No. 23-1275

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

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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).

Three times, the court of appeals has held that the free-choice-of-provider provision unambiguously confers a right that is privately enforceable under Section 1983. In its most recent decision, the court of appeals so held after faithfully applying this Court's recent decision in *Health & Hospital Corp. of Marion County* v. *Talevski*, 599 U.S. 166 (2023).

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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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 95 F.4th 152. The opinion of the district court (Pet. App. 68a-79a) is reported at 487 F. Supp. 3d 443.

Prior relevant opinions of the court of appeals (Pet. App. 38a-65a, 80a-125a) are reported at 27 F.4th 945 and 941 F.3d 687. A prior relevant order of the district court (Pet. App. 126a-146a) is reported at 326 F. Supp. 3d 39.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2024. The petition for a writ of certiorari was filed on June 3, 2024. 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 "agree[s]" that PPSAT "is perfectly competent to provide * * * healthcare." Pet. App. 41a. 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. 126a-146a; the court of appeals affirmed, *id.* at 80a-119a; and this Court denied certiorari, see *id.* at 47a.

The district court then granted summary judgment to PPSAT and the patient, *id.* at 66a-79a; the court of appeals affirmed, *id.* at 64a; and this Court granted the petition, vacated, and remanded in light of *Health & Hospital Corp. of Marion County* v. *Talevski*, 599 U.S. 166 (2023), Pet. App. 37a. After reconsidering its prior holding in light of *Talevski*, the court of appeals again affirmed, with all three judges agreeing that the Medicaid Act's free-choice-of-provider provision is privately enforceable under Section 1983. *Id.* at 1a-35a; *id.* at 36a (Richardson, J., concurring in the judgment).

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. A state must comply with various federal requirements to participate, see *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323 (2015), including the free-choice-of-provider requirement. To comply with that requirement, a 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).

2. PPSAT and its predecessors have provided health care to low-income residents of South Carolina for four decades. Pet. App. 7a, 58a. 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, No. 21-1043 (4th Cir. May 28, 2021) (21-1043 Resp. C.A. Br.). Those centers serve hundreds of Medicaid patients each year. Pet. App. 7a, 87a.

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, 69a; 21-1043 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. 6a-7a.

Patients insured through Medicaid choose PPSAT for many reasons. PPSAT provides non-judgmental, high-quality medical care. See Pet. App. 6a-7a. It also has designed its services to help low-income patients overcome barriers to accessing care. *Id.* at 7a. 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 continued to offer high-quality medical care during the COVID-19 pandemic, including through telemedicine. 21-1043 Resp. C.A. Br. 5. That ensured continuity of care for low-income patients and lessened the burdens on other parts of the health care system. Pet. App. 7a-8a & n.2.

Respondent Julie Edwards is a Medicaid patient who has received care at PPSAT. Pet. App. 7a. She suffers from diabetes. *Id.* at 44a. 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. *Id.* at 7a, 44a. 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, 70a. 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 8a, 88a; 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 87a. 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 88a.

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 providers. *Ibid.*

The district court entered a preliminary injunction. Pet. App. 126a-146a. As a threshold matter, it held that the Medicaid Act's free-choice-of-provider requirement is privately enforceable under Section 1983 because the statute "unambiguously confers a right" on Medicaid patients to "obtain assistance from any qualified and willing provider." *Id.* at 134a. Then, on the merits, the court concluded that petitioner likely violated the Medicaid Act by terminating PPSAT's Medicaid participation without cause. *Id.* at 138a-141a. The court found it "undisputed" that PPSAT is "qualified" to provide medical care, as the statute requires. *Id.* at 138a-139a (citing 42 U.S.C. 1396a(a)(23)(A)).

The court of appeals affirmed the preliminary injunction. Pet. App. 80a-125a. 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 94a-98a. Applying this Court's decisions in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), 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. 94a (quoting *Gonzaga*, 536 U.S. at 284-285).

Here, the court of appeals explained, the statute is "unmistakably clear" in creating a privately enforceable right. Pet. App. 103a-104a. "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 102a. All three judges agreed on this point. See *ibid.*; *id.* at 120a-125a (Richardson, J., concurring) (agreeing that the statute "unambiguously create[s] a right privately enforceable under § 1983").

