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 AMICI CURIAE THE STATE OF KANSAS AND SEVENTEEN OTHER STATES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Using its Spending Clause power, Congress provides funds to the States to carry out certain programs for the welfare of their people. In exchange, the States agree to comply with the terms and conditions attached to those funds. Everyone agrees that those terms and conditions must be clear and unambiguous when the States accept the money.

If the States fail to comply with the conditions set by the statute, they can expect to lose the funding. In addition, in some instances, they are also open to lawsuits from private individuals under the relevant statute itself or 42 U.S.C. § 1983. Before an individual can sue and recover under § 1983, however, he must show that Congress clearly and unambiguously created an individual right of action that is enforceable under that section.

The lower courts have been inconsistent as to when a Spending Clause statute creates a clear and unambiguous individual right enforceable under § 1983. Some courts apply a multi-factor test to determine whether the plain language of a statute grants a right to sue. Others say that that test no longer applies but continue to weigh various factors. As a result, the States often lack proper notice of whether they are at risk of private suit when they accept federal funding and are often sued when they

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[1] Amici States certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than amici, their members, or their counsel, has made a monetary contribution to its preparation or submission.

did not expect to be. This is unconstitutional. And the costs of this litigation are considerable. The States must pay their own costs to litigate whether there is a right to sue in the first place and, if the court decides there is such a right, to defend themselves. And if they lose, they must also pay damages and the plaintiff's attorney's fees.

Amici States of Kansas, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Dakota, and West Virginia are interested in clearing the confusion once and for all. This Court should hold that nothing short of an *explicit* statement from Congress declaring that a Spending Clause statute contains a private right of action enforceable against the States imparts such a right. Accordingly, the Court should reverse the Fourth Circuit's decision.

SUMMARY OF THE ARGUMENT

When Congress makes funding available to the States to carry out programs for the general welfare, it often attaches terms and conditions to that funding. Those conditions must be clear and unambiguous when the States accept that funding.[2]

In some cases, Spending Clause statutes may contain, as a condition, an individual right of action against the States privately enforceable under 42 U.S.C. § 1983. In three cases, *Wright v. City of*

[2] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), and *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court created a multi-part test to determine whether a federal Spending Clause statute creates such a right.

This multi-factor test inherently leads to uncertainty. That test is, therefore, inconsistent with the rule that terms and conditions attached to federal funding must be clear and unambiguous at the time the funds are accepted.

Accordingly, in the following decades, this Court attempted to tighten the rule in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), and *Health & Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023). But the lower courts continue to apply the multi-factor test. The only difference is that now it is unclear which factors they will apply and how much weight they will give them.

This is best evidenced by the Fourth Circuit's decision below. The Fourth Circuit applied the multi-factor *Blessing* test and held the statute unambiguously created a right to sue the State. On remand from this Court, the Fourth Circuit decided that some of the factors might no longer be relevant, applied just one of them, and came to the same result. By contrast, the Fifth Circuit has looked at the exact same statute and held there is no such right. The Fifth Circuit has decided that Congress must do its job, holding that the Legislative Branch must clearly say

if there is a right to sue—the constitutionally required result.

Anything other than an *explicit* statement from Congress that a Spending Clause statute confers a private right of action enforceable against the States under § 1983 fails to put the States on notice about such liability. Because anything less than a clear and unambiguous statement violates the Spending Clause, the Court should reverse.

ARGUMENT

The States accept billions of dollars in federal Medicaid funding every year.[3] Though they are given wide latitude to use those funds, there are some requirements with which they must comply. The States accept that if they do not comply with these requirements, they may lose that the money. But, as it stands today, arguably imperfect compliance—a result of a policy decision—may open the States up to lawsuits from anyone who arguably benefits from one of these programs and suffers as a result of that decision. At the very least, the States must litigate whether the aggrieved person has a right to sue in the first place. This can take years, if not decades. And if a court, applying the old (possibly no longer good) multi-factor test decides there is such a right, the States must then continue litigating until it is determined whether the law has been violated. If they

[3] Rebecca Thiess, Kate Watkins & Justin Theal, *Record Federal Grants to States Keep Federal Share of State Budgets High*, Pew Research (Sept. 10, 2024), available at https://tinyurl.com/35ztr64f.

lose, they are open to damages and attorney's fees. All of this is costly.

