No. 23-1275

IN THE

Supreme Court of the United States

EUNICE MEDINA, IN HER OFFICIAL CAPACITY AS 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 OF AMICI CURIAE SOUTH CAROLINA MEDICAID PRACTITIONERS IN SUPPORT OF THE PETITIONER

Thomas M. Fisher
Counsel of Record
Bryan G. Cleveland
111 Monument Circle, Suite 2650
Indianapolis, IN 46204
(317)698-6223
tom@tomandcathyfisher.com

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the Medicaid Act's "any-qualified-provider" provision unambiguously confers a private right upon a Medicaid beneficiary to choose a specific provider.

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INTEREST OF AMICI CURIAE[1]

Dr. Mark Shaffer is a Clinical Associate Professor of Family and Preventive Medicine at the University of South Carolina School of Medicine. He joins this amicus in his individual capacity, not on behalf of any institution. Dr. Shaffer is board certified in Family Medicine with special interests that include prenatal care and natural family planning. He accepts Medicaid patients as part of his clinical practice.

The Holy City Catholic Physicians Guild of Charleston, SC is a chartered guild of the Catholic Medical Association, providing opportunities for fellowship, educational discussion, spiritual development, and service in Charleston. Its members include physicians that offer women's health and family planning services to Medicaid patients in Charleston.

Dr. Thomas McNamara, the guild president, is a board-certified family physician with master's degrees in medical management and theology/bioethics. During his forty-year career, he managed Medicaid patients with family planning and contraception concerns at all levels of the healthcare system.

[1] No party or its counsel authored any of this brief, and no person other than amici curiae, their members, or their counsel contributed monetarily to this brief.

Dr. Jordan O'Steen is a third-year resident at AnMed in Anderson, SC. He is a native of Greenville and a graduate of the Medical University of South Carolina. He practices family medicine with special interest in natural family planning, and his practice includes obstetrics and gynecology as part of full spectrum family medicine. He accepts Medicaid patients as part of his clinical practice.

Amici file this brief to stress the need for clarity and consistency in private enforceability of Medicaid plan requirements and to make the Court aware that many quality Medicaid providers other than Planned Parenthood actively serve women in South Carolina.

SUMMARY OF THE ARGUMENT

In *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166 (2023), the Court reaffirmed its commitment to the rule from *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), that private plaintiffs may use section 1983 to enforce only those statutes with text and structure creating federal *rights*, not all statutes that confer federal benefits. Under that standard, laws that tell federal agencies how to regulate state use of federal money rarely create rights for individual program beneficiaries. Yet because this Court in *Talevski* did not formally overrule *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and *Blessing v. Freestone*, 520 U.S. 329 (1997), many lower courts still allow plaintiffs like Planned Parenthood to sue to enforce spending conditions for federal programs that merely confer individual benefits. Accordingly, vigilant enforcement of the *Gonzaga* standard for implied rights of action requires the Court to overrule *Wilder* and *Blessing* expressly.

Even if the Court does not overrule *Wilder* and *Blessing*, it should reinforce the text-and-structure rule from *Gonzaga*. Courts like the circuit below inappropriately read select provisions of federal statutes devoid of context to find rights-creating language. The Court should clarify that the entire structure of the statute, including its enforcement mechanisms, is relevant to the implied-rights inquiry. Here, two aspects of Medicaid's "any-qualified-provider" plan requirement weigh against inferring an enforceable right: The statute's structure as a directive to a federal

agency concerning approval of state Medicaid plans, and its express authority for the Secretary to withhold funding for states that violate spending conditions. Both structural provisions suggest Congress did not confer enforceable rights in 42 U.S.C. § 1396a(a)(23).

Nor should the Court be concerned about the practical effects of denying enforceable rights under the "any qualified provider" condition. Many providers in South Carolina, like the Amici Practitioners, eagerly serve women on Medicaid in South Carolina. Planned Parenthood's participation is not required for Medicaid to work in the state.