On the merits, the court of appeals concluded that PPSAT and Ms. Edwards established a likelihood of success on the merits because under the free-choice-of-provider provision, a state may not exclude a qualified and willing provider. Pet. App. 138a-141a. The court noted that petitioner did not dispute that "PPSAT is professionally qualified to deliver the services that [Ms. Edwards] seeks." *Id*. at 107a; see *id.* at 98a n.3 ("PPSAT's qualifications are simply not in dispute" in this case.). The court rejected petitioner's argument that it can terminate the Medicaid contract of any provider it wishes even when

it "admits" that the provider is "perfectly competent." *Id.* at 109a-110a.

Petitioner filed a petition for a writ of certiorari, which this Court denied. *Baker* v. *Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020) (No. 19-1186).

5. The district court granted summary judgment to PPSAT and Ms. Edwards and entered a permanent injunction. Pet App. 68a-79a. The court again held that the Medicaid Act's free-choice-of-provider provision is privately enforceable under Section 1983 and determined that petitioner violated the Medicaid Act by terminating PPSAT's participation in the state Medicaid program. *Id.* at 74a. The court noted that petitioner did not dispute that PPSAT is a "medically and professionally qualified provider" and determined that petitioner accordingly had no valid basis for the termination. *Ibid.*

The court of appeals affirmed. Pet. App. 38a-64a. The court again held that Medicaid's free-choice-of-provider provision confers a right enforceable under Section 1983. *Id.* at 54a-64a. The court carefully reviewed this Court's precedents and recognized that "nothing 'short of an unambiguously conferred right' * * * may support a cause of action." *Id.* at 55a (quoting *Gonzaga*, 536 U.S. at 283). The statute here, the court explained, "unmistakably evinces Congress's intention to confer on Medicaid beneficiaries a right to the free choice of their provider" because it confers an individual right in mandatory terms; courts are competent to determine if a provider is qualified; and the Medicaid Act does not provide a comprehensive enforcement scheme that shows Congress's intent to foreclose private enforcement. *Id.* at 57a-62a. Again, all three judges agreed that the statute unambiguously confers a

private right enforceable under Section 1983. *Id.* at 51a-64a; *id.* at 65a (Richardson, J., concurring in the judgment).

The court of appeals noted that petitioner no longer contested the merits. Pet. App. 51a. Specifically, petitioner "d[id] not" renew his merits arguments to "challenge the district court's determination (and [the court of appeals'] own previous conclusion) that South Carolina violated" the free-choice-of-provider provision "by terminating Planned Parenthood's Medicaid provider agreement." *Id.* at 51a n.1.

6. This Court then granted the petition for a writ of certiorari in *Talevski*. That petition presented two questions: (1) whether a federal statute that Congress enacted using its Spending Clause power can give rise to a right enforceable under Section 1983, and (2) whether two provisions in the Federal Nursing Home Reform Act (FNHRA), 42 U.S.C. 1396r(c)(1)(A)(ii) and 1396r(c)(2)(A), are privately enforceable under Section 1983. See Pet. at *i-ii, *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, No. 21-806, 2021 WL 5702312 (Nov. 23, 2021). The Court answered both questions in the affirmative. *Talevski*, 599 U.S. at 175-191. In concluding that the provisions at issue are privately enforceable under Section 1983, the Court applied its "established method for ascertaining unambiguous conferral" of an individual right. *Id.* at 183; see *id.* at 175-191.

In the meantime, petitioner filed a petition for a writ of certiorari in this case. The Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Talevski*. *Kerr* v. *Planned Parenthood S. Atl.*, 143 S. Ct. 2633 (2023) (No. 21-1431).

7. The court of appeals affirmed. Pet. App. 1a-36a. "[W]ith the benefit of *Talevski*'s guidance," the court again held that the free-choice-of-provider provision confers a right enforceable under Section 1983. *Id.* at 12a-13a.

The court of appeals explained that the free-choice-of-provider provision is enforceable under Section 1983 because it "explicitly gives Medicaid beneficiaries the right to the provider of their choice" and "there is no indication that Congress wanted to foreclose such individuals from seeking relief under § 1983." Pet. App. 14a. On the first point, the court reviewed this Court's precedents and recognized that "'*Gonzaga* sets forth [the] established method for ascertaining unambiguous conferral' of individual rights." *Id.* at 19a (quoting *Talevski*, 599 U.S. at 183). That test is satisfied, the court continued, "where the provision in question is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Ibid.* (quoting *Talevski*, 599 U.S. at 183 (in turn quoting *Gonzaga*, 536 U.S. at 284, 287)).

