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 *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONER

STEVEN H. ADEN
Counsel of Record
CAROLYN MCDONNELL
DANIELLE PIMENTEL
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave NW,
Suite 500
Washington, DC 20036
Steven.Aden@aul.org
Tel: (202) 741-4917

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Americans United for Life (AUL) is the original national pro-life legal advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has committed over fifty years to protecting human life from conception to natural death. Supreme Court opinions have cited briefs and scholarship authored by AUL attorneys. *See*, *e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266 (2022) (citing Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of* Roe v. Wade 127, 141 (2013)). AUL is an expert on pro-life litigation and public policy, tracking and analyzing bioethics cases across the nation and publishing life-affirming model legislation, including legislation that allocates public funds away from the subsidization of elective abortion providers. *Life Litigation Reports*, Ams. United for Life, https://aul.org/topics/life-litigation-reports/ (last visited Feb. 4, 2025); *Pro-Life Model Legislation and Guides*, Ams. United for Life, https://aul.org/law-and-policy/ (last visited Feb. 4, 2025). AUL has represented parties before this Court in cases involving Congress' constitutional authority and the right of States not to use public funds to subsidize elective abortions or abortion providers. *See*, *e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v.*

---

[1] No party's counsel authored this brief in whole or in part. No person other than *Amicus Curiae* and its counsel contributed any money intended to fund the preparation or submission of this brief.

Zbaraz, 448 U.S. 358 (1980). AUL has long held the policy position that State-appropriated or controlled funds should not subsidize elective abortions, but, instead, support authentic women's healthcare.

SUMMARY OF ARGUMENT

This case is much broader than abortion. *See Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from denial of certiorari) ("[T]he question presented has nothing to do with abortion."). It is about federalism's limitations upon a Spending Clause statute. Specifically, it is about whether a Spending Clause statute—the Medicaid Act's any-qualified-provider provision, 42 U.S.C. § 1396a(a)(23)(A)—creates a private right of action under 42 U.S.C. § 1983 for a Medicaid beneficiary to challenge in federal court a State's decision to decertify a provider.

The any-qualified-provider provision does not contain an enumerated cause of action. *See* 42 U.S.C. § 1396a(a)(23)(A). Although courts have held that Spending Clause legislation may contain implied private rights of action through 42 U.S.C. § 1983, this is a "demanding bar" to meet. *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1455 (2023). Under Section 1983:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Although "'[l]aws' in § 1983 means what it says" and courts apply "a straightforward reading of the 'plain language' of § 1983," *Talevski*, 143 S. Ct. at 1452, 1455 (citing *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)), it is a more complex question whether that law creates a private right of action.

The Medicaid Act's any-qualified-provider provision is certainly a "law" for the purposes of Section 1983. However, the provision does not confer "rights" upon a Medicaid beneficiary to challenge a State's decertification of a provider. In *Gonzaga University v. Doe*, this Court "made clear that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to create individually enforceable rights, federal funding provisions provide no basis for private enforcement by § 1983." 536 U.S. 273, 273–74 (2002) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 & n.21 (1981)) (alteration in original). The any-qualified-provider provision does not pass the *Gonzaga* test.

Amici's argument is two-fold: (I) Applying the *Gonzaga* test, Section 1396a(a)(23)(A)'s text and context do not unambiguously create a private right for a Medicaid beneficiary to choose a specific provider. Congress has enumerated other enforcement mechanisms to ensure compliance with the Medicaid Act, and these mechanisms do not include a federal

private right of action for a Medicaid beneficiary. Under Respondents' position, there would be parallel and inconsistent litigation. This litigation would be costly for States and raise questions under the anti-commandeering doctrine since it would nullify States' enumerated powers to exclude providers from the Medicaid program.

(II) Although predating the *Gonzaga* test, the Supreme Court's decision in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) determined the federal Medicaid statute does not grant Medicaid patients a right to legal process in federal court to challenge federal or State provider qualification decisions. *O'Bannon* held that Medicaid's any-qualified-provider provision is a State plan requirement mandating that patients receive a range of choices among providers deemed qualified by Medicaid officials, not a substantive right to challenge a State's disqualification decision in federal court. *Id.* at 785. As such, several circuits, including the Fourth Circuit below, have erred in holding that Section 1396a(a)(23)(A) confers a private right of action upon Medicaid patients to challenge individual provider qualification determinations in a federal venue.

Accordingly, *Amicus* urges the Court to reverse.

ARGUMENT

The Medicaid Act's any-qualified-provider provision does not contain an implied right of action for a Medicaid beneficiary to challenge a State's

decertification of a provider. Section 1396a in relevant part reads:

> **(a) Contents**
>
> A State plan for medical assistance must—
>
> *****
>
> (23) provide that (A) 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 . . . .
>
> *****
>
> **(b) Approval by Secretary**
>
> The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) . . . .

