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 U.S. Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER AND REVERSAL

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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.

TABLE OF CONTENTS

Question Presented i
Table of Contents ii
Table of Authorities.. iv
Interest of *Amicus Curiae* 1
Statement of the Case 1
Summary of Argument... 2
Argument.. 3
I. Threshold issues undermine PPSAT both jurisdictionally and on the merits. 3
   A. Spending-Clause legislation falls under a clear-statement rule. 4
   B. South Carolina's sovereign immunity bars this suit. 6
   C. Public-health legislation is subject to the presumption against preemption................. 9
   D. Both federal common law and South Carolina law bar third-party suits to enforce unvested government rights. 9
II. Third-party beneficiaries lack standing to enforce Medicaid's any-qualified-provider clause. 11
   A. Medicaid's any-qualified-provider clause does not create cognizable rights. 13
      1. The any-qualified-provider clause lacks rights-creating language. 13
      2. South Carolina has not violated the any-qualified-provider clause. 16
      3. PPSAT and Edwards suffer a form of generalized grievance. 17
   B. As incidental beneficiaries, PPSAT and Edwards lack standing. 18

C. Even if they are intended beneficiaries, PPSAT and Edwards lack standing to enforce a non-vested HHS right.................. 20

1. Medicaid's conditions precedent to enforcement remain unmet. 21

2. Neither promisees nor third-party beneficiaries can "cherry pick" the portions of a promise to enforce............ 21

3. HHS and third-party beneficiaries cannot enforce non-vested rights.......... 23

D. PPSAT lacks standing to litigate HHS's alleged injuries. 26

III. Even if it has standing, PPSAT lacks a cause of action. 27

A. PPSAT has no cause of action under § 1983. 28

B. PPSAT has no cause of action under *Young*. 31

Conclusion 32

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706 (1999) 6
Alexander v. Sandoval,
532 U.S. 275 (2001) 14-15, 29
Alexander's Land Co., L.L.C. v. M&M&K Corp.,
390 S.C. 582 (2010) 24
Altria Group, Inc. v. Good,
555 U.S. 70 (2008) 9
Am. Agric. Chem. Co. v. Thomas,
206 S.C. 355 (1945) 23
ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 17-18
Astra USA, Inc. v. Santa Clara County, Cal.,
563 U.S. 110 (2011) 27
Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.,
933 F.2d 314 (5th Cir. 1991) 21-22
Barnes v. Gorman,
536 U.S. 181 (2002) 4, 20-21, 27
Bertrand ex rel. Bertrand v. Maram,
495 F.3d 452 (7th Cir. 2007) 27
Blessing v. Freestone,
520 U.S. 337 (1997) 28-30, 32
Boyle v. United Tech. Corp.,
487 U.S. 500 (1988) 10
California v. Sierra Club,
451 U.S. 287 (1981) 14, 29
Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 15

Centex Corp. v. Dalton,
840 S.W.2d 952 (Tex. 1992) 22
Chamber of Commerce of U.S. v. Edmondson,
594 F.3d 742 (10th Cir. 2010)............................. 31
Chen v. Chen,
586 Pa. 297 (2006).. 24
City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005)....................................... 28, 30
City of Waukesha v. EPA,
320 F.3d 228 (D.C. Cir. 2003) 12, 28
Connecticut State Medical Soc. v. Oxford Health Plans (CT), Inc., 272 Conn. 469 (2005) 24
Conoco, Inc. v. Republic Ins. Co.,
819 F.2d 120 (5th Cir. 1987)............................... 25
Continental Oil Co. v. Lane Wood & Co.,
443 S.W.2d 698 (Tex. 1969) 24
Cooper Industries, Inc. v. Aviall Services, Inc.,
543 U.S. 157 (2004).. 26
Danforth v. Minnesota,
552 U.S. 264 (2008).. 25
Edelman v. Jordan,
415 U.S. 651 (1974).. 7
Empire Healthchoice Assur., Inc. v. McVeigh,
547 U.S. 677 (2006)... 10-11
Ex parte Young,
209 U.S. 123 (1908)..................3, 7-8, 27-28, 31-32
FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000)....................................... 20, 22
Ford Motor Co. v. Dep't of Treasury of State of Indiana, 323 U.S. 459 (1945)............................. 6-7

Garcia v. Truck Insurance Exchange,
36 Cal.3d 426 (1984) 19
Gart v. Cole,
263 F.2d 244 (2d Cir. 1959) 20
Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 550 U.S. 45 (2007) 20
Gonzaga Univ. v. Doe,
536 U.S. 273 (2002)............................ 14-15, 28-30
Green v. Mansour,
474 U.S. 64 (1985).. 7, 31
Grigerik v. Sharpe,
247 Conn. 293 (1998) 20
Guy v. Leiderbach,
459 A.2d 744 (Pa. 1983) 19
Hagans v. Lavine,
415 U.S. 528 (1974).. 12
Haywood v. Drown,
556 U.S. 729 (2009).. 7
Health & Hosp. Corp. v. Talevski,
599 U.S. 166 (2023)....................................... 14-15
Holbrook v. Pitt,
643 F.2d 1261 (7th Cir. 1981)............................ 21
Illinois Ass'n of Mortg. Brokers v. Office of Banks & Real Estate, 308 F.3d 762 (7th Cir. 2002)...... 31
In re Marriage of Bouquet,
16 Cal.3d 583 (1976) 24
In re United Airlines, Inc.,
368 F.3d 720 (7th Cir. 2004)............................... 22
Ingalls Shipbuilding v. Fed'l Ins. Co.,
410 F.3d 214 (5th Cir. 2005)............................... 22

Joseph v. Hospital Service Dist. No. 2,
939 So.2d 1206 (La. 2006).............................. 19-20
Karo v. San Diego Symphony Orchestra Ass'n,
762 F.2d 819 (9th Cir. 1985)......................... 23, 25
Kingman v. Nationwide Mut. Ins. Co.,
243 S.C. 405 (1964) 22
Kowalski v. Tesmer,
543 U.S. 125 (2004)... 26
Land v. Dollar,
330 U.S. 731 (1947)... 12
Lapides v. Bd. of Regents of Univ. System of Georgia, 535 U.S. 613 (2002)............................. 6-7
Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949)... 8
2 Benedict Coal Corp.,
361 U.S. 459 (1960)... 23
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)... 13
Lynch v. United States,
292 U.S. 571 (1934).. 4-5
Magee v. O'Neill,
19 S.C. 170 (1883) 23-24
McGill v. Moore,
381 S.C. 179 (2009) 24
Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996)... 9
Miree v. DeKalb County,
433 U.S. 25 (1977)... 10
O'Bannon v. Town Court Nursing Center,
447 U.S. 773 (1980)...................... 14, 16, 19-20. 30

