No. 23-1275

In the Supreme Court of the United States

EUNICE MEDINA,
Interim Director, South Carolina Department of Health and Human Services,
Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,
Respondents.

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

Brief of Governor Henry Dargan McMaster as *Amicus Curiae* in Support of Petitioner

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INTERESTS OF *AMICUS CURIAE*

Henry Dargan McMaster is Governor of the State of South Carolina.* He has sworn to "preserve, protect, and defend" both the South Carolina Constitution and the United States Constitution. S.C. Const. art. VI, § 5. This oath compels Governor McMaster to assert—and insist on adherence to—the constitutional principles on which our Republic was founded and to guard against efforts to erode or intrude upon his State's sovereign interests.

Governor McMaster has another, more specific interest here: He issued the executive orders that sparked this litigation. *See* Pet.App.149a, 157a. Director Medina has aptly explained why the Fourth Circuit's decision is wrong. The Governor writes separately to highlight the broader principles at stake here.

SUMMARY OF ARGUMENT

At first glance, this looks like another abortion case. And to be sure, protecting unborn children was central to the Governor's decision to issue the executive orders that started this case. As was ensuring compliance with state law. *See* S.C. Code Ann. § 43-5-1185.

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* Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief, in whole or in part, and that no entity or person, aside from *amicus curiae* and his counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

But abortion is not the only issue here, much less the primary question before this Court. Whether in the context of abortion regulation or any other contentious issue, this case raises broader structural concerns about the relationship between the States and the federal government and the "critical" need to "ensur[e] that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012).

Two considerations support reversing the Fourth Circuit. The first is the Spending Clause basis of section 1396a(a)(23)(A)'s any-qualified-provider provision. The Court's Spending Clause cases draw heavily on contract principles, and generally, contract law requires that the parties to a contract must have intended for a third-party beneficiary to be able to enforce a right before a court will allow that third party do so. The Fourth Circuit, however, flipped that rule, holding that a private right exists here because "there is no indication that Congress wanted to foreclose such individuals from seeking relief under § 1983." Pet.App.14a. But this Court has never endorsed a presumption of private rights of action against the States under the Spending Clause.

The second consideration is constitutional structure. "[T]he States retain[ed] . . . a very extensive portion of active sovereignty" under the Constitution. *The Federalist No. 45*, p. 286 (J. Madison) (C. Rossiter & C. Kelser eds. 2003). An important part of sovereignty is how a State spends public funds. If a State accepts federal funds and spends state funds along with those federal dollars, the State should know—upfront—

what strings are attached. That means that Congress must make any private rights of action expressly known. Only then can the States make an informed decision about whether to accept the federal funds along with the corresponding liability.

ARGUMENT

I. The Fourth Circuit's decision conflicts with the contract-law principles that undergird the Court's Spending Clause jurisprudence.

This Court has long explained that Spending Clause legislation "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). That makes sense as a matter of basic contract principles. The federal government makes an offer, the State accepts it, and consideration changes hands in the form of funding (from the federal government) and compliance with various obligations (from the State).

But this case raises a principle of contract law that goes beyond the first week of a 1L class: third-party beneficiaries. No matter whether one looks to when section 1983's predecessor statute was first enacted in the 1870s or when the any-qualified-provider provision came almost a century later, the conclusion is the same: A third party may enforce a contract only when the parties intended specifically to benefit the third party.

Start with the earlier time. Even into the early 20th century, decades after section 1983's predecessor statute was enacted, *see* Act of Apr. 20, 1871, § 1, 17

Stat. 13, American jurisdictions were still split on whether a third party could enforce a contract, even if the contract had been made for his benefit, 1 S. Williston, *Law of Contracts* § 368, pp. 694–99 (1920); *see, e.g.*, *Lawrence v. Fox*, 20 N.Y. 268, 272 (1859) (third party could sue); *Brown v. O'Brien*, 30 S.C.L. 268, 270 (S.C. App. L. 1845) (same); *Curry v. Rogers*, 21 N.H. 247, 255 (1850) (third party could not sue). For jurisdictions that allowed third parties to enforce such contracts, they required "a clear intent" in the contract "to benefit the third party." 2 W. Elliott, *Commentaries on the Law of Contracts* § 1412, p. 670 (1913). As one New York court explained, "[i]t is not sufficient that the performance of the covenant may benefit a third person." *Durnherr v. Rau*, 135 N.Y. 219, 222 (1892). Instead, the contract "must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties." *Id.*

Fast forward almost 100 years to when Congress enacted the any-qualified-provider provision. *See* Pub. L. 90-248, § 227(a)(3), 81 Stat. 821, 903–04 (Jan. 2, 1968). By this point, American courts had largely accepted the concept of third-party beneficiaries. *See* 2 W. Jaeger, *Williston on Contracts* § 347, pp. 793–97 (1968) (third-party beneficiaries enforcing a contract was a "well recognized exception" to the rule that "strangers to a contract acquire no rights under such a contract"); *id.* § 368, p. 897 (calling this the "prevailing rule in this country"). But still, it remained "well settled that before a third party can enforce a contract in his favor it must clearly appear that the contract was made and intended for his benefit." *Resinol v. Valentine Dolls, Inc.*, 220 N.Y.S.2d 884, 885 (1961). As

another court put it, "[t]he intention of the parties to the subcontract is of paramount importance" to determining whether a third party can sue. *Vogel v. Reed Supply Co.*, 177 S.E.2d 273, 279 (N.C. 1970); *see also Touchberry v. City of Florence*, 367 S.E.2d 149, 150 (S.C. 1988); *Restatement (Second) of Contracts* § 302 (1979) ("intended," but not "incidental," beneficiaries may enforce a contract).