ARGUMENT

I. The Court Should, At Long Last, Overrule *Wilder* and *Blessing*

The standard for permitting program beneficiaries to enforce federal spending conditions under 42 U.S.C. § 1983 suffers from a lack of both uniformity and predictability. Both *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990), and *Blessing v. Freestone*, 520 U.S. 329 (1997), are plainly out of step with modern doctrine as set forth in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (and reaffirmed in *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166 (2023)). Yet the Court's failure to overrule them has undermined the effectiveness of the *Gonzaga* standard. Neither *Wilder* nor *Blessing* warrants stare decisis protection. The nature of the errors in those

decisions, the deficient quality of the reasoning employed, the unworkability of the rules they represent, the exceptional relationship they bear to later cases, and lack of substantial reliance interests in their holdings all support overruling them.

A. *Wilder* and *Blessing* err by searching for benefits rather than rights and by reading isolated spending conditions out of context

In a 5-4 decision, Justice Brennan's opinion for the Court in *Wilder* inappropriately focused on whether an individual condition on Medicaid grants—the "Boren Amendment" requiring state Medicaid plans to provide "reasonable and adequate" reimbursement rates for hospital services—benefited the plaintiff hospitals, as if benefits are the same as rights. *Wilder*, 496 U.S. at 509 (asking only whether "the provision in question was intend[ed] to benefit the putative plaintiff" (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989))). Yet the Court did not assess the contextual significance of the Boren Amendment's structure as a directive to government officials on how to administer the Medicaid program, *i.e.*, as a condition of participating in a federal program and, conversely, as a limit on federal grantmaking. *See id.* at 527 (Rehnquist, J., dissenting) ("[O]ne most reasonably would conclude that § 1396a(a)(13)(A) is addressed to the States and merely establishes one of many conditions for receiving Federal Medicaid funds.")

Blessing tried to clarify *Wilder* but did not alter its fundamental approach. There, the Court distilled from *Wilder* (and related precedent *Wright v. Roanoke Housing Authority*, 479 U.S. 418 (1987)), a three-part test. "First, Congress must have intended that the provision in question benefit the plaintiff." *Blessing*, 520 U.S. at 340. "Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. *Id.* at 340–41 (citation omitted). "Third, the statute must unambiguously impose a binding obligation on the States," meaning one "couched in mandatory, rather than precatory, terms." *Id.* at 341.

Thus, as in *Wilder*, the Court in *Blessing* focused on whether statutes confer benefits rather than rights—and secondarily on vagueness. The vagueness factor encourages lower courts to zero in on select passages devoid of context and thereby avoid a text-and-structure approach. In a passage often cited by § 1983 plaintiffs, the Court elaborated that a complaint's assertion of rights must be reviewed in "manageable analytic bites," *Blessing*, 520 U.S. at 342, assessing "whether the 'provision in question' was designed to benefit the plaintiff," *id.* (quoting *Golden State*, 493 U.S. at 106). *See, e.g.*, *Ball v. Rodgers*, 492 F.3d 1094, 1106 n.18 (9th Cir. 2007) (criticizing the Sixth Circuit for considering the structure of the statute). In Medicaid cases, lower courts often take this passage to prevent consideration of structure. Pet. App.103a–104a (criticizing South Carolina for "reach[ing] beyond the plain and narrow text" of the provision at issue).

B. *Wilder* and *Blessing* lack grounding in sound legal principles

Since *Wilder* and *Blessing*, the Court has recognized their departure from usual legal principles used to infer enforceable rights. Both cases suggested that a weaker standard applied "for inferring a private right of action under § 1983" than "for inferring a private right of action directly from the statute." *Gonzaga*, 536 U.S. at 282. The Court has criticized *Wilder* for supporting the idea that "implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983." *Id.* at 283 (citing *Wilder*, 496 U.S. at 508–09 n.9). And it separately criticized *Blessing* for equivocating between whether to weigh three factors or search for clear statements of rights. *See id.* at 282–83.

While not expressly overruling either *Wilder* or *Blessing*, the Court in *Gonzaga* "reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. It further emphasized that the implied-right-of-action cases apply to § 1983 cases because § 1983 is simply a remedy that does not alter the test for rights. *See id.* at 284. Thus, the Court has already cast *Wilder* and *Blessing* as outliers that ignored the legal principles grounding the Court's implied-rights doctrine.