However, (I) the text and context of this statute do not "unambiguously confer" a Section 1983-enforceable right; and (II) in *O'Bannon*, the Supreme Court already interpreted the any-qualified-provider provision to not confer a private right to challenge a State's determination that a provider is not qualified under the Medicaid program.

I. SECTION 1396A(A)(23)(A) DOES NOT UNAMBIGUOUSLY CONFER A SECTION 1983-ENFORCEABLE RIGHT.

In *Talevski*, this Court reaffirmed that courts should apply the *Gonzaga* test to determine whether a statute creates a Section 1983-enforceable right. Under the *Gonzaga* test, "[s]tatutory provisions must *unambiguously* confer individual federal rights." *Talevski*, 143 S. Ct. at 1455 (citing *Gonzaga*, 536 U.S. at 280) (emphasis in original). As the *Talevski* Court described, "the *Gonzaga* test is satisfied where the provision in question is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Id.* at 1457 (citing *Gonzaga*, 536 U.S. at 284, 287). Within this analysis, "[c]ourts must employ traditional tools of statutory construction." *Id.* However, "[e]ven if a statutory provision unambiguously secures rights, a defendant 'may defeat t[he] presumption by demonstrating that Congress did not intend' that § 1983 be available to enforce those rights." *Id.* at 1459 (citing *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) (second alteration in original)).

An analysis of the text and context of the any-qualified-provider provision shows Congress did not unambiguously confer a Section 1983-enforceable right within the provision. Under Respondents' position, the Medicaid Act nominally empowers States to determine the qualification status of providers, yet beneficiaries could challenge any State

determination of a provider's qualification status in federal courts. This litigation would not only be costly and produce inconsistent results, but it also would essentially usurp the power that States reserved to themselves in the Medicaid statute to determine whether a provider is qualified, raising tension under the anti-commandeering doctrine.

A. Section 1396a(a)(23)(A)'s Text and Context Do Not Unambiguously Show a Private Federal Right for a Medicaid Beneficiary to Choose a Specific Provider.

Under the *Gonzaga* test, the any-qualified-provider provision does not unambiguously confer a private federal right to challenge a State's decision to exclude a provider from the Medicaid program. The provision directs State medical assistance plans to "provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from" any provider that is both "qualified to perform the service or services required" and "undertakes to provide him such services." 42 U.S.C. 1396a(a)(23)(A).

The plain language of the provision shows "[a] provider is not eligible to be chosen unless both conditions are met—that it is qualified and willing to provide services." *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347, 358 (5th Cir. 2020) (en banc). In this regard, "[t]he most natural reading of § 1396a(a)(23) is that it is up to the provider to establish that it is both 'qualified' and willing to provide the services. A Medicaid patient is not involved in a provider's

willingness to accept Medicaid procedures, regulations, and reimbursement rates." *Id*.

The any-qualified-provider provision does not utilize "qualified" in its common usage sense. A common usage definition of "qualified" would view "factors external to the Medicaid program; the provider's competency and professional standing as a medical provider generally." *Does v. Gillespie*, 867 F.3d 1034, 1053 (8th Cir. 2017) (Melloy, J., dissenting) (citing *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 969 (9th Cir. 2013)). Under this interpretation, "a Medicaid recipient has the right to challenge the merits of a provider's decertification when the State permits that provider to continue providing care to other patients. But this interpretation is plainly wrong." *Gillespie*, 867 F.3d at 1048–49 (Shepherd, J., concurring). The any-qualified-provider provision does not ask whether the provider is "qualified" to provide medical services *generally*; rather, it asks whether the provider is "qualified" to provide medical services *specifically* under the Medicaid program. *See* 42 U.S.C. § 1396a(a)(23)(A).

Although the Medicaid Act does not define "qualified," it uses it as a term of art to mean a provider has been certified under the program. *See Kauffman*, 981 F.3d at 368–69 (en banc). In turn, States have the authority to determine whether they want to certify or exclude the provider from the Medicaid program. For example, under 42 U.S.C. § 1396a(p)(1), which details the "[e]xclusion power of

[the] State[s]," "[i]n addition to any other authority," States may determine a provider is not qualified "for any reason for which the Secretary could exclude the individual or entity from participation in [the Medicaid] program." These reasons can include "a provider's excessive charges; fraud, kickbacks, or other prohibited activities; failure to provide information; failure to grant immediate access under specified circumstances; or default on loan or scholarship obligations." *Kauffman*, 981 F.3d at 369 (en banc) (citing 42 U.S.C. § 1320a-7(b)). Accordingly, "[f]ederal law expressly allows States to terminate a provider's Medicaid agreement on many grounds, including those articulated in the Medicaid Act, none of which contemplate that the provider must also be precluded from providing services to all non-Medicaid patients before termination is permissible." *Id*. at 368 (en banc) (citations omitted).

