No. 23-1275

IN THE

Supreme Court of the United States

EUNICE MEDINA, INTERIM DIRECTOR,
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

States possess the inherent sovereign authority to decide with whom they will contract. When Congress passed the Medicaid Act, it neither said nor suggested that federal courts, not the State itself, would decide which entities were qualified to provide healthcare in that State. Despite that, the Court of Appeals for the Fourth Circuit appointed itself arbiter of healthcare qualifications and forced South Carolina's hand by requiring it to subsidize Planned Parenthood with taxpayer money.

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1. Rule 37 statement: No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

Congress did not grant the courts that role. Indeed, Congress labored to preserve each state's sovereign discretion. The Medicaid Act does not confer an individual right enforceable in federal court—nor could it do so consistent with our Constitution. The Fourth Circuit's opinion strays so far from the constitutional order because of a faulty foundation. This case should prompt an originalist examination of the underlying constitutional principles at issue and the Court should return its jurisprudence to solid ground once and for all.

Although this case is postured as a Spending Clause case, the Court should begin with an examination of the General Welfare Clause. The former only exists because of a twisted reading of the latter. The Court's jurisprudence will not align with the text, history, and tradition of the Constitution until the Court re-examines the General Welfare Clause itself. Tweaking Spending Clause jurisprudence year after year merely repaints a constitutional façade that is built upon a rotting foundation. Current precedent is badly out of step with the original public meaning of the clause, as well as its history and tradition, and even its plain text. For too long, this misreading of the General Welfare Clause has created spending powers divorced from Congress's enumerated legislative powers. That invention is as atextual as it is ahistorical. Because an accurate reading of the General Welfare Clause would resolve this case, the Court should carefully re-examine its existing jurisprudence. Existing precedent in this area is "egregiously wrong," and "on a collision course with the Constitution from the day it was decided . . . ." *Cf. Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022). The sooner it is corrected, the better.

In the alternative, the Medicaid Act is too ambiguous to have created an individual right enforceable under § 1983. A long tradition of cases has clarified that enactments pursuant to the spending power, like the Medicaid Act, must provide clear and unambiguous notice to the recipient state of its obligations. That is not so here for two reasons. First, the effect of the Fourth Circuit's reading of the Act is to transform Medicaid from a state-run system to one where the State can no longer exclude participants without federal court say-so. And second, even if the Act does provide clear notice that it is creating an enforceable right, the contours and effect of that right are anything but clear. The recipient state must actually know what it is agreeing to. That could not occur here.

In either case, this Court should reverse the decision of the Fourth Circuit.

ARGUMENT

I. The Court Should Revisit Its Spending Clause Jurisprudence.

This Court's jurisprudence has for centuries misread the General Welfare Clause to create a spending power. That misreading has been dubbed the Spending Clause. No such clause exists: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]" U.S. Const. Art. 1, § 8, cl. 1. The text itself is clear that the second portion of the clause is a limitation on Congress's power to tax—not a separate

power to spend. This Court's jurisprudence has strayed far afield from the original meaning.

The Court, in recent years, has faithfully worked to correct its jurisprudence to reflect the Constitution's original public meaning by analyzing its text and history. *See, e.g.*, *N.Y. State Rifle & Piston Ass'n v. Bruen*, 597 U.S. 1, 22, 24 (2022) (interpreting Second Amendment based on "constitutional text and history"); *Dobbs*, 597 U.S. at 240; *Town of Greece v. Galloway*, 572 U.S. 565, 578–79 (2014); *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."). This work has employed "[a]n analysis focused on original meaning and history" as the "rule," not the "exception," to better enforce constitutional provisions as understood by those who enacted them. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022). This case presents an opportunity to continue that work and restore the original meaning of the General Welfare Clause.

Originalism posits that the meaning of terms is fixed at the time of ratification. Lawrence Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 1–2 (2015). It ensures respect for "the consent of the governed with which the actions of the governors must be squared." Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decision: the Law of the Constitution*, 61 Tul. L. Rev. 979, 986 (1987). It excludes the notion that meaning changes over time because a democratic society "does not, by and large, need constitutional guarantees to ensure that its laws will reflect 'current values.'" Antonin Scalia,

Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862 (1989). Originalism, therefore, "follows inexorably" from our commitment to a written constitution. Randy Barnett, *An Originalism for Nonoriginalists*, 45 Loy. U. L. Rev. 611, 636 (1999).

This contrasts with living constitutionalism, or "the doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, Black's Law Dictionary (Westlaw 12th ed. 2024). Living constitutionalism "allow[s] judges to adopt novel constitutional constructions in response to changing values and circumstance." Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 451 (2023). Originalists maintain that living constitutionalists (1) subvert the rule of law by permitting judges to make constitutional rulings based on their subjective beliefs instead of the fixed meaning of the text; (2) undermine the separation of powers by empowering judges to make and apply constitutional law instead of effecting the meaning of the constitutional text and preexisting legal rules; and (3) undermine popular sovereignty by elevating the authority of judges over the people's will as expressed through enacting supermajorities or constitutional conventions. *Id.* at 479–80.

