NO. 23-1275

IN THE

Supreme Court of the United States

ROBERT M. KERR, in his official capacity as Director, South Carolina Department of Health and Human Services,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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There is an undeniable 5–2 circuit split over the private enforceability of the Medicaid Act's any-qualified-provider provision. The Fourth, Sixth, Seventh, Ninth, and Tenth Circuits are on one side; the Eighth and en banc Fifth Circuits are on the other, as the Fourth Circuit acknowledges. App.52a & n.2; Pet.17–32. That split is driven by confusion over whether lower courts should continue following *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), and *Blessing* v. *Freestone*, 520 U.S. 329 (1997), or eschew those cases in favor of *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). Pet.3–4. "[E]ven after" this Court's decision in *Health & Hospital Corp. of Marion County* v. *Talevski*, 599 U.S. 166 (2023), courts "lack the guidance inferior judges need." App.35a–36a (Richardson, J., concurring in the judgment).

Unable to deny that this case "present[s] a conflict on a federal question with significant implications," *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018) (Thomas, J., dissenting from denial of certiorari), Respondents' main argument is that the "court of appeals' decision is correct." Opp.12–19. But Respondents are wrong. The "clear rights-creating language" and "unmistakable focus on the benefited class" that were present in *Talevski*, 599 U.S. at 186 (cleaned up), are absent here. So the any-qualified-provider provision is one of the "many federal statutes" that does *not* clear *Gonzaga*'s "high" "bar" for implying a private right enforceable under section 1983. *Talevski*, 599 U.S. at 193 (Barrett, J., concurring). And this Court should grant review and say so.

The Fourth Circuit's rulings also present a 3–1 circuit split over the proper reading of *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), and the scope of a Medicaid beneficiary's alleged right to challenge a state's decision to disqualify a provider. Pet.4, 33–34. Here, Respondents mainly argue that Petitioner somehow forfeited that argument. But in his briefing below, Petitioner devoted a whole section to it. Petitioner argued that even if the Fourth Circuit held that a Medicaid beneficiary has an implied right to select a provider, that does not include the right to demand a hearing to certify a provider the state has deemed not qualified, or to seek care from a provider the state has decertified. See Appellant's Br. 22–27, No. 21-1043 (4th Cir. Mar. 29, 2021) (relying on *O'Bannon*). The Fourth Circuit ruled on and rejected that argument. App.62a–64a.

That argument is both preserved and correct. In *O'Bannon*, this Court effectively recognized that a Medicaid beneficiary has no substantive right to keep receiving services from a provider after the state decertifies that provider; any such right is limited to choosing from the range of qualified providers. The Fifth Circuit agrees. Yet the Fourth, Seventh, and Tenth Circuits have all held the opposite. So this Court should grant the second question presented and reverse the court of appeals.

ARGUMENT

I. The Court should resolve the recognized 5-2 circuit split over whether the any-qualified-provider provision confers a private right.

A. The split warrants this Court's review.

Respondents insist that "[a]ny differences in the approaches of the courts of appeals do not warrant this Court's review." Opp.19–25. They try to distinguish the en banc Fifth Circuit's opinion in *Planned Parenthood of Greater Texas Family Planning & Preventative Services, Inc.* v. *Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc), and the Eighth Circuit's opinion in *Does* v. *Gillespie*, 867 F.3d 1034 (8th Cir. 2017), because Texas and Arkansas purportedly had health and safety concerns about the providers there, while South Carolina disqualified Planned Parenthood because of a statute that prohibits taxpayer funding of abortion. Opp.20–23.

But the Fifth Circuit did *not* base its holding—that the "right asserted by the Individual Plaintiffs [was] not unambiguously conferred"—on any specific factual justifications for Texas's disqualification decision. *Kauffman*, 981 F.3d at 359. Instead, the court based its decision on the "text and structure" of the any-qualified-provider provision and "closely related federal statutes," none of which "suggest[ed] that Medicaid patients have a right to challenge whether, as either a factual or legal matter, a State's exclusion or removal of a provider is permitted or mandated." *Id.* at 360. Nothing in the opinion suggests the result turned on the reason the providers were disqualified.