In this regard, a plain language reading of the statute, using "qualified" in its technical sense, shows "[a] Medicaid patient may choose among qualified and willing providers but has no right to insist that a particular provider is 'qualified' when the State has determined otherwise." *Id*. at 358 (en banc).

The any-qualified-provider provision's context confirms the provision does not unambiguously confer a Section 1983-enforceable right upon a Medicaid beneficiary to challenge a State's decision regarding whether a provider is qualified. In *Talevski*, this Court recognized that, for there to be a Section 1983-enforceable right, courts must find that "'Congress

intended to create a federal right' *for* the identified class, not merely that the plaintiffs fall 'within the general zone of interest that the statute is intended to protect.'" *Talevski*, 143 S. Ct. at 1457 (citing *Gonzaga*, 536 U.S. at 283) (emphasis in original).

Construing 42 U.S.C. § 1396a as a whole shows the any-qualified-provider provision does not focus upon the Medicaid beneficiary. In fact, "the focus of the Act is two steps removed from the interests of the patients who seek services from a Medicaid provider." *Gillespie*, 867 F.3d at 1041. The any-qualified-provider provision is part of a long list of what "[a] State plan for medical assistance must" include. 42 U.S.C. § 1396a(a). In turn, the statute directs the Department of Health and Human Services (HHS) Secretary to "approve any plan which fulfills the conditions specified in subsection (a) . . . ." *Id.* at § 1396a(b). Accordingly, "[l]ike the provision at issue in *Armstrong* [*v. Exceptional Child Center, Inc.*], '[i]t 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.'" *Gillespie*, 867 F.3d at 1041 (citing *Armstrong*, 575 U.S. 320, 331 (2015) (plurality opinion)) (third alteration in original); *accord Kauffman*, 981 F. 3d at 372 (Elrod, J., concurring).

The any-qualified-provider provision is part of a substantial compliance regime, which cuts against the argument that the provision contains a Section 1983-enforceable right. Under 42 U.S.C. § 1396c(2),

Congress directs the HHS Secretary to withhold a State's Medicaid funding if "in the administration of the plan there is a *failure to comply substantially* with any such provision." (emphasis added). Yet, in applying the *Gonzaga* test, the Supreme Court "ha[s] rejected § 1983 enforceability where the statutory provision 'contain[ed] no rights-creating language'; had 'an aggregate, not individual, focus'; and 'serve[d] primarily to direct the [Federal Government's] distribution of public funds.'" *Talevski*, 143 S. Ct. at 1457 (citing *Gonzaga*, 536 U.S. at 290) (first alteration added). The any-qualified-provider provision fits that description. As Judge Elrod described in her concurrence in *Kauffman*, "[s]ubstantial-compliance regimes like these have an 'aggregate focus,' are 'not concerned with whether the needs of any particular person have been satisfied,' and thus do not 'give rise to individual rights.'" 981 F.3d at 373 (citing *Gonzaga*, 536 U.S. at 288); *accord Gillespie*, 867 F.3d at 1042.

A private right of action under the any-qualified-provider provision would create tension with closely related statutory provisions that empower States to exclude providers from the Medicaid program. As the Fifth Circuit en banc described in *Kauffman*, "[s]tatutory provisions, including other subsections of § 1396a, permit a State to exclude providers from Medicaid plans for a host of reasons, while other statutory provisions, also including other subsections of § 1396a, *mandate* exclusion for various reasons." 981 F.3d at 360 (citing 42 U.S.C. §§ 1396a(p)(1) to (2), 1320a-7(a) to (b)) (emphasis in original). 42 U.S.C.

§ 1396a(p)(3) recognizes that "the term 'exclude' includes the refusal to enter into or renew a participation agreement or the termination of such an agreement."

Under the harmonious-reading canon, "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012). A private right of action would contradict these provisions, *e.g.*, 42 U.S.C. § 1396a(p)(1), permitting Medicaid beneficiaries to second guess—in federal court—States' determinations of whether a provider is qualified. This would not only apply to State decisions regarding abortion clinics, but also to State determinations regarding providers of any medical services under the Medicaid program. *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari). In turn, Medicaid beneficiaries could strategically use the Federal Judiciary "to challenge the *failure* to list particular providers, not just the removal of former providers." *Id*. (emphasis in original) (citations omitted). Thus, an *implied* private right of action would vastly diminish States' *enumerated* statutory powers to exclude providers from the Medicaid program.