This Court was presented with an opportunity to revisit its General Welfare Clause jurisprudence with an originalist eye in *Health & Hospital Corporation of Marion County v. Talevski*. *See* 599 U.S. 166, 177–80 (2023). The majority explained then that "something more than ambiguous historical evidence is required

before we will flatly overrule a number of major decisions of this Court." *Id.* at 179 (quotation marks omitted). Yet a thorough review of the evidence shows anything but ambiguity because both the text and historical record support only one conclusion: there is no Spending Clause, and Congress's power to spend is a component of the necessary and proper exercise of its enumerated powers. The evidence unambiguously shows that the Constitution limits Congress's authority to spend to its enumerated powers. Congress does not possess an indiscriminate power to spend in the name of "general Welfare," disconnected from its enumerated powers.

Justice Thomas highlighted that evidence in his *Talevski* dissent. *Id.* at 206 (Thomas, J., dissenting). And although he was alone in his dissent, his views on the topic find many allies in the scholarship. *See, e.g.*, Philip Hamburger, Purchasing Submission 76 (2021); Jeffrey T. Renz, *What Spending Clause? – (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 John Marshall L. Rev. 81 (1999); David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. Rev. 496 (2007); Robert Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 Kan. L. Rev. 1, 23–29 (2003). There is a remarkable consensus that the clause limits the taxing power rather than creates an independent power to spend. That consensus comes from not only the text itself, but also the historical record.

One compelling anecdote is that of Gouverneur Morris's attempt to shift the meaning of the clause as part

of the Constitutional Convention's Committee of Style. Gouverneur Morris was one proponent of giving Congress a general legislative power. He was not alone. In fact, proposals to include a general legislative power failed no less than five separate times during the Convention. *See* Renz, 33 John Marshall L. Rev. at 104–05 (recounting five rejected attempts "to insert a grant of general legislative power into the Constitution").

After these many failed (and well-documented) attempts to introduce a general legislative spending power openly, Gouverneur Morris attempted to sneak the power into the Constitution. *Id.* at 105. He replaced the comma after "Excises" with a semicolon, altering the meaning of the clause to create two separate powers rather than one limited and conjoined power. *See Talevski*, 599 U.S. at 208 n.23 (Thomas, J., dissenting) (recounting this anecdote). Replacing the comma with a semicolon created a new clause with a standalone power to spend: the power "to pay the Debts and provide for the common Defence and general Welfare of the United States." *See* U.S. Const. Art. 1, § 8, cl. 1. "The Convention, however, recognized the alteration and restored the comma, 'corroborat[ing] the conclusion that the General Welfare Clause was not an independent power.'" *Talevski*, 599 U.S. at 208 n.23 (Thomas, J., dissenting) (quoting Natelson, 52 Kan. L. Rev. at 28).

And the evidence from the Convention does not stand alone. Accounts of the time provide further corroboration. As Federalist advocates went out to defend the General Welfare Clause to the public, "their basic message was that the language in question was not a grant at all—rather it was a restriction on federal authority."

Natelson, 52 Kan. L. Rev. at 39; *see also, e.g.*, 3 Debates on the Constitution 207 (J. Elliot ed. 1876) (E. Randolph, Virginia Convention) ("The plain and obvious meaning of this is, that no more duties, taxes, imposts, and excises, shall be laid, than are sufficient to pay the debts, and provide for the common defence and general welfare, of the United States . . . ."); Noah Webster, An Examination Into the Leading Principles of the Federal Constitution, in Pamphlets on the Constitution of the United States 50 (P. Ford ed. 1888).

What this demonstrates is that the General Welfare Clause is not an independent source of federal power, but a limitation on the taxing power. Although Congress can tax, it can only do so for the three listed purposes—debts, defense, and general welfare. That does not mean that Congress is empowered to spend on anything it deems in the "general Welfare." Rather, it limits Congress's use of the taxing power to pay for only those uses of its enumerated powers that serve "the common Defence and general Welfare . . . ." U.S. Const. Art. 1, § 8, cl. 1.

Few said it with more vigor than did Madison in Federalist 41:

> Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every

> power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

The Federalist No. 41, at 262 (C. Rossiter ed. 1961). Or, as Governor Randolph put it, "[y]ou must violate every rule of construction and common sense, if you sever it from the power of raising money, and annex it to anything else, in order to make it that formidable power which it is represented to be." 3 Debates on the Constitution 600. The original public meaning of the clause is in little doubt. That fact alone provides good reason to revise this Court's jurisprudence to accord with the Constitution.

Yet another reason exists in how the Court moved to the understanding common today. The change was hastily penned with cursory reasoning. After laying out the question, the Court explained that,

> We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

United States v. Butler, 297 U.S. 1, 65–66 (1936); *see also Talevski*, 599 U.S. at 211–19 (Thomas, J., dissenting) (providing the historical evolution of the meaning of the General Welfare Clause and discussing the transition from Jefferson and Hamilton's initial agreement that the clause provided no "independent font of legislative power" to the pre-*Butler* view that it permitted spending but no regulation).