I. Twenty Years of Litigation to Determine Whether a Suit can be Brought at All

When a private party sues a State alleging it violated one of his rights under § 1983, he must show he has a right to sue in the first place. Under existing precedent, that is not a straightforward inquiry.

The statute at issue here exemplifies the problem perfectly. The statute states:

> A State plan for medical assistance must provide that [] any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services[.]

42 U.S.C. § 1396a(a)(23) (the qualified provider provision). Notably absent from the statute is any language *explicitly* stating that if a State determines a provider is not qualified, any person eligible for assistance has a right to sue the State. So, when

several States[4] determined that Planned Parenthood was not a "qualified provider" and were subsequently sued, the first job of the courts was to determine whether those plaintiffs had a right to sue in the first place.

A look at the litigation in the Fourth and Fifth Circuits shows the need for a determinative answer as to what counts as a "clear" and "unambiguous" right to sue under this statute and all others.

a. The Fifth Circuit's Long Road to Nowhere

Louisiana

In July 2015, an organization released video footage, taken surreptitiously, allegedly showing staff at a Planned Parenthood in Texas sifting through the body parts of aborted children and negotiating the sale of those body parts. This footage sparked a congressional investigation.

Louisiana also launched an investigation into Planned Parenthood facilities operating in the state and, one month later, the Louisiana Department of Health and Hospitals decided to terminate its agreements with the abortion providers. As per state law, it gave the organization thirty days to appeal the decision.

Planned Parenthood did not appeal through the administrative process. Instead, it sued the State in federal court. Planned Parenthood argued the

[4] Including Arizona, Indiana, Kansas, Louisiana, Michigan, South Carolina, and Texas.

qualified provider provision gave it, or the private individuals who joined the suit, a right to sue the State under § 1983 to reverse the funding decision. Two months later, the Middle District of Louisiana agreed, granting an injunction prohibiting the State from terminating its Medicaid agreements with Planned Parenthood.

Louisiana appealed. In late 2016, the Fifth Circuit affirmed. The unanimous panel began "by joining every other circuit to have addressed this issue to conclude that § 1396a(a)(23) affords the Individual Plaintiffs a private right of action under § 1983."[5] Nine months after that opinion was filed, Judge Owen changed her mind in light of this Court's decision in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980).[6] In her dissent in the superseding opinion, she argued that *O'Bannon* determinatively answered the question of whether Medicaid patients could challenge a State's determination of whether a provider is "qualified" under § 1396a(a)(23): they could not. "[P]atients ha[ve] no substantive right to demand care from a provider that had been decertified, they ha[ve] no due process rights to participate in a hearing regarding certification or decertification of the provider."[7]

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[5] *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477, 489 (5th Cir. 2016). The Sixth Circuit had arrived at this conclusion in 2006 after two years of litigation. *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006). The Tenth Circuit followed in 2018. *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018).

[6] *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 476 (5th Cir. 2017) (Owens, J., dissenting).

[7] *Id.* at 475 (Owens, J., dissenting).

Despite Judge Owen's dissent and this Court's *O'Bannon* decision, the Fifth Circuit denied *en banc* review and this Court denied certiorari. For three years, *Gee* bound Fifth Circuit States.

Texas

Also in 2015, the Texas Office of the Inspector General concluded that the same video footage showed Planned Parenthood violating Texas law, including prohibitions on the sale of human body parts. Based on the unlawful conduct, the State concluded that Planned Parenthood was not a "qualified provider" and was no longer eligible to participate in the State's Medicaid program. Texas terminated its agreements with Planned Parenthood.[8]

Rather than challenge the termination though the State's administrative process—which it had a right to do—Planned Parenthood joined private individuals and sued the State under § 1983.[9] Texas asked for dismissal, arguing the qualified provider provision does not clearly and unambiguously contain a private right of action enforceable under § 1983. Two years later, the Western District of Texas rejected that argument. Relying solely on *Gee*, it held that the individual plaintiffs did have such a right to sue when a provider was determined to no longer be "qualified."[10] It then proceeded to find that Texas had violated that right and granted a preliminary