At most, "the any-qualified-provider provision, like many statutes, may confer a benefit. And Ms. Edwards may even be within the statute's zone of interests. But that's not enough to unambiguously confer a private right." Br. for the Pet'r 22. The

provision's text and context confirm that "§ 1396a(a)(23) does not unambiguously grant Medicaid patients the right to be involved in or to contest a state agency's determination that a provider is not 'qualified.'" *Kauffman*, 981 F.3d at 358 (en banc).

B. The Express Enforcement Mechanisms of Section 1396a(a)(23)(A) Overcome Any Presumption of a Purported Section 1983-Enforceable Right.

"[I]f a statutory provision unambiguously secures rights," then a State may rebut the presumption that it is enforceable by Section 1983. *Talevski*, 143 S. Ct. at 1459. A State can point to a statutory provision that "expressly forbid[s] § 1983's use." *Id*. "Absent such a sign, a defendant must show that Congress issued the same command implicitly, by creating 'a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Id*. (citing *Rancho Palos Verdes*, 544 U.S. at 120). This is known as implicit preclusion. Here, *arguendo*, even if Section 1396a(a)(23)(A) creates a right to choose a provider, it implicitly precludes enforceability under Section 1983.

First, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Id*. at 211 (Barrett, J., concurring) (citing *Pennhurst*, 451 U.S. at 28). Here, 42 U.S.C. § 1396c expressly authorizes the HHS Secretary to withhold or reduce federal funds if a State's "plan has been so

changed that it no longer complies with the provisions of section 1396a" or "in the administration of the plan there is a failure to comply substantially with any such provision." Accordingly, the traditional remedy for State noncompliance—the withholding of federal funds—is available.

Second, 42 U.S.C. § 1396a(a)(4)(A) empowers the HHS Secretary to "provide . . . such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan." The HHS "Secretary has used that authority to require states to give providers the right to appeal their exclusion from the Medicaid program." *Kauffman*, 981 F.3d at 373 (Elrod, J., concurring) (citing 42 U.S.C. § 1396a(a)(4)(A); 42 C.F.R. § 1002.213); *see also* 42 C.F.R. § 455.422 ("The State Medicaid agency must give providers terminated or denied under § 455.416 any appeal rights available under procedures established by State law or regulations."). In turn, South Carolina has ensured providers have a right to an administrative appeal followed by state judicial review. Br. for Pet'r 42. (listing a state statute and regulations). As such, "[b]ecause other sections of the Act provide mechanisms to enforce the State's obligation under § 23(A) to reimburse qualified providers who are chosen by Medicaid patients, it is reasonable to conclude that Congress did not intend to create an enforceable right for individual patients under § 1983." *Gillespie*, 867 F.3d at 1041 (citations omitted); *accord Kauffman*, 981 F.3d at 373 (Elrod, J., concurring).

Thus, "[t]hough a Medicaid beneficiary does not have the right to contest, through a § 1983 suit, a determination that a particular provider is not qualified, that does not render the any-qualified-provider provision a 'dead letter'." *Id.* at 362 (en banc). And regardless of the Court's decision in this case, Medicaid beneficiaries will still have access to comprehensive medical care. Br. for the Pet'r 9–11.

However, if there is a Section 1983-enforceable right to contest a State's decision, there would be serious harm to States' sovereignty. Allowing patients to bring these claims directly in federal court reduces the ability of States to manage Medicaid, as the suits give Medicaid providers "an end run around the administrative exhaustion requirements in [the] state's statutory scheme." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari) (citation omitted).

An implied private right of action under the any-qualified-provider provision would subject States to possibly irreconcilable litigation results. Litigation would proceed under "a rather imprecise standard, asking whether the provider is 'qualified to perform the service or services required.'" *Gillespie*, 867 F.3d at 1042. Parallel litigation would occur in state administrative agencies (followed by state judicial review) and federal courts. As the Eighth Circuit describes in *Gillespie*:

> Federal law . . . requires that when a State terminates a Medicaid provider, the State must afford the provider an opportunity for

> administrative appeal and judicial review in the state courts. Under the [Medicaid beneficiary-plaintiffs'] vision, while the provider is litigating its qualifications in the state courts, or after the provider unsuccessfully appeals a determination that it is not qualified, individual patients separately could litigate or relitigate the qualifications of the provider in federal court under § 1983.