OEC-Diasonics, Inc. v. Major,
674 N.E.2d 1312 (Ind. 1996) 20, 24
Palma v. Verex Assur., Inc.,
79 F.3d 1453 (5th Cir. 1996) 25
Peabody v. Weider Publications, Inc.,
260 Fed.Appx. 380 (2d Cir. 2008) 25
Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984) 4
Pennhurst State School & Hospital v. Halderman,
451 U.S. 1 (1981) 7
Perez v. Ledesma,
401 U.S. 82 (1971) 27-28
Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control, 430 S.C. 200 (2020) 23
Renne v. Geary,
501 U.S. 312 (1991) 26
Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 9
Seguin v. City of Sterling Heights,
968 F.2d 584 (6th Cir. 1992) 25
Shaw Constructors v. ICF Kaiser Engineers, Inc.,
395 F.3d 533 (5th Cir. 2004) 23
Sloan Constr. Co. v. Southco Grassing, Inc.,
377 S.C. 108 (2008) 19
Sossamon v. Texas,
563 U.S. 277 (2011) 4-6
State ex rel. Roberts v. Public Finance Co.,
294 Or. 713 (1983) 24
Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 12, 25

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 25

Tawes v. Barnes,
340 S.W.3d 419 (Tex. 2011) 24

Taylor v. Sturgell,
553 U.S. 880 (2008) 25

TCX, Inc. v. Commonwealth Land Title Insurance Co., 928 F.Supp. 618 (D.S.C. 1995) 19

Texas Industries, Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 11

Thompson v. Goetzmann,
337 F.3d 489 (5th Cir. 2003) 22

Touchberry v. City of Florence,
295 S.C. 47 (1988) 19

United States v. Andreas,
216 F.3d 645 (7th Cir. 2000) 19

United States v. Kimbell Foods, Inc.,
440 U.S. 715 (1979) 10-11

United States v. Standard Oil Co.,
332 U.S. 301 (1947) 11

United Steelworkers of Am. v. Rawson,
495 U.S. 362 (1990) 21-22

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002) 7, 32

Waggoner v. Herring-Showers Lumber Co.,
40 S.W.2d 1 (Tex. 1931) 22-23

Warth v. Seldin,
422 U.S. 490 (1975) 12, 28

Waters v. Churchill,
511 U.S. 661 (1994) 25

Wilder v. Virginia Hosp. Ass'n,
496 U.S. 498 (1990) 14-15, 29-30

Wyoming v. Oklahoma,
502 U.S. 437 (1992) 26

Youngblood v. S.C. Dep't of Soc. Servs.,
402 S.C. 311 (2013) 23

Statutes

U.S. CONST. art. I, § 8, cl. 1 ....
............................1-2, 4-5, 14-15, 17, 20-22, 27, 30

U.S. CONST. art. III 3, 12-13, 16-17, 23, 26

U.S. CONST. art. III, § 2 13

U.S. CONST. amend. XI 6

20 U.S.C. § 1681(a) ....

28 U.S.C. § 1331 28

28 U.S.C. § 1343(3) 28

Medicaid Act, 42 U.S.C. §§ 1396-1396w-8
....1-6, 8-9, 11, 13-19, 21-32

42 U.S.C. § 1396a 16

42 U.S.C. § 1396a(a) 13, 29-30

42 U.S.C. § 1396a(a)(23) 2, 7, 14, 16, 30-31

42 U.S.C. § 1396a(p)(1) 2, 16, 19

42 U.S.C. § 1396c 13, 16, 21, 29-31

42 U.S.C. § 1396r(h) 15

42 U.S.C. § 1396r(h)(8) 15

42 U.S.C. § 1983 .... 3, 10-12, 14, 16, 27-32

42 U.S.C. § 1988(a) 10

M.C.L.A. § 600.1405(2)(a) 24

Civil Rights Act of 1871,
17 Stat. 13 28

Judiciary Act of 1875,
18 Stat. 470 28

Rules, Regulations and Orders

S.Ct. Rule 37.6.. 1

FED. R. CIV. P. 12(b)(1) 23

FED. R. CIV. P. 12(b)(6) 23

42 C.F.R. § 1002.3(b) 2, 16, 19

Other Authorities

THE FEDERALIST, No. 81, at 511 (A. Hamilton) 4

William A. Fletcher, *The Structure of Standing*,
98 YALE L.J. 221 (1988) 18

9 J. Murray, Corbin on Contracts § 45.6 (rev. ed.
2007) 27

RESTATEMENT (SECOND) OF CONTRACTS § 302 18

RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b) 18

Tr. at 25:17-27:08 (Oct. 3, 2011), *Douglas v.*
Indep. Living Ctr. of California, Inc., Nos. 09-
958, 09-1158, 10-283 (U.S.)................................ 5-6

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF")[1] is an Illinois nonprofit corporation founded in 1981 by Phyllis Schlafly. Eagle Forum ELDF has consistently defended federalism and supported states' autonomy from the federal government in areas—like public health—that are of traditionally local concern. In addition, Eagle Forum ELDF has a longstanding interest in protecting unborn life and a corresponding interest in the right of government at all levels to refrain from supporting abortion with taxpayer money. For these reasons, Eagle Forum ELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Planned Parenthood South Atlantic and Medicaid patient Julie Edwards (collectively, "PPSAT") sued to enjoin South Carolina's excluding abortion providers from South Carolina's Medicaid program. Medicaid is a Spending Clause statute in which States contract with the Department of Health and Human Services ("HHS"). *Amicus* Eagle Forum ELDF adopts the facts as stated by South Carolina. *See* Pet'r Br. 7-12. In summary, South Carolina has disqualified PPSAT from serving as a provider in South Carolina's Medicaid program, as South Carolina has the state-

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[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

law right to do, which right Medicaid and its implementing regulations expressly preserve. *See* 42 U.S.C. § 1396a(p)(1); 42 C.F.R. § 1002.3(b) ("Nothing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law.").