Here, the court of appeals explained, the free-choice-of-provider provision unambiguously confers rights on individual Medicaid recipients: "Like the text at issue in *Talevski*," the free-choice-of-provider provision "speak[s] 'in terms of the person benefited,' and ha[s] an 'unmistakable focus on the benefited class.'" Pet. App. 25a (quoting *Talevski*, 599 U.S. at 186). The free-choice-of-provider provision, the court explained, "focus[es] on discrete beneficiaries and guarantee[s] them a choice" of any qualified medical provider "free from state interference." *Ibid.* The court noted that *Talevski* "bolstered [its] previous conclusion" by providing examples of rights-creating

language "similar to the language" in the free-choice-of-provider provision. *Ibid.*

Petitioner had argued that the court of appeals should reverse its prior holdings because its decisions cited *Blessing* and *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and in petitioner's view, those decisions no longer are good law after *Talevski*. Pet. App. 14a. The court of appeals noted that *Talevski* did not overrule either decision. *Id.* at 22a-23a, 28a. But either way, the court explained, "the central analysis remains the same" – *Talevski* made clear that courts should "look primarily to *Gonzaga*" to determine whether Congress unambiguously conferred an individual right, and the court of appeals' prior decisions "turned upon" that same analysis and "relied heavily on *Gonzaga*." *Id.* at 23a.

The court of appeals then reiterated its conclusion that the Medicaid Act does not provide a comprehensive enforcement scheme that shows Congress's intent to foreclose private enforcement. Pet. App. 32a-33a. The court noted that petitioner had "not asked us to revisit this question [i]n this appeal." *Id.* at 33a.

Finally, the court of appeals noted that it is undisputed that PPSAT is a qualified and willing provider and that petitioner's decision to terminate PPSAT from South Carolina's Medicaid program was unjustified. Pet. App. 33a-34a. The court emphasized that petitioner "has not contested" – at any time "during the long path of this litigation" – that PPSAT "is professionally qualified to provide the care that the plaintiff seeks." *Id.* at 33a.

Judge Richardson concurred in the judgment. Pet. App. 35a-36a (Richardson, J., concurring in the judgment). He agreed that the statute here "create[s]

an individual right enforceable under 42 U.S.C. § 1983," but suggested this Court provide additional guidance on the relevant legal standard. *Id.* at 36a (Richardson, J., concurring in the judgment).

ARGUMENT

Petitioner asks this Court (Pet. 15-16) to grant certiorari to address two questions: (1) 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, and (2) if so, whether the free-choice-of-provider provision allows a state to terminate a Medicaid provider for any reason, even if the state acknowledges that the provider is professionally qualified. This Court's review is not warranted on either question.

On the first question, the court of appeals faithfully applied this Court's precedents, including *Talevski*, and its conclusion is consistent with that of nearly every court that has considered the issue. Petitioner contends (Pet. 31-32) that the courts of appeals need guidance on the appropriate test for determining whether a federal statute is privately enforceable under Section 1983. But *Talevski* already provided that guidance; the Court reaffirmed that courts should use its "established method" (599 U.S. at 183) for deciding whether a provision is privately enforceable. This Court has repeatedly denied petitions presenting this first question – including in this case[1] – and it should do the same here.

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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.*, 571 U.S. 1198 (2014) (No. 13-

This case does not present the second question, because that question concerns whether a patient has a right to choose an *unqualified* provider, and petitioner has conceded throughout this litigation that PPSAT is a *qualified* provider. Further, petitioner presented no argument on this issue to the district court on summary judgment or to the court of appeals in two rounds of briefing on appeal from that decision. He accordingly has forfeited any argument based on that question. Even if the question were presented here, petitioner's argument is mistaken, and no circuit split exists. Further review therefore is unwarranted.

I. THE PRIVATE-RIGHT-OF-ACTION ISSUE DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner contends (Pet. 17-32) 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).

