Clause legislation. Cf. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) ("Our precedents establish that a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred.'" (quoting *Gonzaga,* 536 U.S. at 283)).

B. Judicial creation of private rights disrupts Congress's carefully calibrated enforcement mechanisms.

The Medicaid Act reflects Congress's deliberate decision to rely on administrative enforcement—not Article III courts—to resolve disputes over state compliance with federal requirements. Congress entrusted oversight to the Secretary of Health and Human Services (HHS), armed with the authority to withhold funds or impose corrective actions when states fail to meet federal conditions. See 42 U.S.C. § 1396c. This approach was intentional: It reflects a commonsense

recognition that that disputes involving intricate Medicaid provisions are best handled by experts familiar with the program's complexities, not to be litigated to pieces in federal court. Cf. *Armstrong*, 575 U.S. at 329 ("The sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts.").

Planned Parenthood's litigation strategy undermines this framework. Instead of pursuing the administrative remedies Congress envisioned, Planned Parenthood has weaponized the courts to sidestep state oversight and bulldoze its way into Medicaid funding. Take *Kauffman*. Texas disqualified Planned Parenthood after uncovering allegations of Medicaid fraud and unethical practices, including altering abortion procedures to harvest fetal tissue. See 981 F.3d at 350; see also *id.* at 379–380 (Elrod, J., concurring) ("The OIG relied on video footage showing that Planned Parenthood Gulf Coast (PPGC) has permitted doctors involved in fetal-tissue research to perform abortions to secure that fetal tissue." (footnote omitted)). Did Planned Parenthood meaningfully address these allegations? Of course not. Instead, it sued in federal court, thereby dragging Texas into protracted litigation—all while circumventing the administrative process designed to handle such disputes.

This abuse of Section 1983 liability burdens states and taxpayers alike. As the Eighth Circuit pointed out in *Gillespie*, judicially expanding private enforcement leads to "parallel litigation," forcing states to defend provider qualifications in state administrative

proceedings and federal court simultaneously. 867 F.3d at 1041–42. And, as it turns out, Planned Parenthood's strategy is to require States to expend taxpayer funds to defend their decisions in administrative proceedings, further expend taxpayer funds defending federal lawsuits concerning their decisions, and simultaneously pay for Planned Parenthood's litigation expenses with Medicaid funds that are otherwise indirectly subsidizing Planned Parenthood's litigation strategy. In other words, Planned Parenthood's strategy is "heads we win, tails you lose" because it is requiring States to fund both sides of the war. Allowing a private right of action would transform Section 1396a(a)(23) into a cause of action that Congress never intended—and one that undermines the efficiency and credibility of Medicaid's enforcement framework.

But it does not stop there. When courts entertain these lawsuits, it incentivizes more litigation at the expense of provider compliance with healthcare standards. Consider *Kauffman* again. Texas excluded Planned Parenthood to protect Medicaid's integrity and taxpayer dollars. Yet Planned Parenthood's lawsuits have turned these good-faith efforts into drawn-out legal battles, consuming resources that should be used to provide care. It is no surprise, then, that taxpayers are losing trust in Medicaid when courts force states to keep writing checks to unethical providers. Cf. Press Release, Office of the Inspector General, *Medicaid Clients and Providers are a Critical Link in Combating Medicaid Fraud*, Texas Health and Human Services (Nov. 12, 2024) ("Medicaid is funded by Texas tax dollars to provide critical services to low-income residents. Breaking the public's trust erodes

program support, which could leave millions of Texans without access to care.").[9]

Congress designed Medicaid to function as a cooperative partnership between federal and state governments—not as a forum for Planned Parenthood's scorched-earth litigation. Judicially expanding Section 1983 liability undercuts that partnership by replacing sound policy with endless lawsuits. Courts should respect Congress's choice of enforcement mechanisms, leave program disputes where they belong—with HHS and state agencies—and keep Planned Parenthood's litigation circus out of Medicaid.

* * *

The resolution of this case should be simple. *O'Bannon* makes clear that Medicaid beneficiaries have no enforceable private right to dictate which providers participate in a state's Medicaid program. See 447 U.S. at 785. Yet here we are, litigating what should be an uncontroversial application of precedent. Why? Because "it has something to do with the fact that some respondents in these cases are named 'Planned Parenthood.'" *Gee*, 586 U.S. at 1059 (Thomas, J., dissenting from denial of certiorari). The needless circuit split over whether Medicaid recipients have a private right of action to challenge a State's determination of "qualified" providers under Section 1396a(a)(23) shows that, despite this Court's decision in *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 286 (2022), it is still "painfully clear that no legal rule or doctrine is safe from ad hoc nullification * * * when an

[9] Available at https://tinyurl.com/ypdrdnx3.

occasion for its application arises in a case involving state regulation of abortion," *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). That distortion is on full display here. Basic principles of cooperative federalism and statutory construction should not be set aside just because Planned Parenthood is involved. This Court should resist the temptation to indulge that distortion and resolve the case as Section 1396a(a)(23) and *O'Bannon*, uncolored by politics, plainly require.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

ANITA L. STAVER
HORATIO G. MIHET
DANIEL J. SCHMID
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776
court@lc.org

Counsel for Amicus

FEBRUARY 2025