The Court revisited Medicaid Act enforceability under the Supremacy Clause in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 331 (2015), where a plurality rejected a reading of the Medicaid Act that ignores its structure. "[The Medicaid Act] is phrased as a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." *Id.* That observation underscores just how fundamentally unsound *Wilder* and *Blessing* are, as they fail even to ask how the spending program at issue operates. But even that kill shot was not enough. As one circuit bluntly stated, "it [*Armstrong*] is not binding on us; *Wilder* still is." *Planned Parenthood of Kansas v. Andersen*, 882 F.3d 1205, 1229 (10th Cir. 2018).

C. *Wilder* and *Blessing* are inconsistent with the Court's later decisions

Doctrinal developments show *Wilder* and *Blessing* to be an "anomaly." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 925 (2018) (internal citation omitted). Neither precedent is consistent with later cases.

In the three decades since *Wilder*, the Court has "repeatedly declined to create private rights of action under statutes that set conditions on federal funding of state programs." *Nasello v. Eagleson*, 977 F.3d 599, 601 (7th Cir. 2020). Indeed, the Court began to abandon the standard that *Wilder* announced almost as soon as the decision was published. Just two years

after deciding *Wilder*, in *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court refused to permit private enforcement of the "reasonable efforts" state-plan requirement of the Adoption Assistance and Child Welfare Act of 1980 because the statute did not "unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 363.

And while *Blessing*'s three factors proliferate in lower court decisions, this Court has *never* found any statute enforceable using the *Blessing* factors, having displaced it in *Gonzaga*. The Court in *Gonzaga* openly mocked "a multifactor balancing test to pick and choose" proposed by the dissent and insisted that a Section 1983 plaintiff must point to "clear and unambiguous terms" showing that Congress wished to create a "new right[] enforceable under § 1983." *Gonzaga*, 536 U.S. at 286, 290. The "text and structure" of FERPA conferred no such "unambiguous" enforceable right. *Id.*

Armstrong—decided 25 years after *Wilder*—leaves no doubt that *Wilder* is an orphan. The majority correctly acknowledged that this Court's intervening decisions "plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong*, 575 U.S. at 330 n* (citing *Gonzaga*, 536 U.S. at 283). And a full majority of the Court joined the repudiation of *Wilder,* even as factions debated whether § 1396a(a)(30)(A) creates implied rights. *See id.*

Talevski confirms that the *Blessing* factors are no longer the law for finding implied rights. The majority opinion emphasized that the "demanding bar" of *Gonzaga* is the rule, without reference to the *Blessing* factors. *Talevski*, 599 U.S. at 180. Two justices emphasized the "text and structure" test of *Gonzaga*. *See id.* at 193 (Barrett, J, joined by Roberts, C.J., concurring). And the dissenting justices agreed with the majority's test, observing that the entire Court was now "rejecting the standard articulated in *Blessing*." *Id.* at 230 (Alito, J., joined by Thomas, J., dissenting).

Because the Court has expressly repudiated *Wilder* and implicitly repudiated *Blessing*, neither precedent comports with prevailing doctrine.

D. *Wilder*'s standard is unworkable—and begot yet another unworkable standard

Wilder invites courts to engage in inquiries bound to produce unpredictable, conflicting outcomes; *Blessing*'s multi-factor test only reinforces the inconsistencies. Since *Gonzaga*, courts have struggled to determine whether a statutory provision is "phrased with an *unmistakable focus* on the benefitted class," as opposed to a "focus on the person regulated." *Gonzaga*, 536 U.S. at 284, 287. Courts that believe *Wilder* and *Blessing* are still good law have created muddled tests fusing those holdings with *Gonzaga*, either expressly or implicitly.

Lower courts find the *Wilder* approach difficult to avoid in Medicaid cases precisely because *Wilder* construed the Medicaid Act. Pet.App.27a; *see, e.g.*, *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Hum. Servs.*, 443 F.3d 1005, 1015 (8th Cir. 2006), *cert. granted, judgment vacated in part on other grounds sub nom. Selig v. Pediatric Specialty Care*, *Inc.*, 551 U.S. 1142 (2007). As a result, splits have proliferated over various provisions of the Medicaid Act.