Butler's reasoning is sharply out of alignment with the Court's jurisprudential focus on the text, history, and tradition of the Constitution. The Court should take this opportunity to align its precedent on the General Welfare Clause, and thus the ill-conceived doctrine of the "Spending Clause," with the text, history, and original public meaning of the Constitution.

II. The Medicaid Act Does Not Create a Right Even Under Existing Jurisprudence.

Revising this Court's jurisprudence would resolve the present controversy, and the Court should take the opportunity not to go further down the wrong path. However, even under existing precedent, the Medicaid Act is too ambiguous to have created a private right of action under § 1983.

The Medicaid Act is spending power legislation. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323 (2015). "The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Drawing on bedrock

contract principles, this Court held that the State must have clear notice of the condition. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

Spending enactments fail to provide clear notice when (1) the terms are altered from the original enactment or (2) as several circuit courts of appeals have held, the terms are unclear such that the State would not know its obligations. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 (2012) (*NFIB*); *Kentucky v. Yellen*, 67 F.4th 325, 346 (6th Cir. 2023); *West Virginia v. U.S. Dept. of the Treasury*, 59 F.4th 1124, 1144–46 (11th Cir. 2023). In short, "unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (internal quotation marks omitted). This Court explained in *Talevski* that this is a firm test. 599 U.S. at 175. The Medicaid Act fails to provide clear notice of Congress's unambiguous intent to confer an individual right enforceable under § 1983 via the Act's any-qualified-provider provision. *See* 42 U.S.C. § 1396a(a)(23).

NFIB illustrates well the first way a statute can lack clear notice. 567 U.S. at 583. The Court squarely rejected the idea that the federal power to compel states using the spending power was unlimited. *Id.* It was critical of the Affordable Care Act's (ACA's) expansion of the Medicaid Act because it was "a shift in kind, not merely degree." *Id.* The ACA "transformed" Medicaid from a program to help "the needy: the disabled, the blind, the elderly, and needy families with dependent children . . . into a program to meet the health care needs of the entire nonelderly population . . . ." *Id.* The Medicaid Act's lone clause that

reserved Congress's right to "alter" or "amend" the Act did not provide notice of this complete transformation. *Id.* at 584. The upshot is simple: states must be aware at the outset what obligations they are accepting.

Recent cases at the circuit level under the American Rescue Plan Act (ARPA) illustrate the second point: the State must be able to read the terms and actually know its obligations. *See Kentucky*, 67 F.4th at 346; *West Virginia*, 59 F.4th at 1144–46. ARPA gave $200 billion to states with a significant string attached—the "offset provision." *Kentucky*, 67 F.4th at 328. That provision prohibited states that received ARPA funds from using them to "directly or indirectly offset a reduction in the[ir] net tax revenue . . . resulting from" tax cuts. *Id.* The Sixth Circuit held that the condition *itself* was clear at the outset, but the obligations it imposed were not. *Id.* at 346–48. The question was not whether the State knew there was a condition; it was whether the condition was stated in clear enough language for the State to know what it had really signed up for. *Id.* at 346. In other words, the problem was that "what this language actually obliges the States to do is difficult to say." *Id.* at 348. *West Virginia* tells the same story and reaches a similar conclusion, as do cases in other circuits. *See, e.g.*, 59 F.4th at 1144–46; *Texas v. Yellen*, 105 F.4th 755 (5th Cir. 2024).

The Medicaid Act's any-qualified-provider provision fails to provide either kind of clear notice that it is creating a right enforceable under § 1983. First, the Medicaid Act sets up a system where the recipient state decides what providers are "qualified." Critically, the Act does not define "qualified." It reserves to recipient states the authority to exclude providers for the same reasons the Secretary of

Health and Human Services can exclude providers from Medicare. *See* 42 U.S.C. § 1396a(p)(1). And this authority to exclude is in addition to the recipient state's inherent, retained authority to decide which entities to contract with. *See id.*

The Medicaid Act offered a bargain in which the recipient state decides what providers it will work with. Interpreting the bargain as the Fourth Circuit did and allowing courts, not the States, to decide what providers are qualified is not a minor shift in terms—it is a transformation. The Medicaid Act promised a state-operated system where the recipient states retain their sovereignty to decide with whom to contract. Interpreting the any-qualified-provider provision to confer an individual and enforceable right is directly contrary to the bargain struck. As in *NFIB*, the bargain may be altered, not transformed, and this would effect a radical transformation.

Second, even if the Act did provide clear notice that it was creating an individual and enforceable right, the effect of that right is as clear as mud. The Act itself provides no definition of "qualified." The original Fourth Circuit opinion in this case held that to mean that it "bars states from excluding providers for reasons unrelated to professional competency." *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 691 (4th Cir. 2019) (subsequent procedural history omitted). Yet it is unclear how the State, when considering the bargain, would have come to that conclusion independently. States are sovereign entities with myriad interests to protect. This Court should not assume that they gave away the right to decide which medical providers they subsidize through

the ambiguous language the Fourth Circuit seized upon. This Court should reverse the decision below.

CONCLUSION

This case presents another opportunity for the Court to reconsider an important component of its constitutional jurisprudence. It should do so.

Respectfully submitted,

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