SUMMARY OF ARGUMENT

Federalism requires courts to interpret the terms of—and compliance with—Spending Clause statutes under a clear-statement rule (Section I.A), presuming that Congress did not cavalierly intend to preempt state law in areas of traditional state concern (Section I.B). With respect to implied rights to sue recipients, these constraints apply with even greater force if the recipient is a State that is immune from unconsented suits in federal courts (Section I.C). In fashioning law to apply to these programs, this Court can adopt a federal common law or apply the States' common law (Section I.D).

Medicaid's any-qualified-provider clause[2] does not provide indicia of an intended private right because the clause focuses on the regulated States, not on providing rights to beneficiaries like Edwards (Section II.A.1). Moreover, Medicaid expressly allows States to adopt state-law qualification criteria like the ones adopted here (Section II.A.2). Consequently, PPSAT suffers a form of generalized injury in not getting its way (Section II.A.3) as a merely incidental beneficiary (Section II.B), notwithstanding that South Carolina's

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[2] 42 U.S.C. § 1396a(a)(23).

Medicaid program complies substantially in aggregate.

To the extent that PPSAT qualifies as an intended beneficiary, PPSAT nonetheless lacks standing to bring this action because Medicaid's conditions precedent to Medicaid enforcement—*i.e.*, HHS notice and an HHS hearing, including an HHS substantial-compliance determination—have not occurred, which makes HHS enforcement non-vested (Section II.C.1). Neither HHS nor third-party beneficiaries can "cherry pick" the provisions of Medicaid to enforce while the conditions precedent remain unmet (Section II.C.2). Until the conditions precedent are met, third-party beneficiaries lack standing to enforce non-vested "rights" (Section II.C.3).

If the Court reaches the merits, PPSAT lacks a cause of action under § 1983 for the same reasons it lacks a legally cognizable interest for standing (Section III.A). Further, because South Carolina has not violated Medicaid, PPSAT also lacks a cause of action under *Ex parte Young*, 209 U.S. 123 (1908) (Section III.B).

ARGUMENT

I. THRESHOLD ISSUES UNDERMINE PPSAT BOTH JURISDICTIONALLY AND ON THE MERITS.

Whether this Court considers the substantive scope of Medicaid's any-qualified-provider clause under the merits in Section III, *infra*, or under Article III jurisdiction in Section II, *infra*, the Court will rely on several canons of construction when it does so. This Section lays out the relevant threshold canons before taking on jurisdiction and the merits.

A. **Spending-Clause legislation falls under a clear-statement rule.**

Under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, courts analogize federal programs to contracts between the government and recipients (here, States), with the public as third-party beneficiaries. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Id.*; *cf. Sossamon v. Texas,* 563 U.S. 277, 290-91 (2011). After the required clear notice, recipients *potentially* may face enforcement for violating the conditions of federal spending. *Gorman*, 536 U.S. at 187-89.

"In legislation enacted pursuant to the spending power, 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." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981). Even if it had a vested right in South Carolina's Medicaid contract, PPSAT still could not enforce the contract—as a contract—in federal court against a non-consenting State:

> The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.

Lynch v. United States, 292 U.S. 571, 580–81 (1934) (*quoting* THE FEDERALIST, No. 81, at 511 (A.

Hamilton)); *Sossamon*, 563 U.S. at 290 (same). *Sossamon* clarifies that this contract-law analogy is not an open-ended invitation to interpret Spending-Clause agreements broadly but rather—consistent with the clear-notice rule—applies "only as a potential *limitation* on liability." *Sossamon*, 563 U.S. at 290 (emphasis in original).

In accepting Medicaid funding, States do not sign on to private enforcement, without the administrative conditions precedent to HHS enforcement. Private enforcement is thus not part of the federal-state agreement. Indeed, the United States appearing as *amicus curiae* at oral argument in a related context argued that the Medicaid statute forecloses private enforcement by third parties, outside of Medicaid's enforcement procedures:

> Our basic point is the Spending Clause is a contractual relationship between the Federal Government and the State, and the Respondents here are in the position of the people asserting rights as third-party beneficiaries to the bilateral relationship between the United States and the -- and the States. Under standard contract law principles -- … the third-party can sue only if the parties intended him to be.
>
> …
>
> [It] also goes to the question whether the parties to the contract intended third-party beneficiary-type rights to be able to sue under—under a—what is really analogous to a contract.

Tr. at 25:17-27:08 (Oct. 3, 2011), *Douglas v. Indep. Living Ctr. of California, Inc.*, Nos. 09-958, 09-1158, 10-283 (U.S.) (Edwin S. Kneedler, Deputy Solicitor General).[3] In essence, parties to the Medicaid contract do not view third parties as having the right to enforce third-party interpretation of the contract, outside the parties' dispute-resolution process.

B. South Carolina's sovereign immunity bars this suit.

With exceptions not applicable here, States are immune from unconsented suits in federal court. *See* U.S. CONST. amend. XI; *Alden v. Maine*, 527 U.S. 706, 728-29 (1999). This immunity bars suits for both money damages and injunctive relief unless the state has waived its immunity or Congress has abrogated immunity under the Fourteenth Amendment. *Alden*, 527 U.S. at 712-16. The test for waiver is "a stringent one," and "consent … must be unequivocally expressed." *Sossamon*, 563 U.S. at 292 n.10 (internal quotation marks and citations omitted). Moreover, the *ability* of administrative or executive officers to waive sovereign immunity is a question of state law, such that if they lack authority to waive immunity, their failure to raise the immunity as an affirmative *defense* early in the litigation does not preclude their later raising the defense, even for the first time on appeal. *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459, 468-69 (1945), *overruled in part on other grounds Lapides v. Bd. of Regents of*

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[3] The *Douglas* transcript is posted on this Court's website at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/09-958.pdf (last visited Feb. 10, 2025).

Univ. System of Georgia, 535 U.S. 613, 623 (2002).[4] The officer-suit exception of *Ex parte Young*, 209 U.S. 123 (1908), allows prospective declaratory and injunctive relief (not money damages), but has two relevant limitations applicable here.