Indeed, as Judge Higginson pointed out in his partial dissent, Texas terminated two of the providers "based solely on their legal affiliation" with a different provider that had engaged in questionable conduct. *Kauffman*, 981 F.3d at 386 (Higginson, J., dissenting in part) (cleaned up). To Judge Higginson, that affiliation "fail[ed] to determine that these providers [were] not qualified," *ibid.*, because mere affiliation with other providers "had no bearing on whether" the providers themselves "were qualified," *id.* at 387. But that factual difference did not affect the majority's conclusion that the "right" that *all* the individual Medicaid recipients were asserting had not been "unambiguously conferred." *Id.* at 359.

Relatedly, in overruling the prior panel opinion in *Planned Parenthood of Gulf Coast, Inc.* v. *Gee*, 862 F.3d 445 (5th Cir. 2017), the en banc Fifth Circuit "disavow[ed] the conclusion in *Gee* that a state agency or actor cannot legitimately find that a Medicaid provider is not 'qualified' unless under state or federal law the provider would be unqualified to provide treatment or services to the general public." *Kauffman*, 981 F.3d at 368. Respondents insist it matters that Planned Parenthood was medically "qualified" to provide non-abortion services. Opp.12. But that's irrelevant given "the lack of unambiguous provisions in § 1396a(a)(23) conferring a right to challenge a State's determination that a provider is not 'qualified.'" *Kauffman*, 981 F.3d at 369. As federal law "make[s] clear," there are many valid reasons why a state agency may disqualify a Medicaid provider "even if the provider is lawfully permitted to provide health services to the general public." *Ibid.* And that is all that happened here.

As for *Gillespie*, Respondents fail to mention that Arkansas terminated Planned Parenthood affiliates based on "the release of controversial video recordings involving *other* Planned Parenthood affiliates." 867 F.3d at 1037 (emphasis added). Those videos prompted the Arkansas Governor to "direct[]" the relevant state department "to terminate its Medicaid provider agreements with Planned Parenthood." *Id.* at 1038. And when Planned Parenthood and three patients challenged that decision, they argued that the department had wrongfully excluded Planned Parenthood "for a reason *unrelated* to its fitness to provide medical services." *Ibid.* (emphasis added). That makes *Gillespie* factually *indistinguishable* from this case. And the Eight Circuit still held that the any-qualified-provider provision "does not unambiguously create a federal right for individual patients that can be enforced under § 1983." *Id.* at 1037. As the court below recognized, the circuit split is real. App.52a & n.2.

B. The need for review is urgent.

Alternatively, Respondents tell the Court to wait. Opp.23–25. But the circuit split has been percolating for years, and as the decision below shows, it is not going anywhere, even after *Talevski*. Pet.29–32.

The issue is also of immense importance. The uncertainty leaves states "unable to determine when they accept federal funds whether they are opening themselves up to lawsuits, including the accompanying liability for damages and attorney's fees." Kansas.Br.3–4. And the ability of some 70 million Medicaid beneficiaries to challenge their state's provider decisions depends solely on the circuit where they reside. Pet.35.

The lower courts also need this Court's decisive intervention. Despite the GVR after *Talevski*, the Fourth Circuit barely altered its analysis. The court of appeals did not read *Talevski* as "toppling the existing doctrinal regime." App.4a. Instead, it concluded that *Wilder* remained good law and "appear[ed] to doom the State's argument at the starting gate." App.27a–28a. And it believed it was "bound by *Blessing* until given explicit instructions to the contrary—instructions that have yet to come." App.22a. Thus, Judge Richardson again highlighted the confusion surrounding *Wilder* and *Blessing* before issuing his third plea asking this Court to provide "the guidance inferior judges need." App.35a–36a.

C. The court of appeals got it wrong.

Talevski found privately enforceable rights in FHNRA's nursing-home provisions, while *Gonzaga* rejected a privately enforceable right in FERPA's non-disclosure provisions. Read together, *Talevski* and *Gonzaga* show the importance of "rights-creating" language. Under this "demanding bar," *Talevski*, 599 U.S. at 180, the any-qualified-provider provision does *not* create a right that is privately enforceable under section 1983.