The courts of appeals, for example, have splintered over not only the provider-choice plan requirement in this case, but also whether 42 U.S.C. § 1396a(a)(13) creates a right for Medicaid providers to challenge a state's procedures for adjusting reimbursement rates. *Compare BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 824 (7th Cir. 2017) (concluding that nursing home operators could use Section 1983), *with Developmental Servs. Network v. Douglas*, 666 F.3d 540, 546–48 (9th Cir. 2011) (finding no individual right of action under Section 1983). They have also split over whether 42 U.S.C. § 1396a(a)(30), Medicaid's "equal access provision," is privately enforceable. *Compare Arkansas Med. Soc., Inc. v. Reynolds*, 6 F.3d 519, 525–26 (8th Cir. 1993), *with John B. v. Goetz*, 626 F.3d 356, 362–63 (6th Cir. 2010) (per curiam) (no Section 1983 right of action), *Long Term Pharmacy All. v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004) (same), *and Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005) (same).

Conflicts exist outside Medicaid as well. Four courts of appeals are admittedly divided over whether

the Adoption Act's payments provision is privately enforceable. *Compare N.Y. State Citizens' Coalition for Child. v. Poole*, 922 F.3d 69, 74 (2d Cir. 2019) (finding a private right of action, relying in part on *Wilder*), *and D.O. v. Glisson*, 847 F.3d 374, 378 (6th Cir. 2017) (same), *and Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 977 (9th Cir. 2010) (same), *with Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1203 (8th Cir. 2013) (no private right of action).

Talevski has not resolved these issues. The majority opinion in that case stated that "[s]tatutory provisions must *unambiguously* confer federal rights," citing *Gonzaga* but not elaborating further. 599 U.S. at 180. Two concurring justices ventured that, "[u]nder *Gonzaga*, courts must ask whether 'text and structure' indicate that the statute 'unambiguously' confers federal rights." *Id.* at 193 (Barrett, J., concurring) (quoting *Gonzaga*, 536 U.S. at 283). Neither opinion expressly rejected *Wilder*'s or *Blessing*'s other tests for implied rights, though.

These direct statements notwithstanding, the Fourth Circuit concluded that *Talevski* left *Blessing* and *Wilder* intact as precedent, Pet.App.21a–23a, and it is not alone in that view. Just last year, the Third Circuit examined both *Gonzaga* and the *Blessing* factors to split from the Fourth Circuit on a different statute, the Federal Law Enforcement Officers Safety Act, observing that nothing in *Talevski* overruled *Blessing*. *See Fed. L. Enf't Officers Ass'n v. Att'y Gen. New Jersey*, 93 F.4th 122, 130–31 & n.4 (3d Cir. 2024).

As the Second Circuit has observed, the task of deciding whether legislation creates privately enforceable rights after *Gonzaga* is "not an easy one" with all this conflicting precedent. *Kapps v. Wing*, 404 F.3d 105, 127 (2d Cir. 2005). While *Gonzaga* may be a workable standard, combining it with *Wilder* and *Blessing* breeds confusion. As Judge Richardson has stated repeatedly in this case, Pet.App.35a–36a, and members of this Court have observed, the "mess" surrounding *Wilder* and related cases is so bad that "[c]ourts are not even able to identify which . . . decisions are 'binding.'" *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 586 U.S. 1057, 1059 (2018) (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from the denial of certiorari). This array of conflicting precedent is hardly a workable test.

E. No reliance interests support retaining *Wilder* and *Blessing*

Only stable rules can create meaningful reliance. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 410 (2024). As the experience of the circuit courts demonstrates, judges cannot apply *Wilder* or *Blessing* to achieve predictable outcomes. Such instability paired with the Court's "constant tinkering with and eventual turn away from" *Wilder* and *Blessing* indicates that they are not the sort of stable rule that fosters reliance. *See id.*

In addition to lacking stable rules, *Wilder* and *Blessing* also lack any reliance on their judgments. Congress repealed the Boren Amendment at issue in

Wilder in 1997. *See* Balanced Budget Act of 1997, Pub. L. No. 105–33, § 4711, 111 Stat. 251, 507–08. In support of doing so, the House Committee on the Budget conveyed its aim to undo *Wilder*: "It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of Section 1902 will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive." H.R. Rep. No. 105-149, at 591 (1997).