First, *Young* applies only to ongoing *violations* of federal law. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). For example, *Young* was unavailable in *Green v. Mansour*, 474 U.S. 64 (1985), where, after "Respondent … brought state policy into compliance," the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Mansour*, 474 U.S. at 66-67.

Second, the relief requested here falls outside the limited *Young* exception to sovereign immunity because "relief sought nominally against an officer is in fact against the sovereign" where "the decree would operate against the latter" by "expend[ing] itself on the public treasury or domain," "interfer[ing] with the public administration," or "restrain[ing] the Government from acting, or to compel[ling] it to act." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 & n.11 (1984) (internal quotation marks omitted). Thus, even if South Carolina were presently "violating" § 1396a(a)(23), the relief requested

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[4] States may assert sovereign immunity at any time, even on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). The States' immunity from suit in federal court does not bar plaintiffs from asserting their claims in state court under the concurrent jurisdiction doctrine. *Haywood v. Drown*, 556 U.S. 729, 735 (2009).

nonetheless would fall outside the *Young* exception to sovereign immunity.

PPSAT cannot evade sovereign immunity simply by naming an officer as the defendant under *Young*, instead of naming her office, her department, or the State. That would glibly flout the Eleventh Amendment. Properly understood, *Young* is not so broad. Leaving aside suits where "the officer purports to act as an individual and not as an official," suits against government officers provide an exception to sovereign immunity only where (1) "the officer's powers are limited by statute, [so that] his actions beyond those limitations are considered individual and not sovereign actions," or (2) "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949). Neither is present here.

Significantly, a "claim of error in the exercise of [delegated] power is … not sufficient" to avoid "impleading the sovereign" under the first prong. *Larson*, 337 U.S. at 690. Medicaid allows States to use state-law tests for provider qualification, and any perceived error in a State's priorities does not rise to the level of "illegality" needed to evade sovereign immunity. *Larson*, 377 U.S. at 692 ("normal concomitant of such [contract-related] powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract"). PPSAT lacks a credible basis on which to hale a State into federal court.

C. <u>Public-health legislation is subject to the presumption against preemption.</u>

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Even if the Court finds that Medicaid preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Because the public health field here is one traditionally occupied by state government, *id.* at 475 ("[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matter[s] of local concern") (internal quotation marks omitted), the presumption applies. Accordingly, if an ambiguous provision is open to both a preemptive and a non-preemptive interpretation, the presumption ordinarily requires adopting the non-preemptive one. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008).

D. <u>Both federal common law and South Carolina law bar third-party suits to enforce unvested government rights.</u>

PPSAT's standing to sue depends in part on its enforceable rights as a third-party beneficiary to the contract between South Carolina and HHS and in part on the issue of whether any such rights are vested. *See* Sections II.C, *infra*. Answering those questions could depend on whether the Court applies federal common

law or South Carolina law. *Cf.* 42 U.S.C. § 1988(a) (actions under § 1983 can borrow from state law).

"This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). "Federal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract." *Boyle v. United Tech. Corp.*, 487 U.S. 500, 519 (1988); *cf. Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006) (uniform federal law need not apply to all questions in federal government litigation). For *private enforcement* of a federal contract or program, however, a uniform federal rule of decision is not required if the claim "will have *no direct effect upon the United States or its Treasury*." *Boyle*, 487 U.S. at 520 (quoting *Miree v. DeKalb County*, 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). Under *Miree*, 433 U.S. at 28, federal courts can look to state law for third-party beneficiaries' standing to enforce federal obligations.

"Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods*, 440 U.S. at 727-28. This Court could adopt a federal rule of decision that looks to state law: "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *Kimbell Foods*, 440 U.S. at 728. Indeed, "[t]he prudent course … is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *McVeigh*, 547 U.S. at 691-92

(internal quotation marks omitted). In other words, notwithstanding that federal law applies, the federal rule of decision nonetheless could be "*See the state rule.*"

Finally, "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). Generally, therefore, this Court has discretion "[w]hether to adopt state law or to fashion a nationwide federal rule," *Kimbell Foods*, 440 U.S. at 728, based on "a variety of considerations … relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947). In sum, this Court makes a case-by-case determination on the need for uniform federal rules, based on the totality of the circumstances. As explained in Sections II.B-II.C, *infra*, the issues here resolve the same under both federal common law and South Carolina law.

II. THIRD-PARTY BENEFICIARIES LACK STANDING TO ENFORCE MEDICAID'S ANY-QUALIFIED-PROVIDER CLAUSE.

Although the Question Presented and the parties' briefing place the question of whether Medicaid's any-qualified-provider clause creates federal rights—as distinct from merely federal law—to support an action under § 1983, *amicus* Eagle Forum ELDF respectfully

submits that this Court should—indeed, *must*—weigh the issue as a question of Article III jurisdiction:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998) (internal quotation marks omitted). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Id.* at 101-02.

To be sure, statutes can create rights, which can provide standing if those rights are denied. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Moreover, typically, "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Id.*; *cf. City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("in reviewing the standing question, the court must … assume that on the merits the plaintiffs would be successful in their claims"). The general rule does not apply when jurisdiction merges with the merits, *Land v. Dollar*, 330 U.S. 731, 735 (1947) (consideration of the two can be merged when they "intertwine"), or when a plaintiff's claim is too insubstantial to support federal jurisdiction (*e.g.*, when the Court already has decided the issue). *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974). In any event, the merits issues considered here apply equally to the § 1983 issues discussed in Section III, *infra*.

A. <u>Medicaid's any-qualified-provider clause does not create cognizable rights.</u>

Article III limits federal courts to "cases" and "controversies," U.S. CONST. art. III, § 2, which requires an actual or imminent "injury in fact" to a cognizable interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, constitutional standing presents a tripartite test: "an invasion of a *legally protected interest*" of the plaintiff, caused by the defendants, and redressable by a court. *Id.* at 560-62 (emphasis added). The jurisdictional issue here is that Medicaid recipients like Edwards lack a legally protected interest to pick "off-menu" providers that their State has disqualified from participating their State's Medicaid program.

1. <u>The any-qualified-provider clause lacks rights-creating language.</u>

Nothing in Medicaid's any-qualified provider clause supports the creation of a right for recipients to choose which providers are qualified under state law. Under the circumstances—and especially under the canons of statutory construction that apply here, *see* Section I, *supra*—PPSAT lacks the legally protected interest required for standing.