Id. at 1041; *accord Kauffman*, 981 F.3d at 363–64 (en banc) (noting the "potential for parallel litigation and conflicting results"). In turn, this "looming potential for complex litigation inevitably will dissuade state officials from making decisions that they believe to be in the public interest." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari). "If Congress had intended such a scheme with its inherent potential for conflict, that intent must have been plainly—unambiguously—expressed. It was not." *Kauffman*, 981 F.3d at 360 (en banc) (citing *Gonzaga*, 536 U.S. at 290).

Litigation would be expensive for States. The "health care system . . . is massive and costs taxpayers billions of dollars each year." *Id.* at 364. There are "[a]round 70 million Americans [that] are on Medicaid, and the question presented directly affects their rights," *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari). Under Respondents' theory, "a State faces the threat of a federal lawsuit—and its attendant costs and fees—whenever it changes providers of medical products or

services for its Medicaid recipients." *Id*. Medicaid beneficiaries could also assert an implied right of action under other Section 1396a(a) provisions that "contain individual-focused, benefit-conferring language." Br. for the Pet'r 37–40 (identifying eight provisions that, under Respondents' argument, likely confer an implied private right of action). As such, "it is difficult to conclude from so thin a read of § 1396a(a)(23) that Congress envisioned States' spending additional millions of dollars defending suits in courts across the country brought by Medicaid *patients* when particular providers are excluded or terminated." *Kauffman*, 981 F.3d at 364 (en banc) (emphasis in original).

Accordingly, the Medicaid Act implicitly precludes a Section 1983-enforceable right to challenge a State's decision to decertify a provider in federal court. The comprehensive enforcement scheme is simply "incompatible with individual enforcement under § 1983." *Talevski,* 143 S. Ct. at 1459 (citing *Rancho Palos Verdes*, 544 U.S. at 120).

C. A Medicaid Beneficiary's Implied Right of Action Under Section 1396a(a)(23)(A) Would Infringe Upon State Sovereignty Under the Anti-Commandeering Doctrine.

If the any-qualified-provider provision confers a private right upon a Medicaid beneficiary to choose a specific provider, then it collides with the anti-commandeering doctrine. The application of the anti-commandeering doctrine rebuts the presumption that a Spending Clause statutory right "is presumptively

enforceable by § 1983," *Gonzaga*, 536 U.S. at 284, acting as a fail-safe 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) [hereinafter "*NFIB*"].[2]

This Court has not fully analyzed the anti-commandeering principle in relation to the issue presented in this case. As Justice Gorsuch noted in *Talevski*, "there are other issues lurking here that petitioners failed to develop fully—whether legal rights provided for in spending power legislation like the Act are 'secured' as against States in particular and whether they may be so secured consistent with the Constitution's anti-commandeering principle." *Talevski*, 143 U.S. at 1462–63 (Gorsuch, J., concurring) (citing *NFIB*, 567 U.S. at 575–78; *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475–78 (2018)). Justice Thomas likewise voiced a concern about the anti-commandeering principle in *Talevski*, noting "[t]he Court must, at some point,

---

[2] If this Court adds an anti-commandeering analysis to the *Gonzaga* test, courts will need to decide these cases on anti-commandeering grounds only in rare instances. If a plaintiff shows that a "statutory provision unambiguously secures rights," and if a State cannot "defeat the presumption by demonstrating that Congress did not intend that § 1983 be available to enforce those rights," *Talevski*, 143 S. Ct. at 1459 (cleaned up), only then would it be necessary for a court to analyze the statute under the anti-commandeering doctrine. However, since "§ 1983 actions are the exception—not the rule—for violations of Spending Clause statutes," *id.* at 1463 (Barrett, J., concurring), it is likely courts could continue deciding most cases on statutory grounds and avoid the constitutional question.

revisit its understanding of the spending power and its relation to § 1983." *Id.* at 1465 (Thomas, J., dissenting) (arguing, however, that the Court could "escape this quandary only by recognizing spending conditions . . . as the terms of possible contracts that secure rights only by virtue of an offeree's acceptance—the very conclusion compelled by the traditional understanding of the spending power.").

Under the Spending Clause, "Congress may . . . grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.'" *NFIB*, 567 U.S. at 576 (citing *Coll. Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999)). These conditions may "encourage a State to regulate in a particular way" or "influenc[e] a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992). However, this power is not boundless. "The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Although Congress may "directly prohibit[ ] the States from exercising some attributes of sovereignty." *Murphy*, 138 S. Ct. at 1475 (citing U.S. Const. art. I, § 10), unenumerated legislative powers "are reserved to the States," U.S. Const. amend. X. "And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy*, 138 S. Ct. at 1476. This is known as the anti-commandeering doctrine.

The anti-commandeering doctrine is "a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Id.* at 1475. In this regard, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (citing *Hodel v. Va. Surface Mining Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)) (alteration in original). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *NFIB*, 567 U.S. at 578.