For its part, *Blessing* found no implied rights in Title IV-D of the Social Security Act under its looser multifactor test, meaning that enforcing *Gonzaga*'s tougher rule would not change that judgment. *See Blessing*, 520 U.S. at 346. The lack of any existing implied rights under either judgment signals that no direct reliance interests support retaining either precedent.

***

Over the last half century, the Court has changed course on how to decide if federal spending conditions confer privately enforceable rights under § 1983. But *Wilder* and *Blessing*—the undead walkers of Spending Clause doctrine—prevent harmony and consistency in the enforcement of federal programs. Piecemeal attempts to reign in *Wilder* and *Blessing* by examining isolated spending conditions for "rights" have not fixed the problem. Conflicts continue to arise, as "it is not [the Court] who will be 'closing in on the law' in the foreseeable future, but rather . . .

thirteen different courts of appeals and fifty state supreme courts." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). The Court cannot course correct in every Spending Clause case; it can at most review "only an insignificant proportion" of cases, making clear rules essential. *Id.* at 1178. The Court should reinforce *Gonzaga* by expressly overturning *Wilder* and *Blessing*.

II. The Court Should Reinforce the Text and Structure Approach of *Gonzaga* and Reject Private Enforcement of § 1396a(a)(23)

Separately, the Court should reaffirm that *Gonzaga* requires consideration of not only the text of the provision at issue but also the broad structure of the statute containing that provision. *Wilder*'s and *Blessing*'s avoidance of statutory structure plagues not only the circuit split over § 1396a(a)(23) but also other circuit splits applying *Gonzaga*. It occurs through two errors. *First*, courts fail to distinguish between parties directly regulated by a statute and those indirectly impacted. A federal statute directing the federal government on its interactions with states has a different structure than one directing providers on their interactions with patients. *Second*, courts refuse to consider enforcement mechanisms when analyzing the structure of a statute. They assume that because enforcement provisions are considered in the separate inquiry whether § 1983 is an available remedy, they are irrelevant to interpreting the structure of the statute. The Court should correct both errors that avoid *Gonzaga*'s text and structure rule.

A. ***Gonzaga*'s text-and-structure rule distinguishes between parties directly affected and those further removed, *i.e.*, it asks whether the statute regulates the interactions of the § 1983 plaintiff and defendant**

When deciding whether a statute confers rights on plaintiffs, the Court has distinguished between those who are the "focus" of a statute and those "two steps removed." *Gonzaga*, 536 U.S. at 287. In *Gonzaga*, the Court observed that the Family Educational Rights and Privacy Act (FERPA) was a directive to a federal agency regarding its interactions with an "educational agency or institution." *Id.* It concluded from that observation that the plaintiff student was neither the focus of FERPA nor a directly affected party, meaning the student was "two steps removed" and lacked an enforceable right—*i.e.*, FERPA was "not concerned with whether the needs of any particular person have been satisfied." *Id.* Using the same inquiry, the Court in *Talevski permitted* private enforcement of the Federal Nursing Home Reform Act (FNHRA), which directs nursing facility Medicaid providers to afford specific rights to residents. *Talevski*, 599 U.S. at 184. That is, FNHRA directly regulated the relationship between the plaintiff and defendant, while FERPA did not. *See id.*

Several circuits have failed to apply this test and take no account of whether the plaintiffs are directly affected by the statute or two steps removed. The "any qualified provider" provision is not a freestanding directive that governs the relationship between the state and the individual. Rather, it arises as part of a directive to the Secretary of Health and Human Services, who may approve Medicaid grants to states only if they meet various conditions. 42 U.S.C. § 1396c. Medicaid lists the conditions (including, among others, the "any qualified provider" condition) in 42 U.S.C. § 1396a. If a State chooses not to meet the conditions of Section 1396a—which is its prerogative—Section 1396c explicitly dictates the appropriate remedy: Rejection or discontinuation of some portion of federal funding. *See id.* § 1396c.

The Fourth Circuit below did not acknowledge this structure, declaring that the phrase "any individual eligible for medical assistance" in the any-qualified-provider subsection shows that the statutory provision is focused on individuals. Pet.App.96a–97a. It ignored how the statute directs a federal agency to approve only state Medicaid plans that meet statutory conditions. *Compare id.*, *with* 42 U.S.C. § 1396a. It simply jumped to the word "individual" and ignored the structure of the statute. Pet.App.96a–97a.