Medicaid allows States to implement partially non-compliant Medicaid plans, hampered only by the potential to lose some or even all Medicaid funding, but only after HHS's notice and an opportunity for an HHS hearing. 42 U.S.C. § 1396c. Indeed, if the State plan complies *substantially* (*i.e.*, not completely), the State might escape any decrease in funding. Further, § 1396a(a) itself regulates *states* on the content of their Medicaid plans, not on the services (or rights)

that third-party beneficiaries must receive: "Statutes that focus on the person regulated rather than the individuals protected create '*no implication* of an intent to confer rights on a particular class of persons.'" *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (*quoting California v. Sierra Club,* 451 U.S. 287, 294 (1981)) (emphasis added); *accord Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (applying the *Sandoval* reasoning to § 1983 actions). Finally, unlike the instances where this Court has found enforceable rights implicit or explicit in Spending Clause legislation, Medicaid's any-qualified-provider clause does not purport to create rights. To the contrary, for freedom of choice, the freedom is to choose *between* state-qualified providers, not independently to choose who is qualified.

Here, the statute neither focuses on the individual protected nor explicitly entitles PPSAT to *anything,* monetary or otherwise. Even recipients like Edwards cannot enforce indirect benefits like her choice of providers, *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 786-88 (1980). Under *Sandoval* and *Gonzaga*, such group-based *benefits* and *systemic* requirements do not create *rights.* Given those differences with *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502, 522-23 (1990), and *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 191 (2023) (*i.e.*, § 1396a(a)(23)'s not explicitly conferring benefits on PPSAT and its conferring only indirect benefits on Medicaid patients), nothing justifies finding rights-

creating language in Medicaid's any-qualified-provider clause.[5]

Significantly, Medicaid's any-qualified-provider clause—indeed, Medicaid generally—lacks a savings clause like the one present and dispositive in *Talevski*. *See* 42 U.S.C. § 1396r(h)(8) (preserving state and federal remedies beyond the enforcement regime in 42 U.S.C. § 1396r(h)). In the only other Spending Clause legislation found privately enforceable, outside the fund-termination remedy, the statutes used clear "no-person-shall" language. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 (1979) (citing 20 U.S.C. § 1681(a)). Even there, the Court disavowed inferring new private rights of action as readily, going forward: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink." *Sandoval*, 532 U.S. at 287. Nothing here warrants walking back the Court's requirement that Congress make private rights of action manifestly clear, particularly for Spending Clause legislation and State recipients. *See* Sections I.A (clear-statement rule), I.B (sovereign immunity), *supra*. PPSAT's claim to have a privately enforceable right is meritless.

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[5] Although *Wilder* held that Medicaid's Boren Amendment constituted rights-creating language enabling the *Wilder* plaintiffs to avoid Medicaid's enforcement remedies, *Gonzaga*—consistent with *Sandoval*—narrowed *Wilder* by mooring it to its facts, including that the "statutory provisions explicitly conferred specific monetary entitlements upon the plaintiffs." *Gonzaga,* 536 U.S. at 274.

2. South Carolina has not violated the any-qualified-provider clause.

In addition to the any-qualified-provider clause's not creating a right enforceable under either Article III or § 1983, that clause also does not create a metric that a State can violate in the way that PPSAT alleges here:

- Eligible individuals can obtain service from any entity or person qualified to perform the service. 42 U.S.C. § 1396a(a)(23); *O'Bannon*, 447 U.S. at 785 ("§ 1396a (a)(23) … gives recipients the right to choose among a range of *qualified* providers, without government interference") (emphasis in original).
- States can adopt state-law qualifications beyond HHS's qualifications. 42 U.S.C. § 1396a(p)(1);[6] 42 C.F.R. § 1002.3(b) (quoted *supra*).
- HHS may—after notice and an opportunity to be heard—end or curtail a State's Medicaid funding if the State's Medicaid plan no longer complies with 42 U.S.C. § 1396a or is administered in a manner that fails *to comply substantially* with the provisions of 42 U.S.C. § 1396a. *See* 42 U.S.C. § 1396c.

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[6] "*In addition to any other authority,* a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title." *Id.* (emphasis added).

Two issues flow from this statutory scheme that are not present in the few Spending Clause provisions where this Court has found free-standing rights.

First, Medicaid expressly allows States to limit Medicaid providers to *qualified* persons and entities, recognizing States' right to exclude entities based on state-law criteria beyond the bases on which HHS may exclude persons or entities. Where a State lawfully disqualifies a person or entity, the State does not violate the any-qualified-provider clause.

Second, Medicaid *allows* States the option to elect to field a non-compliant Medicaid program, leaving to HHS the decision whether to curtail or eliminate the State's Medicaid funding. This is the nature of the Medicaid contract that the States and HHS entered. An alleged breach of that contract simply does not necessarily "violate" federal law if HHS nonetheless deems the State to comply *substantially* with the relevant provisions.

3. PPSAT and Edwards suffer a form of generalized grievance.

On top of their other Article III failings, PPSAT's claims are a health-care variant of the generalized educational grievance in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612-17 (1989). South Carolina's Medicaid program meets the needs of beneficiaries, but not in the manner that PPSAT prefers. Moreover, given the State's discretion to set state-law qualifications and chance that South Carolina's plan *substantially* complies with Medicaid's requirements, any injury PPSAT feels might not—indeed, *does not*—suffice to be actionable. As in *Kadish*, Article III does not allow

aggregating claims that individually are too remote or speculative on their own. *Kadish*, 490 U.S. at 615-16.

B. <u>As incidental beneficiaries, PPSAT and Edwards lack standing.</u>

There are two types of third-party beneficiaries, incidental ones and intended ones:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 302; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 238 n.96 (1988). Under Restatement § 302(1)(b), if circumstances show that Congress intended to give recipients the right to sue for specific performance, then they are intended beneficiaries; otherwise, they are incidental beneficiaries.

At least as applied to Medicaid's any-qualified-provider clause, Medicaid recipients like Edwards are merely incidental beneficiaries for picking qualified providers to participate in their State's Medicaid plan.