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621); *Secretary of Ind. Fam. & Soc. Servs. Admin.* v. *Planned Parenthood of Ind., Inc.*, 569 U.S. 1004 (2013) (No. 12-1039).

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 without states "restricting beneficiaries to certain providers." Pet. App. 6a; see, *e.g.*, S. Rep. No. 744, 90th Cong., 1st Sess. 183 (1967). Congress then 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, the court of appeals faithfully applied this Court's precedents and correctly concluded that the Medicaid Act's free-choice-of-provider provision is privately enforceable under Section 1983. Pet. App. 5a-35a. All three judges agreed that the statute at issue here is "clear and unambiguous" in conferring a privately enforceable right. *Id.* at 29a; see *id.* at 36a (Richardson, J., concurring in the judgment). This was not a close call: The court found it "hard to conceive of any text * * * that would permit" a private right of action "[i]f the language of this

medical provider provision does not suffice." *Id.* at 35a.

The court of appeals began its analysis by carefully reviewing this Court's precedents, including the recent decision in *Talevski*. Pet. App. 15a-21a. *Talevski* applied the Court's settled precedents to hold that a nursing facility resident could sue under Section 1983 to enforce two particular provisions of FNHRA. 599 U.S. at 180-191. In so holding, *Talevski* explained that "'*Gonzaga* sets forth [the] established method for ascertaining unambiguous conferral' of individual rights," and that this test is satisfied "where the provision in question is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" Pet. App. 19a (quoting *Talevski*, 599 U.S. at 183 (in turn quoting *Gonzaga*, 536 U.S. at 284, 287)). As the court of appeals recognized, this Court's decisions set a "demanding bar" for finding a privately enforceable right. *Id.* at 22a (quoting *Talevski*, 599 U.S. at 180).

Applying that guidance, the court of appeals correctly concluded that the free-choice-of-provider provision is privately enforceable. The court "rigorously examine[d]" the statutory text and concluded that it unambiguously gives Medicaid patients an individual right to obtain care from their provider of choice. Pet. App. 22a, 25a. 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). *Id.* at 23a (quoting 42 U.S.C. 1396a(a)(23)(A); emphasis omitted).

That language is "a prime example of the kind of 'rights-creating' language required to confer a

personal right on a discrete class of persons." Pet. App. 25a-26a (discussing *Gonzaga*, 536 U.S. at 284 n.3). It "speak[s] in terms of the persons benefited and ha[s] an unmistakable focus on the benefited class." *Id.* at 25a (quoting *Talevski*, 599 U.S. at 186). Indeed, the court explained, *Talevski* "bolstered" the court's prior conclusion on this point "by providing additional examples of rights-creating language similar to the language at issue here." *Ibid.*

Further, the court of appeals found no indication in the statutory text that Congress intended to foreclose a Section 1983 remedy. Pet. App. 32a-33a. There is no "incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted." *Id.* at 32a (quoting *Talevski*, 599 U.S. at 187). That is particularly true, the court explained, because "there is no way for Medicaid beneficiaries to challenge disqualifications of their preferred providers through the administrative scheme." *Ibid.*[2] Notably, petitioner did not contest this point in the court of appeals. The court previously had held that "the Medicaid Act provides no comprehensive enforcement scheme sufficient to overcome the presumption that the free-choice-of-provider provision is enforceable under § 1983," *id.* at 32a (quoting *id.* at 102a), and "South Carolina d[id]

[2] Petitioner asserts in passing (Pet. 9) 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. 101a 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. 101a n.4.

not ask" the court "to revisit this question [i]n this appeal," *id.* at 33a.

3. Petitioner offers two main criticisms of the court of appeals' decision. Pet. 30-32, 36-37. Neither has merit.

First, petitioner argues (Pet. 36-37) that the court of appeals erred in reading the free-choice-of-provider provision to create an unambiguously conferred right. He contends (*ibid.*) that the free-choice-of-provider provision lacks rights-creating language, comparing it to the provision in *Gonzaga* that "sp[oke] only in terms of institutional policy and practice, not individual[s]." 536 U.S. at 288 (discussing 20 U.S.C. 1232g(b)(1)-(2)). That comparison is inapt. Whereas the provision in *Gonzaga* concerned only institutional "polic[ies] or practice[s]," 20 U.S.C. 1232g(b)(1)-(2), the free-choice-of-provider provision addresses whether "individual" Medicaid patients "may obtain" "medical assistance" from their chosen providers, 42 U.S.C. 1396a(a)(23)(A).