The Seventh Circuit's decision on the same plan requirement demonstrates how courts misuse *Gonzaga* to commit this error. It observed that "patients are the obvious intended beneficiaries" without noticing that observation to be true of *all* individuals two

steps removed from a statute. *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 974 (7th Cir. 2012). Relying on *Wilder*—and misunderstanding *Gonzaga's* instruction to consider whether benefits are aggregate when distinguishing them from rights—it concluded the "any qualified provider" "benefit" must be a right because it "focused on the needs of an identified class of persons" and thereby "establishes a personal right to which all Medicaid patients are entitled." *See id.* In short, it mistook *Gonzaga* to ask whether compliance (*vel non*) occurs patient-by-patient. *See id.* Yet that reading cannot be correct because FERPA itself requires educational institutions to maintain confidentiality person-by-person. 536 U.S. at 288; *see also id.* at 295 (Stevens, J., dissenting). In context, therefore, the "aggregate benefits" inquiry of *Gonzaga* necessarily refers to the statute's focus on the relationship between a federal agency and regulated parties. *See id.*

The Sixth Circuit committed essentially the same mistake as the Seventh Circuit. It treated the reference to "individuals" in 42 U.S.C. § 1396a(a)(23) to confer individual rather than aggregate benefits under *Gonzaga*. *See Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006). It then referred to structure not to advance the *Gonzaga* analysis but solely to conclude that the "mandatory" factor from *Blessing* was satisfied. *See id.* The Ninth and Tenth Circuits agreed with this approach. *See Andersen*, 882 F.3d at 1226; *Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960, 966–67 (9th Cir. 2013).

After *Talevski*, the Fourth Circuit adjusted its opinion in this case by joining its sister circuits' warped reading of *Gonzaga* and then proffering an odd reading of *Talevski*, too. Pet.App.24a–26a. In addition to reading *Gonzaga*'s "aggregate benefits" discussion to refer only to whether a statute operates at an individual level, it analogized the federal-state relationship in 42 U.S.C. § 1396a to the nursing facility-resident relationship governed by FNHRA (approved for individual enforcement in *Talevski*)—forgetting that only the latter happens to denote § 1983 defendants and plaintiffs (at least when the government owns the nursing facility). That is, while state Medicaid plans must require nursing facilities to respect patients' rights, neither § 1396a nor state Medicaid plans set forth those rights. Instead, FNHRA—an entirely different section of the Medicaid Act—creates freestanding rights for Medicaid patients vis-à-vis nursing facilities where they reside. (Notably, all nursing home Medicaid patients have some way to assert those rights via grievance process, *see* 42 U.S.C. §§ 1396r(g)(4), (h)(1); 42 C.F.R. § 483.10(j), even if only residents of government-owned nursing facilities may use § 1983.)

Critically, § 1396r is headed "Requirements Relating to Residents' Rights" and sets forth "General Rights" (§ 1396r(c)(1)), "Transfer and Discharge Rights" (§ 1396r(c)(2)), and "Access and Visitation Rights" (§ 1396r(c)(3)), among others. Further, it expressly purports to use those rights to govern the interactions between Medicaid beneficiaries and providers (*i.e.*, between the plaintiff and defendant in

Talevski). *See Talevski*, 599 U.S. at 184–186. The Medicaid plan requirements of § 1396a do not on their own purport to govern those interactions. Accordingly, holding that the structural elements of § 1396a prevent private enforceability under § 1983 would not affect enforceability of nursing facility residents' express rights conferred by § 1396r(c) .

Even without the benefit of *Talevski*, the Eighth Circuit still avoided the problems in the Fourth Circuit's reasoning by following *Gonzaga*'s structural analysis and concluding that § 1396a leaves the ultimate beneficiary two steps removed. *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017). More precisely, the Eighth Circuit set aside *Blessing* in favor of *Gonzaga* when stating that even if "a subsidiary provision includes mandatory language that ultimately benefits individuals," that subsidiary provision does not overcome the structure of the statute. *See id.*

These circuit court decisions demonstrate that *Wilder* and *Blessing* are causing mischief in interpreting *Gonzaga*—and now *Talevski*. To foreclose this problem, the Court should state clearly that "unambiguous" rights require that the statute's structure addresses the relationship between the plaintiff and the defendant.