FHNRA provisions in *Talevski*. The two FHNRA nursing home provisions invoked in *Talevski* "reside in 42 U.S.C. § 1396r(c), which expressly concerns '[r]equirements *relating to residents' rights*.'" 599 U.S. at 184 (citation omitted). "This framing is indicative of an individual 'rights-creating' focus." *Ibid.*

The first provision—FHNRA's "unnecessary-restraint provision"—"requires nursing homes to 'protect and promote … *[t]he right* to be free from … any physical or chemical restraints.'" *Ibid.* (citation omitted). Similarly, FHNRA's predischarge-notice provision, "[n]estled in a paragraph concerning 'transfer and discharge *rights*,' … tells nursing facilities that they 'must not transfer or discharge [a] *resident*' unless certain preconditions are met." *Id.* at 184–85 (quoting 42 U.S.C. 1396r(c)(2)) (cleaned up).

In sum, these provisions included unequivocal rights-creating language for residents of nursing home facilities. This clarity is what made *Talevski* the "atypical case" in which a Spending Clause statute unambiguously confers privately enforceable rights. *Id.* at 183.

FERPA provisions in *Gonzaga*. FERPA's non-disclosure provisions "stand in stark contrast" to *Talevski*'s FHNRA provisions. *Talevski*, 599 U.S. at 185. The FERPA provisions speak "only to the Secretary of Education, directing that '[n]o funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.'" *Gonzaga*, 536 U.S. at 287 (quoting 20 U.S.C. 1232g(b)(1)). And they "entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Ibid.* (cleaned up).

Simply put, the FERPA provisions have an "'aggregate' focus" and are "*not* concerned with 'whether the needs of any particular person have been satisfied.'" *Id.* at 288 (emphasis added, citation omitted).

Any-qualified-provider provision. Like the provisions in *Gonzaga*, the any-qualified-provider provision lacks clear rights-creating language or an unmistakable focus on a benefited class. Indeed, it says nothing about a "right" at all.

Unlike the two FHNRA provisions at issue in *Talevski*, which were in a section listing "[r]equirements relating to residents' rights," 42 U.S.C. 1396r(c), the any-qualified-provider clause appears in a long list detailing what "State plan[s] for medical assistance must" include. 42 U.S.C. 1396a(a). In other words, the any-qualified-provider provision appears in a directive to the Secretary of Health and Human Services, *not* a directive to providers. And that same statutory section instructs the Secretary to "approve any plan which fulfills the conditions" that list sets out. 42 U.S.C. 1396a(b).

To put it in this Court's words, the any-qualified-provider provision is "a directive to the federal agency charged with approving state Medicaid plans, not … a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 331 (2015). It does not say that a beneficiary has a right to declare which providers are "qualified," or a right to challenge a state's decision that a provider is not qualified. The clause's references to individuals are made *only* in the context of how a state must procure federal funding. There is no "unambiguously conferred right." *Gonzaga*, 536 U.S. at 283.

Moreover, along with giving providers themselves the right to an appeal, see 42 C.F.R. 1002.213; S.C. Code Regs. 126-404, 126-150, the Medicaid Act, like FERPA, gives the Secretary a way to enforce compliance: "no further payments," 42 U.S.C. 1396c. That provision does not envision private-party lawsuits when, as here, the provider chooses not to avail itself of its *own* right to appeal a disqualification decision.

Undeterred by all these textual indications to the contrary, Respondents insist that the any-qualified-provider provision is more like the provisions in *Talevski* because it uses the word "individual." Opp.16. But if that word is all that's necessary to imply a private right, it would drop *Gonzaga*'s "demanding bar" to the floor. 599 U.S. at 180. The words "individual" and "individuals" appear throughout 42 U.S.C. 1396a; if Respondents are correct, then the federal code teems with implied private rights enforceable under § 1983, the exact opposite of what *Gonzaga* and *Talevski* suggest.

Statutory context puts an even finer point on it. FHNRA directs that state plans must protect the "rights" of nursing home residents. 42 U.S.C. 1396r(f)(1). There is no comparable directive in 42 U.S.C. 1396a. That's because section 1396a does not create private rights at all.