Petitioner also notes (Pet. 36-37) that the free-choice-of-provider provision does not contain the word "right." Yet there is no basis for petitioner's "magic words" rule. Pet. App. 26a (quoting *Federal Aviation Admin.* v. *Copper*, 566 U.S. 284, 291 (2012)). The free-choice-of-provider provision has an "unmistakable focus" on the benefited class and is "phrased in terms of the persons benefited," which "satisfie[s]" this Court's test for whether a statute contains the necessary rights-creating language. *Talevski*, 599 U.S. at 183.

Second, petitioner argues (Pet. 30-31, 35-36) that the court of appeals erred by putting too much weight on this Court's decisions in *Blessing* and *Wilder*. That is mistaken. The court of appeals recognized that

"'*Gonzaga* sets forth [the] established method for ascertaining unambiguous conferral' of individual rights." *Id.* at 19a (quoting *Talevski*, 599 U.S. at 183). The court then correctly stated and applied that test, explaining that, for a statutory provision to be privately enforceable, it must unambiguously confer an individual right on a particular class of people, and it must not include a comprehensive enforcement scheme showing a congressional intent to preclude private enforcement. Pet. App. 24a-31a, 32a. Further, the court correctly noted that this Court has not overruled *Blessing*. *Id.* at 22a-23a. Indeed, as the court noted (*id.* at 31a), both *Gonzaga* and *Talevski* cited *Blessing*. See *Talevski*, 599 U.S. at 189; *Gonzaga*, 536 U.S. at 287-289.

Far from changing the standard for determining whether a federal law secures rights for Section 1983 purposes, the Court in *Talevski* stated that it was applying its "established method for ascertaining unambiguous conferral" to the federal statute at issue in that case. 599 U.S. at 183; see *id.* at 184-186. The court of appeals likewise recognized that, throughout this Court's line of decisions, the "central inquiry" has remained the same – "whether Congress conferred a clear and unambiguous right upon a discrete class of beneficiaries." Pet. App. 21a. The court of appeals explained that this analysis "remains the same" "with or without *Blessing*," *id.* at 23a, and it did not even cite *Blessing* in evaluating whether the free-choice-of-provider provision is enforceable under Section 1983, see *id.* at 24a-33a. Instead, as in its prior decisions, it focused on *Gonzaga*. *Id.* at 23a-26a. Petitioner is

therefore wrong to criticize the court of appeals for its brief citations to *Blessing*.[3]

Petitioner likewise is wrong to say (Pet. 31, 35) that the court of appeals improperly relied on *Wilder*. The court cited *Wilder* only for a narrow proposition – that a provision in the Medicaid Act can create a privately enforceable right. Pet. App. 27a, 32a. That is just a statement of the holding in *Wilder*. *Id.* at 27a (citing *Wilder*, 496 U.S. at 509-510 (holding that the Boren Amendment is privately enforceable under Section 1983)). That holding has never 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). Pet. App. 62a.

This Court has questioned *other* parts of *Wilder*, but the court of appeals recognized that, stating that this Court has "noted * * * that '[its] later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified'" and "expressly 'reject[ed] the notion,' implicit in *Wilder*, 'that [its] cases permit anything short of an unambiguously conferred right.'" Pet. App. 27a-28a (quoting *Armstrong*, 575 U.S. at 330 n.*).

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[3] Notably, earlier in this case, petitioner took a different position from the one he takes now; he actually relied on *Blessing* as providing the relevant legal standard. For example, in his appeal of the preliminary injunction, petitioner argued that a statute can give rise to a right enforceable through Section 1983 if the factors identified by this Court in *Blessing* are satisfied. See, *e.g.*, Pet. C.A. Prelim. Inj. Br. 22-23, No. 18-2133 (4th Cir. Nov. 26, 2018) (arguing that a plaintiff must "meet all * * * of the[] requirements" from *Blessing* for "a § 1983 claim [to] lie"); Pet. C.A. Prelim. Inj. Reply Br. 3-10, No. 18-2133 (4th Cir. Feb. 4, 2019) (similar). This is reason to doubt petitioner's claimed need for clarification about *Blessing*.