See 42 U.S.C. § 1396a(p)(1); 42 C.F.R. § 1002.3(b). The canons of statutory construction demand that result. *See* Sections I.A (clear-statement rule), I.C (presumption against preemption). Medicaid gives States no notice that beneficiaries can sue to override state qualification determinations outside providers' intra-Medicaid process for resolving those issues. Instead, Medicaid expressly *preserves* the States' state-law qualification authority and gives beneficiaries no role in it. PPSAT's view is sufficiently frivolous for the Court to reject at the threshold standing inquiry. Indeed, this Court already found that recipients lack a right to enforce indirect benefits like the choice of a provider deemed unqualified. *O'Bannon*, 447 U.S. at 786-88 (distinguishing direct benefits like financial assistance and indirect benefits like freedom of choice and finding only direct benefits protected by the Due Process Clause).

If they are not intended beneficiaries *vis-à-vis* the any-qualified-provider clause, PPSAT and Edwards lack both a right to enforce and standing to sue. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 118-20 (2008) (calling intended beneficiaries "direct third-party beneficiaries"); *Touchberry v. City of Florence*, 295 S.C. 47, 48-49 (1988) (same); *TCX, Inc. v. Commonwealth Land Title Insurance Co.*, 928 F.Supp. 618 (D.S.C. 1995); *accord*, *e.g.*, *Garcia v. Truck Insurance Exchange*, 36 Cal.3d 426, 436-37 (1984); *United States v. Andreas*, 216 F.3d 645, 664 (7th Cir. 2000) (those "not parties or third-party beneficiaries … do not have standing to enforce the terms of [an] agreement); *Guy v. Leiderbach*, 459 A.2d 744, 750-52 (Pa. 1983); *Joseph v. Hospital Service*

Dist. No. 2, 939 So.2d 1206, 1213 (La. 2006); *OEC-Diasonics, Inc. v. Major*, 674 N.E.2d 1312, 1314-15 (Ind. 1996) ("intent of the contracting parties to bestow rights upon a third party must affirmatively appear from the language of the instrument when properly interpreted and construed") (internal quotation marks omitted); *Grigerik v. Sharpe*, 247 Conn. 293, 317-18 (1998) ("the fact that a person is a foreseeable beneficiary of a contract is not sufficient for him to claim rights as a third party beneficiary"); *cf. Gart v. Cole*, 263 F.2d 244, 250-51 (2d Cir. 1959) (individual landowners and tenants lack standing to enforce sponsorship agreements under the Housing Act, which are designed to benefit the public at large).

C. Even if they are intended beneficiaries, PPSAT and Edwards lack standing to enforce a non-vested HHS right.

Although the clear-statement rule, presumption against preemption, and *O'Bannon* make recipients incidental beneficiaries without enforceable rights, recipients would lack standing on the facts here, even assuming *arguendo* that they were "direct third-party beneficiaries" (*i.e.*, intended beneficiaries).

As indicated, courts analogize Spending-Clause programs to contracts struck between the federal government and recipients, with the public as third-party beneficiaries. *Gorman*, 536 U.S. at 186. When a statute defines obligations, courts read the *whole* statute to understand the parties' bargain. *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 59 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Because not even HHS could bring this action as the

promisee, PPSAT cannot bring this action as an alleged beneficiary.

Third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 375 (1990); *Holbrook v. Pitt*, 643 F.2d 1261, 1273 n.24 (7th Cir. 1981) ("tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts"); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 318 (5th Cir. 1991) ("[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee's] rights"). Here, not even HHS could enforce Medicaid to compel South Carolina to provide funding to PPSAT. *What agencies cannot do directly, plaintiffs cannot do indirectly as third-party-beneficiaries.*

1. <u>Medicaid's conditions precedent to enforcement remain unmet.</u>

Under the terms of South Carolina's Medicaid contract, funding termination or curtailment are the only remedies, after notice and an opportunity *from HHS*. *See* 42 U.S.C. § 1396c. Even under that process, South Carolina might avoid repercussions for less than full compliance if HHS found the State to have substantially complied with Medicaid requirements. *Id.* None of these conditions precedent have been met.

2. <u>Neither promisees nor third-party beneficiaries can "cherry pick" the portions of a promise to enforce.</u>

As indicated, courts analogize Spending-Clause programs to contracts entered between the government and recipients, with the public as third-party beneficiaries. *Gorman,* 536 U.S. at 186. When a

statutory scheme under the Spending Clause defines recipients' obligations, the *entire* scheme constitutes the bargain that the United States (or its agencies or any third-party beneficiaries) can enforce. *Thompson v. Goetzmann*, 337 F.3d 489, 501 (5th Cir. 2003) ("litigants cannot cherry-pick particular phrases out of statutory schemes simply to justify an exceptionally broad—and favorable—interpretation of a statute"); *cf. Brown & Williamson*, 529 U.S. at 133. Because not even HHS could bring this action as the promisee, *Kingman v. Nationwide Mut. Ins. Co.*, 243 S.C. 405, 412 (1964) (third-party beneficiaries' "rights depend upon and are measured by the terms of the contract"); *accord*, *e.g.*, *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992) ("[a] condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation"), PPSAT and Edwards cannot bring this action as alleged beneficiaries.

Under "traditional principles of contract interpretation," third-party beneficiaries cannot "cherry-pick" the regulatory provisions that they wish to enforce. *Ingalls Shipbuilding v. Fed'l Ins. Co.*, 410 F.3d 214, 223 (5th Cir. 2005); *In re United Airlines, Inc.*, 368 F.3d 720, 725 (7th Cir. 2004) ("[d]ebtors in bankruptcy can't cherry-pick favorable features of a contract to be assumed") *Goetzmann*, 337 F.3d at 501 (quoted *supra*). Moreover, third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]." *Rawson*, 495 U.S. at 375; *Avatar Exploration*, 933 F.2d at 318; *Waggoner v. Herring-Showers Lumber Co.*, 40 S.W.2d 1, 4 (Tex. 1931) ("beneficiaries for whose advantage the contract was made could not acquire a better standing to enforce

such contract than that occupied by the contracting parties themselves"). Put differently, "the contract … is the measure of the third party's rights." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 467 (1960). Here, not even HHS could *compel* South Carolina to provide Medicaid funding to PPSAT. *What agencies cannot do directly, plaintiffs cannot do indirectly as third-party beneficiaries.*

3. **HHS and third-party beneficiaries cannot enforce non-vested rights.**

Unmet conditions precedent to an enforcement action can implicate both constitutional standing under Rule 12(b)(1) and statutory standing under Rule 12(b)(6). *Compare*, *e.g.*, *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 822-24 (9th Cir. 1985) *with Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 540 & n.15 (5th Cir. 2004). But even if lack of the conditions precedent implicated only Rule 12(b)(6) *for federal agencies,* it nonetheless implicates jurisdiction for third-party beneficiaries.