An implied right of action under the any-qualified-provider provision would violate the anti-commandeering doctrine. The Medicaid Act recognizes that States have certain powers to exclude providers from the program. *E.g.*, 42 U.S.C. § 1396a(p)(1). However, an implied right of action would make that enumerated power meaningless. Medicaid beneficiaries could challenge States in federal courts "to have a particular provider declared 'qualified'". *Kauffman*, 981 F.3d at 358 (en banc). Not only would this litigation be complex and expensive, but it also would likely produce conflicting results. *Supra* Section I(B). This reality might sway state public officials to make decisions that are based on creating an outcome that avoids litigation. *Id.*; *see also* Br. for the Pet'r 53–54. Yet, States would be bound to administer the federal program, which

would include, under Respondents' position, a duty to provide patients with their choice of a provider.[3]

To borrow the common metaphor in caselaw that the Spending Clause is a contract, *see*, *e.g.*, *Armstrong*, 575 U.S. at 328, an implied private right of action within the any-qualified-provider provision would make this contract unconscionable. Procedurally, it would misrepresent that States have powers to exclude providers, *see, e.g.,* 42 U.S.C. § 1396a(p)(1), but have an unwritten term that Medicaid beneficiaries can take States into federal court to second guess States' decisions to exclude providers, *but cf. Pennhurst*, 451 U.S. at 17 (discussing the clear statement rule). At the same time, substantively, the contract would be one-sided and unfairly benefit the Federal Government. The Medicaid Act would require States to administer its program, but States' powers to act as a "dual sovereign[ ]," *Gregory*, 501 U.S. at 457, and exclude providers would be nominal since "allowing patients to bring these claims directly in federal court reduces the ability of States to manage Medicaid." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari). "'[T]he Constitution does not empower

---

[3] If the Court had applied the anti-commandeering doctrine to the Federal Nursing Home Reform Act provisions at issue in *Talevski*, it could have certainly reached a different result. *See* 143 S. Ct. 1444. The key distinction in this case is that the Medicaid Act recognizes States' powers to determine whether a provider is qualified, *e.g.*, 42 U.S.C. § 1396a(p)(1), yet a Medicaid beneficiary's implied private right of action to choose a provider would supplant States' enumerated powers through litigation in federal courts.

Congress to subject state governments to this type of instruction.'" *Murphy*, 138 S. Ct. at 1476 (citing *New York*, 505 U.S. at 176).

In sum, under the anti-commandeering doctrine, a Medicaid beneficiary's implied private right of action cannot nullify a State's enumerated powers within the any-qualified-provider provision. *See*, *e.g.*, 42 U.S.C. § 1396a(p)(1). To allow so infringes upon State sovereignty and commandeers States to adhere to the any-qualified-provider provision without respecting States' powers to administer determinations that a provider is qualified.

II. THE SUPREME COURT HELD SECTION 1396A(A)(23)(A) DOES NOT GIVE A RIGHT TO CONTEST A PROVIDER'S DECERTIFICATION IN *O'BANNON V. TOWN COURT NURSING CENTER*.

The Supreme Court already has interpreted the any-qualified-provider provision to not confer a right to challenge the government's decision to decertify a provider in *O'Bannon v. Town Court Nursing Center*. 447 U.S. at 785. In *O'Bannon*, Medicaid recipients attempted to secure a federal due process right to a qualification determination for their chosen Medicaid provider. The Supreme Court decided *O'Bannon* before it radically expanded the jurisprudence of implied rights of action to encompass Spending Clause provisions in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). Although the Court decided *O'Bannon* before it synthesized the *Gonzaga* test,

O'Bannon nevertheless provided a substantive interpretation of the any-qualified-provider provision, 42 U.S.C. § 1396a(a)(23)(A), that renders Respondents' position untenable. Thus, the Fifth Circuit en banc correctly concluded in *Kauffman* that "[t]he Supreme Court's decision in *O'Bannon* resolves this case." 981 F.3d at 357 (citing *Gillespie*, 867 F.3d at 1047 (Shepherd, J., concurring) ("*O'Bannon* controls the outcome of this case.")).

A. The Supreme Court Interpreted Section 1396a(a)(23)(A) to Grant Patients a Choice *Among* Qualified Providers.

In *O'Bannon*, the federal Secretary of Health, Education and Welfare (HEW, now HHS) disqualified Town Court Nursing Center, a Pennsylvania skilled nursing facility, based on a Pennsylvania Department of Public Welfare (DPW) survey, which found that the facility failed numerous federal statutory requirements. 447 U.S. at 776 & n.3. Pennsylvania likewise disqualified Town Court, citing federal rules that mandated that a State agency follow suit when the federal secretary has disqualified a provider. *Id*. at 776 & n.4.