In any event, the court of appeals explained that petitioner's arguments failed even if he were correct that all of *Wilder* had been abrogated, because *Talevski* also "rejected the argument that provisions that speak to and place obligations on government officials [like the Medicaid Act] cannot create individual rights." *Id.* at 28a; *see ibid.* ("[E]ven if [*Wilder* were] abrogated * * * the State's argument remains unpersuasive."). Again, with or without *Wilder*, the analysis and outcome remain the same.

More generally, petitioner overstates the supposed need for clarification about the status of *Blessing* and *Wilder*. The Court had the opportunity to provide guidance in *Talevski*, and it did so, explaining that *Gonzaga* provides the relevant test, and that this test reflects the Court's "established method for ascertaining unambiguous conferral" of an individual right. 599 U.S. at 183. All three judges of the court of appeals understood that the "central inquiry" was whether Congress unambiguously conferred an individual right on Medicaid patients, and all three judges agreed that Congress did that here. Pet. App. 31a, 35a; see *id.* at 36a (Richardson, J., concurring in the judgment). Under those circumstances, there is no need for this Court's review, particularly because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (This Court's "resources are not well spent superintending each word a lower court utters en route to a final judgment.").

B. Any differences in the approaches of 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.[4] And nearly every district court that has considered the issue has agreed with that conclusion.[5]

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[4] 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.*, 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).

[5] 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, 987 (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.*

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

The Fifth Circuit's analysis in *Planned Parenthood of Greater Texas Family Planning & Preventative Health Services, Inc.* v. *Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc), turned on factors not present in 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." *Kauffman*, 981 F.3d at 351-352. The court of appeals held that the free-choice-of-provider provision does not confer a right enforceable under Section 1983 because a

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& 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); cf. *Akula* v. *Phillips*, No. 22-cv-1070, 2022 WL 17903707, at *7-8 (E.D. La. Dec. 23, 2022), aff'd sub nom. *Akula* v. *Russo*, No. 23-30046, 2023 WL 6892182 (5th Cir. Oct. 19, 2023); see also *Taranov* v. *Area Agency of Greater Nashua*, No. 21-cv-995, 2023 WL 6809637, at *6 (D.N.H. Oct. 16, 2023), appeal pending, No. 23-1934 (1st Cir. filed Nov. 13, 2023); *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 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).

Medicaid patient had no "right to question" the Commission's "factual determination" that the providers violated generally accepted standards of medical practice. *Id.* at 357-358.

The Fifth Circuit stated that it is "not clear" that the Fourth Circuit would disagree with its holding, because that holding was premised on Texas disqualifying 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. *Kauffman*, 981 F.3d at 365. Indeed, as the court of appeals here explained, South Carolina has never contested, "during the long path of this litigation, that Planned Parenthood is professionally qualified to provide the care that the plaintiff seeks." Pet. App. 33a. The Fifth Circuit distinguished private-right-of-action holdings from three other courts of appeals on similar grounds. *Kauffman*, 981 F.3d 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 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 professional qualifications are undisputed.

Further, the Eighth Circuit's decision relied on an analysis that has been foreclosed by *Talevski*. That court did not use the test set out by this Court, which focuses on whether the specific language at issue includes the necessary "rights-creating language."

Talevski, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 290). Rather than analyze the specific text of 42 U.S.C. 1396a(a)(23)(A), the court treated the mere possibility of federal enforcement as precluding private enforcement, *Gillespie*, 867 F.3d at 1041, a view that *Talevski* expressly rejected, 599 U.S. at 186-192.

The Eighth Circuit also focused on the fact that the provision exists within a set of requirements for state Medicaid plans. *Gillespie*, 867 F.3d at 1041. But *Talevski* rejected that reasoning as well, explaining (in the context of a similar statute) that it is wrong to say that provisions that impose obligations on third parties cannot create individual rights. 599 U.S. at 185. Further, as the court of appeals noted (Pet. App. 29a), 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.

Finally, 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 *Gonzaga*. See, *e.g.*, *Spectra Commc'ns 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). The Eighth Circuit should have an opportunity to reconsider its analysis in *Gillespie* in light of these decisions and in light of the guidance this Court provided in *Talevski*.