Respondents' position also has absurd implications. There are many reasons a state can disqualify a provider besides a "health or safety basis." Opp.22. Yet Respondents' argument gives a Medicaid beneficiary the right to override *all* those reasons through a section 1983 suit. That can't be correct.

II. The Court should resolve the 3-1 circuit split over the proper reading of *O'Bannon*.

A. Petitioner preserved this issue.

Respondents concede Petitioner raised the second question presented at the preliminary-injunction stage. Opp.26. But Petitioner also raised the issue in his summary-judgment briefing in the district court. Def.'s Mem. in Opp. to Pls.' Mot. for Summ. J. at 9, *Planned Parenthood S. Atlantic* v. *Baker*, 487 F. Supp. 3d 443 (D.S.C. 2020) (No. 3:18-cv-02078) (arguing "42 U.S.C. § 1396a(a)(23) does not authorize a private right of action under § 1983 to collaterally attack a state agency's decision to exclude a provider from the state's Medicaid program"). And Petitioner raised the issue in his summary-judgment appeal, too, devoting an entire section of his brief to the argument. Appellant's Br. 22–27, No. 21-1043 ("As the Fifth Circuit's en banc decision explains, the panel opinion is demonstrably wrong on the merits. The panel misinterpreted *O'Bannon*'s holding that a Medicaid beneficiary has no right to challenge a state's determination that a provider is unqualified."). Citing *O'Bannon*, Petitioner explained that Ms. Edwards was challenging South Carolina's determination that Planned Parenthood is no longer "qualified," and that this "is precisely what the Supreme Court held she cannot do." *Id.* at 24–25.

The Fourth Circuit ruled on the issue, too, devoting an entire subsection to it. App.62a–64a. That is enough to preserve the issue for this Court's review. See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue

presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.") (cleaned up). And because this issue was not within the scope of the GVR, Petitioner did not need to raise it a third time to preserve it for review. See *Lawrence on Behalf of Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (explaining that "a GVR order … assists the court below by flagging *a particular issue* that it does not appear to have fully considered") (emphasis added).

Respondents also argue that Petitioner has conceded Planned Parenthood *is* a qualified provider. Opp.25–26. Not so. Respondents wrongly conflate "qualified" with "professionally qualified." *Ibid.* The Medicaid Act allows states to impose policy-based qualifications on providers, giving states broad authority to exclude providers for any reason the Secretary can, "*[i]n addition to* any other authority" states retain to exclude providers. 42 U.S.C. 1396a(p)(1).

Exercising that authority, South Carolina disqualified Planned Parenthood because continued funding would violate the State's policy against "the payment of taxpayer funds to abortion clinics" or "the subsidy of abortion." S.C. Exec. Order No. 2018-21 (July 13, 2018). South Carolina recognized that Planned Parenthood is the leading abortion provider in the country, and that its use of Medicaid dollars to cover administrative overhead will free up funds for more abortions. AAPLOG.Br.4–19. For these legitimate policy reasons, Planned Parenthood is unqualified in South Carolina.

B. The split is real and should be resolved.

Respondents say the en banc Fifth Circuit's reading of *O'Bannon* in *Kaufmann* is distinguishable from that of the Fourth, Seventh, and Tenth Circuits because the Fifth Circuit "considered the termination of providers for cause." Opp.28. But as explained in section I.A., that badly misreads *Kaufmann*. Indeed, *Kauffman* expressly disagreed with the decision below, dismissing the Fourth Circuit's reasons for distinguishing *O'Bannon* here as "demonstrably incorrect." *Kauffman*, 981 F.3d at 365–66.

On the merits, the en banc Fifth Circuit had it right: *O'Bannon* held that "Medicaid beneficiaries do *not* have a right" under the any-qualified-provider provision to "contest" a state's "determination that a Medicaid provider is not 'qualified.'" 981 F.3d at 355. (emphasis added). While *O'Bannon* recognized that recipients must be allowed to "choose among a range of *qualified* providers," 447 U.S. at 785, that does not include a right to seek services from a provider that a state has deemed unqualified or to demand a hearing to certify an unqualified provider, *ibid.*

Because that is the very right Ms. Edwards asserts here, this Court should grant the petition, resolve the split, and reaffirm *O'Bannon*.

CONCLUSION

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

Respectfully submitted,

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