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[8] *See generally Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Smith*, 236 F. Supp. 3d 974 (W.D. Tex. 2017).
[9] *Id.* at 977.
[10] *Id.* at 988.

injunction in favor of Planned Parenthood and the individual plaintiffs.[11]

Texas appealed and, two years later, and again relying on *Gee*, the Fifth Circuit affirmed that there was a right of action.[12] It also concluded, however, that the district court had applied the incorrect standard to determine whether Texas had violated the individuals' rights when it terminated its contracts with the abortion provider.[13] So, it vacated the injunction and remanded for further proceedings.

Two years after that, the Fifth Circuit granted Texas's petition for *en banc* review. One year later, in 2020, the *en banc* Fifth Circuit overruled *Gee*. The court recognized that

> [w]hether a particular provider is "qualified" "will obviously vary with the circumstances of each individual case," and though courts are equipped to determine if a particular provider is qualified in the broad sense of that term, just as they are equipped to determine whether a child protective agency made "reasonable efforts" in a particular case, the fact that the courts could make such determinations if called upon by

[11] *Id.* at 999.
[12] *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc v. Smith*, 913 F.3d 551, 560 (5th Cir. 2019).
[13] *Id.* at 569 (emphasis added).

> Congress is not dispositive. *There must be a grant of a right to beneficiaries*.[14]

Because Congress had not explicitly granted that right, "the Individual Plaintiffs d[id] not have a right to continued benefits to pay for care from the Providers"[15] and could not sue. The case was dismissed.

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In the end, it took six years of litigation in two States for the Fifth Circuit to finally—correctly—determine that Congress never created a right to sue in the first place.[16] Fortunately, it has now done so, and in that circuit, there will be no right to sue unless Congress expressly says there is. This result holds Congress to its duty to make any terms and conditions clear and unambiguous and prohibits courts from reading into statutes implied rights that Congress did not make explicit. This is the result the Constitution requires.

b. The Fourth Circuit's Litigation Carousel

The Fourth Circuit has taken things in the opposite direction.

By this time, the Court is well familiar with South Carolina's struggle over the same qualified provider

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[14] *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 362 (5th Cir. 2020) (*en banc*) (footnote omitted, emphasis added).
[15] *Id.* at 357.
[16] The Eighth Circuit reached the same conclusion as the Fifth Circuit after two years of litigation. *See Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017).

provision. In 2018, South Carolina did what many other States have done: It determined that it was not in the interest of the State to continue funding abortion providers.[17] As it had elsewhere, Planned Parenthood gathered individual plaintiffs and sued. As had the other States, South Carolina argued there was no right to sue.[18]

In round one of litigation (at the preliminary injunction stage), the District of South Carolina relied on the other circuits' holdings and *Blessing* to determine that there was a private right of action enforceable under § 1983.[19] The Fourth Circuit did the same and affirmed. This Court denied certiorari.[20]

At the merits stage, the district court declined to revisit its earlier holding.[21] So did the Fourth Circuit, saying:

> After applying the three factors articulated by the Supreme Court in *Blessing v. Freestone*, 520 U.S. 329 (1997), we [] concluded [at the preliminary injunction stage] that the free-choice-of-provider provision conferred on [plaintiff] a private right enforceable under § 1983.
> …

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[17] *Planned Parenthood S. Atl. v. Baker*, 326 F. Supp. 3d 39, 42 (D.S.C. 2018).
[18] *Id.*
[19] *Id.* at 44–47.
[20] *Baker v. Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020).
[21] *Planned Parenthood S. Atl. v. Baker*, 487 F. Supp. 3d 443, 447 (D.S.C. 2020).