B. *Gonzaga*'s text-and-structure rule includes enforcement structure

In addition to analyzing affected parties, the Court has also addressed enforcement mechanisms when reviewing the structure of a statute. In *Gonzaga*, it examined FERPA's administrative remedies and centralized review provision on the way to finding no enforceable rights. *See Gonzaga*, 536 U.S. at 289–290. Similarly, in *Suter* the Court expressly examined the enforcement provisions of Adoption Assistance and Child Welfare Act as part of the rights inquiry, not as part of the enforcement foreclosure inquiry. *Suter*, 503 U.S. at 360 & n.11 (declining to reach the inquiry from *Middlesex County Sewerage Authority v. National Sea Clammers Assn.,* 453 U.S. 1 (1981)). Both decisions are consistent with the observation in *Pennhurst* that, in "determin[ing] whether respondents have a private cause of action," courts must remember that "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981).

Several circuits ignore the Court's method of analysis and do not review enforcement structure as part of analyzing whether an implied right exists. The Fourth Circuit below first found an implied right and acknowledged the enforcement structure of the Medicaid Act only in its finding that no comprehensive enforcement scheme disproves the existence of an implied right. Pet.App.32a–33a. The Sixth and Seventh Circuits are likewise silent on the enforcement

structure until reaching the "disproving" question. *See Planned Parenthood of Indiana*, 699 F.3d at 974–75; *Harris*, 442 F.3d at 462–63.

A debate between the majority and the dissent in the Eighth Circuit underscores the point. The majority examined the enforcement mechanisms of the Medicaid Act in assessing whether it confers an unambiguous right, citing *Gonzaga* and *Suter*. *See Gillespie*, 867 F.3d at 1041. The dissent, in contrast, argued that enforcement mechanisms are relevant only to whether a comprehensive enforcement scheme exists, citing *Blessing* and sister circuits that found a private right of action in 42 U.S.C. § 1396a(a)(23). *See id.* at 1050–51 (Melloy, J., dissenting).

To be fair, *Wilder* and *Gonzaga* provide opposite instructions on how to treat enforcement structure. In *Wilder*, the Court said that the ability of a federal agency to enforce a provision "supports the conclusion that the provision does create enforceable rights." 496 U.S. at 514–15. *Blessing*'s vagueness factor supports *Wilder*'s conclusion. *See, e.g.*, *Betlach*, 727 F.3d at 967; *Gillespie*, 867 F.3d at 1050–51 (Melloy, J., dissenting). Yet in *Gonzaga*, the Court said that an administrative remedy "counsel[s] against our finding a congressional intent to create individually enforceable private rights." *Gonzaga*, 536 U.S. at 290.

The conflicting instructions make it impossible for litigants to argue the correct standard to a lower court. So, regardless whether the Court overrules *Wilder* or *Blessing*, it should say expressly that statutory enforcement schemes undermine claims of "unambiguous" rights.

C. *Gonzaga*'s text-and-structure rule applies to the Medicaid Act

One further question arises when interpreting the Medicaid Act: Whether the "*Suter* fix," 42 U.S.C. §§ 1320a-2, 1320a–10, forbids using the text and structure approach of *Gonzaga*. This provision, added in 1994, states, "In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." *Id.* Yet it "is not intended to limit or expand the grounds for determining the availability of private actions to enforce state plan requirements other than by overturning any such grounds applied in *Suter*." *Id.* And it *disclaims* overturning the holding of *Suter* against private enforcement of 42 U.S.C. § 1396a(a)(15). *Id.*

In other words, Congress expressed disapproval of one aspect of *Suter*'s reasoning under a pre-*Gonzaga* judicially created multifactor test without declaring any spending conditions privately enforceable. The *Suter* fix wags the dog in such a perplexing way that courts routinely despair of applying it. *See, e.g.*, *Gillespie*, 867 F.3d at 1045 (discussing the *Suter* fix);

Sanchez, 416 F.3d at 1057 n.5 (observing the *Suter* fix is "hardly a model of clarity"); *Harris v. James*, 127 F.3d 993, 1002 (11th Cir. 1997) (saying courts need not "determine the 'federal rights' question only according to the pre-*Suter* precedents").