South Carolina requires Article III standing when statutes do not confer statutory standing. *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 210-11 (2020). "Statutory standing exists … when a statute confers a right to sue on a party," which requires interpreting the statute. *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317-18 (2013). "All the authorities agree that conditions precedent must be strictly construed, and that nothing vests until the thing happens, whether it be possible or impossible, legal or illegal, or in

conformity to public policy or against it." *Magee v. O'Neill*, 19 S.C. 170, 181-82 (1883).

All conditions must be satisfied before the contract can be enforced. *Alexander's Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582, 595 (2010). Moreover, the conditions precedent are essential: "Compliance with these conditions, specifically attached to the right, constitutes an essential element of the cause of action, and partakes of the subject-matter." *Am. Agric. Chem. Co. v. Thomas*, 206 S.C. 355, 360 (1945); *McGill v. Moore*, 381 S.C. 179, 185-88 (2009); *accord*, *e.g.*, *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011); *Continental Oil Co. v. Lane Wood & Co.*, 443 S.W.2d 698, 702 (Tex. 1969) (a right cannot vest when conditions precedent remain unmet); *In re Marriage of Bouquet*, 16 Cal.3d 583, 591 n.7 (1976) ("vested right" is one "not subject to a condition precedent"); *Chen v. Chen*, 586 Pa. 297, 311-13 (2006); *State ex rel. Roberts v. Public Finance Co.*, 294 Or. 713, 718 (1983) ("rights only vest when [the plaintiff] has satisfied all conditions precedent") (internal quotation marks omitted); *OEC-Diasonics*, 674 N.E.2d at 1314-15 (Ind. 1996); *Connecticut State Medical Soc. v. Oxford Health Plans (CT), Inc.*, 272 Conn. 469, 476-78 (2005); M.C.L.A. § 600.1405(2)(a) ("[t]he rights … shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject"). This Court should find PPSAT to lack standing while the conditions precedent to enforcing alleged Medicaid violations remain unmet.

Although this Court's "normal role is to interpret law created by others and not to prescribe what [the law] shall be," *Danforth v. Minnesota*, 552 U.S. 264, 290 (2008) (internal quotation marks omitted), "this Court has ultimate authority to determine and declare" the federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). If federal common law applied, the result would be the same. *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120, 123-24 (5th Cir. 1987); *Palma v. Verex Assur., Inc.*, 79 F.3d 1453, 1458 (5th Cir. 1996); *Karo*, 762 F.2d at 822-24; *Peabody v. Weider Publications, Inc.*, 260 Fed.Appx. 380, 383 (2d Cir. 2008) ("[b]ecause the condition precedent never came to fruition, Peabody's rights … never vested") (non-precedential summary order); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 592 (6th Cir. 1992). Without the conditions precedent to Medicaid enforcement, PPSAT lacks a legally protected interest and thus lacks standing. Significantly, *plaintiffs* always bear the burden of proving jurisdiction, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009), and a claim's non-vested nature undermines standing to bring that claim.

To the extent other courts have assumed jurisdiction without addressing this issue, "drive-by jurisdictional rulings" that reach merits issues without considering a particular jurisdictional issue "have no precedential effect" on that jurisdictional issue. *Steel Co.*, 523 U.S. at 94-95; *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("cases [cited by Plaintiffs] cannot be read as foreclosing an argument that they never dealt with"). State law may have differed, or the parties there may have simply not raised these issues.

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (internal quotation marks omitted). Courts that never *considered* a jurisdictional issue plainly never *decided* it.

D. <u>PPSAT lacks standing to litigate HHS's alleged injuries.</u>

It is, of course, "axiomatic" that a "litigant first must clearly demonstrate that [it] has suffered an injury in fact in order to assert Article III standing to sue." *Wyoming v. Oklahoma*, 502 U.S. 437, 465 (1992) (internal quotation marks omitted). Because plaintiffs bear the burden of establishing their standing, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). As explained in the next section, the Providers lack standing under Medicaid.

Significantly, PPSAT lacks standing to litigate HHS's injuries. A plaintiff can assert the rights of absent third parties only if the plaintiff itself has constitutional standing, the plaintiff and the absent third parties have a "close" relationship, and a sufficient "hindrance" keeps the absent third party from protecting its own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). Even assuming *arguendo* that PPSAT could establish constitutional standing on its own, PPSAT would fail the second and third prongs of the test for litigating HHS's injuries: (a) PPSAT lacks the requisite close relationship with

the federal government, and (b) nothing hinders HHS from eventually proceeding against South Carolina if PPSAT is correct on the merits.

III. EVEN IF IT HAS STANDING, PPSAT LACKS A CAUSE OF ACTION.

At the outset, it is undisputed that Medicaid does not provide a private right of action for recipients to enforce Medicaid's perceived requirements. *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 456 (7th Cir. 2007). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman*, 536 U.S. at 186. Medicaid says nothing about private causes of action:

> "The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity."

Astra USA, Inc. v. Santa Clara County, Cal., 563 U.S. 110, 118 (2011) (quoting 9 J. Murray, Corbin on Contracts § 45.6, p. 92 (rev. ed. 2007)). Instead, PPSAT proposes to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra*, 563 U.S. at 120. The states never agreed to that as part of Medicaid, and federal law does not allow it.

In general, a plaintiff without a statutory right of action who seeks to enforce federal law against a conflicting state law can consider two alternate paths, 42 U.S.C. § 1983 and the *Young* exception to sovereign immunity:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte*

> *Young*, established the modern framework for federal protection of constitutional rights from state interference.

Perez v. Ledesma, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. § 1331. *Id.* Neither of these avenues is open to PPSAT under Medicaid.[7]

A. PPSAT has no cause of action under § 1983.

Assuming *arguendo* that the Court takes PPSAT's merits views for purposes of standing, *Warth*, 422 U.S. at 500; *City of Waukesha*, 320 F.3d at 235, PPSAT nonetheless lacks a right to enforce on the merits.