> If these three factors are satisfied, there is "a rebuttable presumption that the right is enforceable under § 1983," provided that Congress has not expressly or implicitly foreclosed a § 1983 remedy.
>
> To repeat, the free-choice-of-provider provision states that "[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." It is difficult to imagine a clearer or more affirmative directive. The statute plainly reflects Congress's desire that individual Medicaid recipients be free to obtain care from any qualified provider and it implements this policy in direct and unambiguous language. For this reason, all three of the *Blessing* factors are met.[22]

So, the Fourth Circuit affirmed. This time, this Court granted certiorari, vacated the decision, and ordered the Fourth Circuit to reconsider in light of *Health and Hospital Corporation of Marion County v. Talevski*, 143 S. Ct. 1444 (2023), a case that did not apply the *Blessing* test but did not overrule it either.[23]

Six years after litigation began, the Fourth Circuit shrugged off the directive, stating: "We are

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[22] *Planned Parenthood S. Atl. v. Kerr*, 27 F.4th 945, 950, 955 (4th Cir. 2022) (some internal citations and quotation marks omitted; first alteration supplied) (quoting 42 U.S.C. § 1396a(a)(23)).
[23] *Kerr v. Planned Parenthood S. Atl.*, 143 S. Ct. 2633 (2023).

unconvinced that *Talevski* effected such a clear doctrinal transformation" as to require reconsideration.[24] Because the *Talevski* Court appeared to apply *Blessing*, the Fourth Circuit concluded the law had not changed, though "*Talevski* shed some new light on *Blessing* that was theretofore unknown to us. *Importantly, by declining to apply all three factors, the* Talevski *Court indicated that no one of them is strictly mandatory for finding a private right had been created*."[25] It thus declined to disturb its previous decision and continued to hold that the qualified provider provision clearly and unambiguously imparts a private right of action.

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The Fourth Circuit's view is untenable. The Constitution requires Congress to make the terms and conditions of Spending Clause statutes clear and unambiguous so that "the States [may] exercise their choice knowingly, cognizant of the consequences of their participation."[26] By holding that not only there are multiple factors to consider in determining whether there is a right to sue but also that some of the old factors may not be relevant, the Fourth Circuit has made it nigh impossible for States to predict when a court will allow them to be sued for routine policy decisions.

In contrast, the Fifth Circuit's much more modest approach correctly recognizes that even if a court

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[24] *Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 160 (4th Cir. 2024).
[25] *Id.* at 163 (emphasis added).
[26] *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17.

could decide an issue generally, it must not do so if Congress did not warn the States ahead of time that they can be sued.

This warning should be nothing less than an *explicit* statement from Congress, one that is—as the Constitution requires—clear and unambiguous. It should be something that can be recognized at once as a grant of a right to sue. Something that does not require the States to guess as to how a court may come out in a multi-factor test. It should certainly not require the States to guess which factor(s) a court may decide is/are relevant in any given case.

II. The Price of Spending Clause Statutes

In addition to the general harm of sewing confusion, this judicial whiplash causes the States monetary and sovereign harm.

a. The high costs to the States

Section 1983 litigation is extremely expensive, even more so where, as here, whether there is a right to sue is not immediately clear. Litigating these types of cases can cost the States hundreds of thousands of dollars, money their taxpayers sent to provide other services.

Could the States decrease the costs by waiving the white flag and agreeing to be sued? Yes, to some extent. But the States disqualify hundreds of providers each year for a variety of reasons that have nothing to with whether the provider is performing

abortions.[27] The idea that Congress obliquely granted Medicaid recipients the right to sue each and every time the State exercised its discretion in disqualifying one of these providers is absurd. It is even more absurd to suggest that the States knowingly agreed to be sued in every such case.