The home and several of its Medicaid patients brought a federal court action asserting the right to an evidentiary hearing on the disqualification decision before Medicaid could be discontinued. Much like the plaintiffs' complaint herein, the *O'Bannon* plaintiffs alleged that terminating Medicaid payments would force Town Court's closure and cause the individual plaintiffs to suffer "immediate and

irreparable psychological and physical harm" due to moving to a different Medicaid provider. *Id.* at 777; *see Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 157 (4th Cir. 2024) ("[the plaintiff] would 'not be able to continue going [to Planned Parenthood] if the services [were] not covered' by Medicaid because she could not afford 'to pay out of pocket.'" (last alteration in original)).

Although the district court declined to find a right to a hearing existed, the Third Circuit reversed on the ground that the Medicaid statute and regulations created a constitutionally protected property interest in continued residency at the home, including through the any-qualified-provider provision, 42 U.S.C. § 1396a(a)(23)(A), and through regulations prohibiting certified facilities from transferring patients except for certain specified reasons, and from reducing or terminating a recipient's financial assistance without a hearing. *O'Bannon*, 447 U.S. at 779–80; *see Town Ct. Nursing Ctr., Inc. v. Beal*, 586 F.2d 280 (3d Cir. 1978). The circuit majority relied on the "general due process maxim that, whenever a governmental benefit may be withdrawn only for cause, the recipient is entitled to a hearing as to the existence of such cause." *O'Bannon*, 447 U.S. at 780. Over a strong dissent authored by Chief Judge Seitz, six judges applied this reasoning in *Town Court*, holding that the patients were entitled to a pretermination hearing on the issue of whether Town Court's Medicare and Medicaid provider agreements should be renewed. 586 F.2d. at 282–83.

The Supreme Court reversed with only a single dissenting vote by Justice Brennan, *O'Bannon*, 447 U.S. at 805–806, "essentially for the reasons stated by Chief Judge Seitz in his dissent." *Id.* at 783 (majority opinion). The Court found "unpersuasive" the plaintiffs' argument that the any-qualified-provider provision and other Medicaid provisions relied upon by the court of appeals conferred on them a property right to remain in the home of their choice absent good cause for transfer, and, therefore, entitled them to a federal hearing on whether good cause existed. *Id*. at 784. As the Court wrote:

> *Whether viewed singly or in combination*, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the home of one's choice. Title 42 U.S.C. § 1396a(a)(23) . . . gives recipients *the right to choose among a range of qualified providers*, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified.

Id. at 785 (emphases added). The Supreme Court held that "enforcement by HEW and DPW of their valid regulations did not directly affect the patients' legal

rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790.

In crediting Chief Judge Seitz's analysis, the Court quoted at length with approval his response to the Third Circuit majority's position:

> The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U.S.C. § 1396a(a)(23), a Medicaid recipient may obtain medical care "from any institution . . . qualified to perform the service or services required." *Clearly, what the majority characterizes as a recipient's right to obtain medical care from a "freely selected provider" is limited to a choice among institutions which have been determined by the Secretary to be "qualified."*

Id. at 782 n.13 (emphasis added). Furthermore, the Supreme Court disagreed with Justice Blackmun's concurring view, which interpreted Section 1396a(a)(23)(A) to "vest[] each patient with a broad right to resist governmental removal, which can be disrupted only when the Government establishes the home's noncompliance with program participation requirements." *Id.* at 791 (Blackmun, J., concurring in the judgment).

The Court also adopted Chief Judge Seitz's view that "since decertification does not reduce or

terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant." *Id.* at 785–86; *see Town Ct.*, 586 F.2d at 296 (Seitz, J., dissenting). On this basis, the *O'Bannon* Court set aside the plaintiffs' impact evidence. "[S]ome may have difficulty locating other homes they consider suitable or may suffer both emotional and physical harm as a result of the disruption associated with their move. Yet none of these patients would lose the ability to finance his or her continued care in a properly licensed or certified institution." 447 U.S. at at 787.

Justice Brennan in his *O'Bannon* dissent and Judge Adams of the Third Circuit both urged that it "begs the question" to hold that Section 1396a(a)(23)(A) expressly gives the patients only a right to stay in "qualified" facilities. *Id.* at 792 (citing *Town Ct.*, 586 F.2d at 287 (Adams, J., concurring)). This view implies that the only way to avoid a circular argument over the definition of "qualified" is to find that federal courts have authority to decide whether a provider is "qualified to provide the services required." But if the question is "begged," only "a strained reading of § 1396a(a)(23)" would allow a Medicaid patient to challenge whether the provider is "qualified." *Kauffman*, 981 F.3d at 358 (en banc). As the en banc Fifth Circuit held in *Kauffman*:

> Where is the language in § 1396a(a)(23) that grants a right to a Medicaid patient, either

> independent of the provider's right or exercised in tandem with the provider, to have a particular provider declared "qualified"? It is not there, and that is why the Supreme Court held as it did in *O'Bannon*. A Medicaid patient may choose among qualified and willing providers but has no right to insist that a particular provider is "qualified" when the State has determined otherwise.