Suter fix notwithstanding, a plurality of the Court has said that *Gonzaga*'s structural inquiry applies to the Medicaid Act. *See Armstrong*, 575 U.S. at 331–32; *see also Gillespie*, 867 F.3d at 1046 & n.7 (citing where the *Armstrong* court was briefed regarding the *Suter* fix). In that regard, one peculiarity of the *Suter* fix is that the portion of *Suter* it leaves intact—regarding the unambiguous statement requirement and the relevance of enforcement mechanisms—can render plan requirements unenforceable under § 1983. *See Gillespie*, 867 F.3d at 1045 (citing *LaShawn A. v. Barry*, 69 F.3d 556, 569 (D.C. Cir. 1995), *vacated*, 74 F.3d 303, *and rev'd en banc on other grounds*, 87 F.3d 1389 (D.C. Cir. 1996)).

Following the *Armstrong* plurality, the Eighth Circuit did not read the *Suter* fix as a directive to "ignore the elements of the text" or structure of the statute. *Id.* at 1045. Indeed, when rejecting private enforcement of 42 U.S.C. § 671(a)(15), the Court in *Suter* did not rely on the structural point that is critical here: That Medicaid plan requirements are structured as part of a directive to the Secretary, not as a directive to state officials (who after all remain free to administer state health insurance plans outside of Medicaid). *See* 42 U.S.C. §§ 1396c, 1396a. Accordingly, the *Suter* fix cannot be understood to clear this structural

barrier to reading § 1396a as a source of rights enforceable through § 1983.

Yet the Fourth Circuit in this case once suggested that the *Suter* fix permits courts to ignore statutory structure. Pet.App.104a. Its latest opinion is less clear, correctly observing that the *Suter* fix leaves open whether a spending condition unambiguously creates a right. Pet.App.29a–30a. And it acknowledges that, *Suter* fix notwithstanding, *Gonzaga* applies to the Medicaid Act if *Wilder* is overruled. *Id.*

Because the Fourth Circuit has vacillated on the relationship between the *Suter* fix and *Gonzaga*, the Court should be clear that the text and structure rule of *Gonzaga* applies to the Medicaid Act.

III. Many Providers Like Amici Actively Serve Women on Medicaid in South Carolina

The Court also does not need to be concerned that an implied right to "any qualified provider" is needed to make Medicaid successful in South Carolina. As Governor McMaster stated in the executive order that prompted this litigation, the state "recognizes that the availability of women's health and family planning services is important for health families and children." Pet.App.157a. Amici Practitioners agree. The Governor also stated that "the State of South Carolina has a strong culture and longstanding tradition of protecting and defending the life and liberty of unborn children." *Id.* Amici Practitioners again agree. The

state is balancing these two competing interests in creating its Medicaid plan that does not allow money to support organizations that participate in elective abortions.

Amici Practitioners will continue providing women's health and family planning services to Medicaid patients in South Carolina. They do not believe that elective abortions are a proper part of women's health and family planning services and have successful practices treating Medicaid patients that do not include elective abortions. No implied rights are necessary for Amici's active practices in Columbia, Charleston, and Anderson to remain open and serving patients with needed care in the state.

For the provider shortages that South Carolina faces in rural areas, creating special implied rights for Planned Parenthood would not solve that issue. The two locations for Planned Parenthood South Atlantic in South Carolina are in the two largest cities in the state. *See* Health Center Locations, Planned Parenthood South Atlantic.[2] While some Amici Practitioners are providing care in those cities as well and do not dispute their own services are needed there, protection of urban providers would not address the issues in South Carolina's rural counties.

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[2] https://www.plannedparenthood.org/planned-parenthood-south-atlantic/patients/health-center-locations.

Amici Practitioners remain committed to addressing the real health needs of the state and are happy to assist in different efforts to improve the Medicaid program or the availability of providers in South Carolina.

CONCLUSION

This Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

Thomas M. Fisher
Counsel of Record
Bryan G. Cleveland
111 Monument Circle, Suite 2650
Indianapolis, IN 46204
(317)698-6223
tom@tomandcathyfisher.com

Counsel for Amici Curiae

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