Nor is this limited to the qualified provider provision of the Medicaid statute. In an earlier version of this case, the States brought to the Court's attention a number of instances where lower courts have found an implied right of action in tucked away in a Medicaid statute. *See, e.g.*, *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) (permitting § 1983 action enforcing the "reasonable promptness" provision of the Medicaid Act, § 1396a(a)(8)); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 192 (3d Cir. 2004) (permitting private enforcement of Medicaid Act §§ 1396a(a)(8), (a)(10), 1396d(a)(15) because "the Court has refrained from overruling *Wright* and *Wilder*"); *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (permitting private enforcement of § 1396a(a)(8) because the "Medicaid Act does not explicitly forbid recourse to § 1983"); *Cal. Ass'n of Rural Health Clinics v. Douglas*, 738 F.3d 1007, 1011–13 (9th Cir. 2013) (permitting a provider to sue to

[27] For example, Kansas has terminated providers for not complying with their contracts, for losing licenses, or for violating other State regulations. *See* Kan. Dep't of Health and Env't Div. of Heath Care Fin., *Medicaid Program Integrity*, available at https://www.kdhe.ks.gov/172/Medicaid (click Termination List (PDF)).

enforce § 1396a(bb), governing payment for services, via § 1983).[28]

Courts also have found rights of action hidden in other federal funding programs—including those involving foster care and adoption. For example, in 2010, New York State Citizens' Coalition for Children sued the State of New York over its alleged failure to distribute foster care funding in accordance with the Adoption Assistance and Child Welfare Act (CWA).[29] The Second Circuit found the CWA—a statute with similar language to the statute at issue here—contains a private right of action supporting the suit.[30]

In their amicus brief to this Court in support of certiorari and reversal, Connecticut outlined the costs it and other States would be forced to incur if the Second Circuit's loose approximation of "clear and unambiguous" were adopted.[31] That brief outlined the policy decisions Connecticut had made regarding its foster care program, the costs of those policy decisions, and informed the Court that these "policy goals, both state and federal, would be thwarted by individually-driven litigation focused narrowly on enhancing payments to some foster families."[32] The States pointed out that "[l]itigation has now spread across the country on this issue. Four circuits have spoken on the issue, with conflicting results; and confusion

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[28]Amicus Br. of Indiana, et al. at 5, *Baker v. Planned Parenthood of South Carolina*, 143 S. Ct. 2633 (No. 21-1431).
[29] *See generally N.Y. State Citizens' Coal. for Child. v. Poole*, 922 F.3d 69 (2d Cir. 2019).
[30] *Id.* at 76–85.
[31]Amicus Br. of Connecticut, et al. at 10–13, *Poole v. N.Y. State Citizens' Coalition for Children*, 140 S. Ct. 956 (No. 19-574).
[32] *Id.* at 13.

reigns in district courts around the country. The time has come for this Court's attention and resolution."[33] This Court denied certiorari.[34]

"Confusion reigns" still describes the current state of things. Even if multi-factor tests and implied rights of action were consistent with the Spending Clause—they are not—lower courts are utterly incapable of applying them consistently and predictably. The time has come for this Court's attention and resolution by clarifying that, absent an explicit, clear, and unambiguous statement from Congress that a Spending Clause statute contains an individual right of action, there is no such right.

b. The costs to Medicaid recipients

In addition to monetary costs, there are costs to the very people the Medicaid program was intended to support. If the States are afraid to disqualify a provider because they have to guess as to whether any given court will preform a multi-factor test and decide that the provider has a right to sue the State for disqualifying it, the States will be crippled in their ability to determine who is—and more importantly, who is not—qualified to provide health services. This will leave hundreds of unqualified providers with opportunities to prey on the poor. This serves no one's interest, and it is preposterous to think the States obliquely agreed to this state of affairs.

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[33] *Id.* at 15.
[34] *Poole v. N.Y. State Citizens' Coal. for Child.*, 140 S. Ct. 956 (2020).

CONCLUSION

For over twenty years, courts have struggled to decide whether this single provision clearly and unambiguously confers a right to sue the States under § 1983. As the courts have vacillated, the States have suffered the consequences, paying unnecessary litigation fees just to determine if there can be a suit in the first place.

It is past time to end the confusion. When Congress attaches terms and conditions to Spending Clause funding, it must do so unambiguously or else, the States cannot be said to have knowingly accepted those terms. Congress knows how to explicitly say that an individual can sue a State under any given statute. This Court can and should hold it to that standard. Anything less than such a clear statement is unfair to States and violates the Spending Clause.

The Fourth Circuit's decision exacerbates the confusion. The Court should reverse.

Respectfully submitted,

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