Thus, while the third-party beneficiary doctrine gained acceptance over these years, the underlying principle was constant: The contracting parties must have intended for the third party to benefit from the contract for that third party to enforce it. And that makes sense. After all, contract law is, at its core, about the parties' intent. ***E.g.***, *W. Coast Cambridge, Inc. v. Rice*, 584 S.E.2d 696, 700 (Ga. Ct. App. 2003) ("the intent of the parties is the cornerstone of contract construction"); *Va. Sur. Co. v. N. Ins. of N.Y.*, 866 N.E.2d 149, 153 (Ill. 2007) ("The cardinal rule is to give effect to the parties' intent, which is to be discerned from the contract language.").

The Fourth Circuit got this contract principle backward. It held that a private right of action exists because "there is no indication that Congress wanted to foreclose such individuals from seeking relief under § 1983." Pet.App.14a. A private right of action exists only if Congress intended for that right to exist. In the Spending Clause context, that intent must be clearly expressed to, and understood by, the other party. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 220 (2022). Put differently, Congress must open a closed door, not close an open one.

To be clear, the Governor isn't suggesting that the Court necessarily needs to hold here that a third party can *never* enforce a Spending Clause provision under section 1983. *Cf. Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 172 (2023). But consistent with the contract-law principles that shape Spending Clause jurisprudence, the Court should ensure that private enforcement under section 1983 of Spending Clause legislation exists only with express congressional authorization. In other words, the Court should enforce the "demanding bar" it has set for such claims. *Id.* at 180.

II. The Fourth Circuit's decision disregards the States' sovereignty.

Our constitutional structure confirms the importance of requiring that Congress explicitly create private causes of action against the States. When the Constitution was sent to the States for ratification, Antifederalists warned that the federal government had too much power. The minority of the Pennsylvania convention, for example, predicted that Congress's "power[]" was "complete and unlimited over the purse," which would permit the federal government to dominate state governments. *Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Pennsylvania Packet and Daily Advertiser (Dec. 18, 1787), in *The Anti-Federalist*, at 210 (Herbert J. Storing ed., 2d ed. 1985) (emphasis omitted). Also looking at article I, section 8, Brutus forecasted that the Necessary and Proper Clause would "annihilate all the state governments." Brutus, *Essay I* (Oct. 18, 1787), in *The Anti-Federalist*, at 112.

Don't fear, the Federalists assured the People. The Constitution, they insisted, forms "a happy combination" of the federal government and the States. *The Federalist No. 10*, p. 77 (J. Madison). In this scheme, "the States [are to] retain . . . a very extensive portion of active sovereignty" and "have the advantage of the federal government" because the powers which "remain in the State governments are numerous and indefinite," while powers in the federal government are "few and defined." *The Federalist No. 45*, pp. 286–89 (J. Madison).

Whether the Federalists' promise remains a reality is debatable. Between some sweeping judicial decisions, *see, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942), and the deluge of money that the federal government offers the States through various programs, *see, e.g.*, *How Much Money Does the Federal Government Provide State and Local Governments?*, USAFacts (updated Oct. 10, 2024), https://tinyurl.com/yetutzkj (in FY2023, the federal government sent about $1.1 trillion to state and local governments), it's fair to ask whether the States still enjoy the "advantage" over the federal government that Madison anticipated. Whatever position one might take in that debate, the Court's role remains unchanged. The Court must protect the constitutional structure—as envisioned by the Framers and reflected in the text adopted by the States—by not gifting the federal government even more power vis-à-vis the States through tenuously implied rights of action.

As part of their retained sovereignty, States enjoy "a wider latitude in choosing among competing demands for limited public funds." *Maher v. Roe*, 432

U.S. 464, 479 (1977). Thus, "[g]overnments generally may do what they wish with public funds." *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911 (6th Cir. 2019) (Sutton, J.). If a State chooses to spend its money in ways required by Congress as a condition of accepting federal money, then the State—as a sovereign—has made that decision. But a State makes that decision knowingly. Congress hasn't hidden the ball or changed the rules, and the State accepted the conditions with its eyes wide open.

Blessing (no pun intended) private plaintiffs bringing lawsuits that Congress hasn't explicitly contemplated—and thus that States have not knowingly accepted the risk of—erodes the States' sovereignty because those lawsuits weren't part of the "deal" that the States made with the federal government. The lawsuits are, instead, an after-the-fact, judicially imposed condition to which the States never assented. *Cf. Horne v. Flores*, 557 U.S. 433, 448 (2009) ("Federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities.").

Would South Carolina (or other States) have declined Congress's offer if the State knew that section 1396a(a)(23)(A)'s any-qualified-provider provision included a private right of action? Perhaps not, given that so much money is involved. (Is Spending Clause legislation an adhesive contract these days? *Cf. Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (Sutton., J., concurring in the order) ("Perhaps more plausibly, the school districts' complaint could be read to include a claim that the Act is unconstitutionally 'coercive,' a choice-

bending contract of adhesion. After all, what State in these fiscally challenging times would have the fortitude to turn down hundreds of millions of dollars in education funding?").) But perhaps a State would decline, to avoid having to use state dollars in a way that was contrary to state policy goals. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). At least it would be the State's decision to make.

As it should be. Our "system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), is "a defining feature"—not a vice—"of our Nation's constitutional blueprint," *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). The Court should protect "the States as sovereign entities" by refusing to subject them to lawsuits that Congress did not expressly authorize and to which the States have not knowingly consented. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996).

CONCLUSION

For these reasons, the Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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