Id. All that *O'Bannon* said about what "qualified" means is that Section 1396a(a)(23)(A) does not grant federal courts the authority to make that decision. "[W]hile a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that [Medicaid authorities] ha[ve] determined to be unqualified." *O'Bannon*, 447 U.S. at 786.

B. *O'Bannon*'s Due Process Analysis Presupposed the *Absence* of Any Implied Federal Right for Respondents.

The Fourth and other Circuits have incorrectly dismissed *O'Bannon* as a due process case.[4] As the en

---

[4] *See*, *e.g.*, *Planned Parenthood S. Atl. v. Kerr*, 27 F.4th 945, 958 (4th Cir. 2022) ("The [Supreme] Court simply rejected the procedural due process claim brought by the [*O'Bannon*] plaintiffs . . . *O'Bannon* therefore has little to do with this case."); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 977 (7th Cir. 2012) (distinguishing *O'Bannon* on the basis that "the free-choice-of-provider statute was raised in the context of a due-process claim" and that "[t]his

banc Fifth Circuit described regarding a due process challenge to whether a Medicaid provider is "qualified," there must be "an underlying *substantive* right that would permit the residents to challenge a State's determination that a provider is not qualified." *Kauffman*, 981 F.3d at 366 (emphasis in original). According to the Fifth Circuit:

> [T]he Supreme Court confirmed that the Due Process Clause does not confer a "right to a hearing" in the abstract; rather, it does so only as a prerequisite to a deprivation of "life, liberty, or property." Accordingly, for the *O'Bannon* beneficiaries to prevail on their due process claim, they had to show that the termination of the nursing home's Medicaid agreement "amount[ed] to a deprivation of an[ ] interest in life, liberty, or property."

Id. at 355–56 (first alteration added) (citing *O'Bannon*, 447 U.S. at 787–88, 790); *accord Gillespie*, 867 F.3d at 1048 (Shepherd, J., concurring) ("The plaintiffs' argument also exhibits a fundamental misunderstanding of due process rights. Any right to due process, whether asserted as a procedural or substantive claim, exists only when there is an underlying substantive right at issue.").

Thus, even though the *O'Bannon* plaintiffs

---

is not a due-process case"); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1231 (10th Cir. 2018) ("[W]e note that the nursing home residents in *O'Bannon* asserted procedural due-process rights, not substantive rights, as the patients do here.").

"contend[ed] that, under the Due Process Clause, they 'were entitled to an evidentiary hearing on the merits of the decertification decision before the Medicaid payments were discontinued,'" the Supreme Court rejected this argument. *Kauffman*, 981 F.3d at 355–356 (en banc). Under Section 1396a(a)(23)(A), "while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified." *O'Bannon*, 447 U.S. at 786. Even if facility decertification imposes "an immediate, adverse impact on some residents . . . that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty, or property." *Id*. at 787. Thus, "the Supreme Court made clear that § 1396a(a)(23) *does not confer a right to contest, collaterally attack, or litigate a State's determination that a provider is not 'qualified.'*" *Kauffman*, 981 F.3d at 367 (en banc) (emphasis in original). "The central holding in *O'Bannon* was that regardless of whether the State's qualification decision was correct, the individual beneficiaries did not have a right that would allow them to 'demand a hearing' to challenge that determination.'" *Id*. (citing *O'Bannon*, 447 U.S. at 785).

In sum, this Court in *O'Bannon* held Section 1396a(a)(23)(A) does not confer a right to challenge a State's decision to exclude a provider from the Medicaid program in federal court.

CONCLUSION

The any-qualified-provider provision does not contain an implied private right of action for a Medicaid beneficiary to choose a specific provider. For the reasons set forth above, *Amicus* urges the Court to reverse.

Respectfully submitted,

STEVEN H. ADEN
Counsel of Record
CAROLYN MCDONNELL
DANIELLE PIMENTEL
AMERICANS UNITED FOR LIFE
1150 Connecticut Ave NW,
Suite 500
Washington, DC 20036
Steven.Aden@aul.org
Tel: (202) 741-4917

Counsel for Amicus Curiae

February 10, 2025