3. There is no urgent need for this Court's review. Contrary to petitioner's suggestion (Pet. 35-37), the question presented does not arise frequently. 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 twelve district court decisions involving lawsuits challenging the termination of Medicaid providers through the free-choice-of-provider provision and Section 1983, see note 5, *supra* (first twelve cases), plus a handful of cases challenging other state policies or actions using those statutes, see, *e.g.*, *ibid.* (next six cases). All but three of the twelve cases were 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 involved pretextual termination attempts lacking any legal basis or evidentiary support.

Further, the issue has arisen less and less frequently in recent years. Outside of this case, no court of appeals has addressed the question presented since 2020. See note 4, *supra*. The small and decreasing number of these cases shows that petitioner is wrong to say (Pet. 35) that the court of appeals' decision will lead to additional litigation. This Court has denied certiorari on this issue multiple times, see note 1, *supra*, and the passage of time has made it even more clear that there is no need for this Court's review.

If this Court potentially were interested in considering this issue, it should first give the courts of appeals the opportunity to consider its recent guidance in *Talevski*. Only the court of appeals in the decision below – and no other court – has had the opportunity to consider the effect of *Talevski* on the question whether the free-choice-of-provider provision confers a right enforceable under Section 1983. In light of the decreasing number of cases raising this issue, there may never be a need for this Court's review. But if petitioner is correct and this remains a

live issue, then this Court will have other opportunities to consider the issue after other courts of appeals have applied the guidance in *Talevski.*

II. THE UNQUALIFIED-PROVIDER ISSUE DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner contends (Pet. 33-34) that if the Medicaid Act's free-choice-of-provider provision confers an individual right enforceable under Section 1983, this Court should grant review to decide whether that right extends to providers that a state has labeled "[un]qualified." This case does not present that question, because petitioner has conceded throughout the course of this litigation that PPSAT is a qualified provider. Further, petitioner forfeited this argument by abandoning it in his most recent appeal. The argument also is mistaken, and there is no disagreement in the courts of appeals on this point.

A. Petitioner is wrong to say (Pet. 33) that Ms. Edwards is seeking to challenge the exclusion of an unqualified provider. Petitioner in fact has conceded at every turn that PPSAT is qualified.

As the court of appeals recognized, "[t]here has never been any question during the long path of this litigation that Planned Parenthood is professionally qualified to provide the care that plaintiff seeks." Pet. App. 33a. Since the beginning, petitioner has not contested that PPSAT is a qualified provider. See *id.* at 107a (first court of appeals decision: "South Carolina does not contest the fact that PPSAT is professionally qualified to deliver the services that the individual plaintiff seeks."); *id.* at 74a (second court of appeals decision: "[T]here is no dispute as to whether [petitioner] asserts PPSAT afforded less than adequate care to its patients. He does not."); *id.* at 33a

(third court of appeals decision: "The State has not contested" "that Planned Parenthood is professionally qualified to provide the care that the plaintiff seeks.").

B. Petitioner has forfeited any argument about "the scope of any alleged right to challenge a state's disqualification decision" (Pet. 33). Petitioner made an argument along those lines at the preliminary-injunction stage; he argued that he did not violate the free-choice-of-provider provision because a state may exclude providers as not "'qualified' * * * based on any conceivable state interest." Pet. App. 109a (quoting 42 U.S.C. 1396a(a)(23)(A)). Among other things, petitioner relied on *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980). Pet. App. 111a-112a. But petitioner "d[id] not contest the fact that PPSAT is professionally qualified to deliver the services that [Ms. Edwards] seeks." *Id.* at 107a. The district court and court of appeals accordingly rejected petitioner's argument and held that he violated the free-choice-of-provider provision. *Id.* at 138a-141a, 106a-117a.

After the preliminary-injunction stage, petitioner focused exclusively on the private-right-of-action question. On summary judgment in the district court and in two rounds of briefing in the court of appeals, petitioner argued only that the free-choice-of-provider provision does not give rise to a privately enforceable right. For example, in opposing summary judgment, petitioner argued that 42 U.S.C. 1396a(a)(23)(A) "does not authorize a private right of action" for the reasons "set forth" in his preliminary-injunction brief. Pet. D. Ct. Summ. J. Br. 9, No. 18-cv-2078 (D.S.C. Feb. 24, 2020). Petitioner did not argue in the alternative that if Section 1983 confers a privately enforceable right, he did not violate that right.