At the outset, PPSAT lacks a cause of action under § 1983 because South Carolina has not violated federal law. *See* Section II.A.2, *supra*; 42 U.S.C. § 1983 (requiring "deprivation of any rights, privileges, or immunities secured by the Constitution and laws"). Where it applies, "§ 1983 permits the enforcement of '*rights*, not the broader or vaguer 'benefits' or 'interests.'" *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-20 (2005) (*quoting Gonzaga*, 536 U.S. at 283 (emphasis in *Gonzaga*)). As such, "[i]n order to seek redress through § 1983, ... a plaintiff must assert the violation of a federal *right*,

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[7] Although the Question Presented focuses only on an action under § 1983, the Court can reach the lack of an action under *Young* in framing the remand, given that the rationales are the same for denying both forms of action.

not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 337, 340 (1997) (emphasis in original). PPSAT has no such right.

To meet this test, § 1983 plaintiffs must establish an enforceable federal right under a three-part test: (1) Congress must have intended the provision in question to benefit the plaintiff; (2) the alleged right is not so "vague and amorphous" that enforcing it would "strain judicial competence;" and (3) the rights-creating provision is stated in mandatory, rather than precatory, terms. *Blessing*, 520 U.S. at 340-41. PPSAT cannot establish any of these three prerequisites for enforcing Medicaid under § 1983.

First, Congress could not have intended the any-qualified-provider clause to benefit PPSAT itself because PPSAT is not a Medicaid beneficiary and Medicaid allows States to adopt a Medicaid non-compliant program, hampered only by the potential to lose some or even all Medicaid funding. 42 U.S.C. § 1396c. Indeed, § 1396a(a) itself regulates *States* on the content of their Medicaid plans, not on the services (or rights) that third-party beneficiaries must receive: Again, a "focus on the person regulated rather than the individuals protected" does not imply creating a right. *Sandoval*, 532 U.S. at 289 (*quoting Sierra Club*, 451 U.S. at 294); *accord Gonzaga*, 536 U.S. at 286 (applying the *Sandoval* reasoning to § 1983 actions). "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Sierra Club*, 451 U.S. at 294. PPSAT cannot meet that test.

Unlike in *Wilder*, *see* note 5, *supra*, the statute neither focuses on the individual protected nor

explicitly entitles PPSAT or Edwards to the right they claim to substitute their judgment about provider qualifications for South Carolina's. *O'Bannon*, 447 U.S. at 786-88. Under *Sandoval* and *Gonzaga*, these group-based *benefits* and *systemic* requirements do not support un action under § 1983. *See* Section II.A.1, *supra*. Given those differences with *Wilder* (*i.e.*, § 1396a(a)(23)'s not explicitly conferring benefits on PPSAT and its conferring only indirect benefits on Medicaid patients), nothing authorizes § 1983's circumventing Medicaid's exclusive review procedures and remedies. *Rancho Palos Verdes*, 544 U.S. at 122-23.

Second, the only Medicaid remedies that States agreed to under the Spending Clause and Medicaid are fund termination and fund curtailment, after an HHS administrative process. 42 U.S.C. § 1396c. Under the circumstances, it would indeed "strain judicial competence" either to interfere in or to circumvent that administrative process. In addition to the second *Blessing* criterion, this Court also could rely on the doctrines of non-justiciable political questions or the primary jurisdiction of a federal agency to reject PPSAT's claims.

Third, and notwithstanding that § 1396a(a) uses the word "must," § 1396a(a)(23) is not mandatory in the way that the *Blessing* test uses the term. The answer to Medicaid's critical "*or what?*" question is not sufficiently concrete for § 1396a(a) to qualify as mandatory for purposes of creating a federal right. Assuming *arguendo* that South Carolina's policies conflict with § 1396a(a)(23), South Carolina's Medicaid plan could be noncompliant, and HHS could

terminate or curtail the State's Medicaid funding, but only if the noncompliance was sufficiently substantial. 42 U.S.C. § 1396c. Because not even HHS could compel South Carolina to comply with § 1396a(a)(23), that provision cannot be considered "mandatory" for purposes of creating an individual right to specific enforcement of that provision.

In summary, neither PPSAT nor Edwards has a right under the any-qualified-provider clause to decide who is qualified to participate as a provider in their State's Medicaid plan. Accordingly, even if South Carolina had violated Medicaid—which it has not, *see* Section II.A.2, *supra*—PPSAT and Edwards could not bring this suit under § 1983.

B. PPSAT has no cause of action under *Young*.

Occasionally, "[i]t is not necessary … to determine whether the" federal statute "create[s] rights enforceable under § 1983" because a court's general jurisdiction suffices to enter injunctive relief under *Young*. *Illinois Ass'n of Mortg. Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010). As explained in this section, a *Young* action would fail for some of the same reasons that a § 1983 action fails.

Although actions under *Young* and actions under § 1983 can result in similar injunctive relief, the two forms of action differ in several ways:

- A *Young* action requires an *ongoing* violation of federal law, *Mansour*, 474 U.S. at 66-67, and thus cannot evade mootness with the potential for monetary damages.

- Unlike § 1983 actions' requirement for violations of federal *rights*, *Young* requires only a violation of federal *law*. *Compare Blessing*, 520 U.S. at 340 ("plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*") (emphasis in original) *with Verizon*, 535 U.S. at 645.
- Whereas § 1983 actions qualify for an attorney-fee award, *Young* actions generally do not. 42 U.S.C. § 1988(b).

In short, the two overlapping actions are distinct, but this Court can consider *Young* as implicit in the Question Presented.

As explained in Section II.A.2, *supra*, PPSAT lacks an ongoing violation of federal law sufficient to trigger the *Young* exception to sovereign immunity. Simply put, South Carolina's actions here represent an entirely permissible exercise of South Carolina's sovereignty, regardless of whether HHS elects to eliminate or curtail Medicaid funding. As such, South Carolina's sovereign immunity bars this action under *Young* every bit as much as it bars this action under § 1983.

CONCLUSION

This Court should reverse the Fourth Circuit's decision—either because PPSAT lacks standing or because it lacks a cause of action---and remand with instructions to dismiss this action.

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Respectfully submitted,

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