Then, on appeal of the summary-judgment decision, petitioner again assumed that PPSAT is "qualified" within the meaning of the free-choice-of-provider provision, rather than argue that he did not violate the statute. See Pet. C.A. Br. 22-30, No. 21-1043 (4th Cir. Mar. 29, 2021) (21-1043 Pet. C.A. Br.). Indeed, the court of appeals found it "[n]otabl[e]" that petitioner "d[id] not challenge the district court's determination (and [the court of appeals'] own previous conclusion) that South Carolina violated this provision." Pet. App. 51a n.1. Petitioner only cited *O'Bannon* for the proposition that the free-choice-of-provider provision is not privately enforceable, *id.* at 62a-64a; see 21-1043 Pet. C.A. Br. 22-27; he did not separately argue that his termination of PPSAT's Medicaid participation was justified under *O'Bannon*.

Finally, in his supplemental briefs following *Talevski*, petitioner did not even cite *O'Bannon*, instead addressing only the private-right-of-action issue and arguing that *Talevski* required the court of appeals to reverse its previous holding that the free-choice-of-provider provision is enforceable under Section 1983. Pet. Supp. C.A. Br. 4-16, No. 21-1043 (4th Cir. Aug. 23, 2023); Pet. Supp. C.A. Reply Br. 2-10, No. 21-1043 (4th Cir. Oct. 13, 2023).

The court of appeals did not address petitioner's argument about the scope of the free-choice-of-provider right in 42 U.S.C. 1396a(a)(23)(A) in the second appeal because petitioner never presented that argument. This Court should not address the argument in the first instance. 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.").

C. To be sure, petitioner's forfeited argument is wrong. A state may not terminate a provider from Medicaid for any reason and then "simply label[]" that

"exclusionary rule as a 'qualification'" under the free-choice-of-provider provision. Pet. App. 110a. The "ordinary definition of 'qualified' [is] being professionally capable or competent." *Id.* at 107a-108a. Congress adopted that meaning when it specified that "qualified" means "qualified to perform the service or services required." 42 U.S.C. 1396a(a)(23)(A); see *Federal Commc'ns Comm'n* v. *AT & T Inc.*, 562 U.S. 397, 405 (2011) ("[W]hen interpreting a statute * * * we construe language * * * in light of the terms surrounding it.").

A provider "is not made unqualified to perform" medical services "based on any conceivable state interest." Pet. App. 109a. Instead, a state may "consider[]" a provider not to be "qualified" based only on the "standards for the provision of care" that the state has "set." S. Rep. No. 744, 90th Cong., 1st Sess. 183. Here, South Carolina agreed that PPSAT meets those standards and is professionally capable of providing the care that Ms. Edwards seeks. See Pet. App. 33a, 58a, 98a n.3, 107a. South Carolina's argument that "the term 'qualified' means whatever the state says," if accepted, "would strip the free-choice-of-provider provision of all meaning" and would "eviscerate the Medicaid Act's cooperative scheme." *Id.* at 110a, 116a.

D. Finally, and in any event, there is no circuit split on the unqualified-provider issue. Petitioner contends (Pet. 33-34) that the Fourth, Seventh, and Tenth Circuits disagree with the Fifth Circuit on whether *O'Bannon* holds that the free-choice-of-provider provision does not confer a right to obtain care from a provider that a state has deemed disqualified. That is incorrect, because the Fifth Circuit considered the termination of providers for cause, whereas the Fourth, Seventh, and Tenth

Circuits considered terminations of providers without cause. The different outcomes in the cases are explained by their 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, the parties agreed that PPSAT is a medically *qualified* provider. The same was true in the Seventh and Tenth Circuit cases. See *Planned Parenthood of Kan. & Mid-Mo.*, 882 F.3d at 1236; *Planned Parenthood of Ind.*, 699 F.3d at 978-80. In that circumstance, *O'Bannon* said that the patient *does* have a right "to choose among a range of *qualified* providers, without government interference." 447 U.S. at 785; see *id.* at 785 n.18. So if *O'Bannon* applies here, it leads to different results in these different cases because they involved different facts. For that reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2024