NO. 23-1275

IN THE

Supreme Court of the United States

EUNICE MEDINA, in her official capacity as 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

REPLY BRIEF FOR THE PETITIONER

KELLY M. JOLLEY
ARIAIL B. KIRK
JOLLEY LAW GROUP, LLC
1320 Main Street
Suite 300
Columbia, SC 29201
(803) 830-6500

JOHN J. BURSCH
Counsel of Record
JAMES A. CAMPBELL
ERIN M. HAWLEY
CHRISTOPHER P. SCHANDEVEL
CAROLINE C. LINDSAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

Congress must use "clear rights-creating language" to confer a private right in a Spending Clause statute. *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, 599 U.S. 166, 186 (2023). Yet Respondents largely ignore the any-qualified-provider provision's lack of any such language—and they overlook other key textual indicators confirming that the provision does not create a private right:

- The provision never says "rights" or uses other rights-creating language. Pet.Br.20.
- Congress chose to use the word "right" in multiple other places in Section 1396a—but not in the any-qualified-provider provision. Pet.Br.22.
- That starkly contrasts with the FNHRA provisions in *Talevski*, which "reside in" a bill of patient "rights." Pet.Br.20, 23–26.
- The any-qualified-provider provision allows the regulated entities—states—to determine who is "qualified," which is inconsistent with rights-creating language. Pet.Br.21.
- The provision speaks of "obtain[ing]" a benefit from a third party. Pet.Br.21.
- FNHRA proves Congress knows how to grant a "*right* to choose a … physician." Pet.Br.25–26 (emphasis added).
- And the Secretary can fund a substantially compliant plan even if a state does *not* fully comply with the any-qualified-provider provision. Pet.Br.33–34.

In response, Respondents misread a list of plan contents as rights that a state "must" provide, Resp.Br.2 (misquoting Section 1396a(a)(23)(A)); mistakenly accuse Petitioner of using a "magic words" test, Resp.Br.3; and wrongly insist that because choosing a doctor is "deeply personal," it must be a right, Resp.Br.2. Desperate, they even rely on *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), and *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), Resp.Br.26, cases this Court limited in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), Pet.Br.45–52.

Respondents' policy arguments fare no better. Under their view, the Act lets federal judges usurp the Secretary's discretion, Pet.Br.42, allows beneficiaries to sue to restore 9,000 disqualified providers, Pet.Br.54, and disincentivizes decisions that states "believe to be in the public interest," *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 586 U.S. 1057, 1058 (2018) (Thomas, J., dissenting from denial of cert.). Respondents also would force states to comb legislative history to find out the terms of their Medicaid agreements. Resp.Br.29–33. That makes no sense.

There are myriad reasons to exclude Planned Parenthood as a Medicaid provider. Pet.Br.7–11. The nation's largest abortion provider directs hundreds of millions of dollars to pro-abortion politics instead of medical services, and it has a "conveyor belt" mentality that hurts women. Katie Benner, *Botched Care and Tired Staff: Planned Parenthood in Crisis*, The New York Times (Feb. 15, 2025), bit.ly/4iKa7oz. Section 1396a does not bar South Carolina's decision or force the State to defend it in a Section 1983 action with attorney-fee shifting. This Court should reverse.

ARGUMENT

I. The any-qualified-provider provision does not create a private right.

A. Respondents' approach eviscerates this Court's "high bar."

The any-qualified provider provision lacks "clear rights-creating language" to make this the "atypical" Spending Clause case. *Talevski*, 599 U.S. at 183, 186 (cleaned up). Respondents try to overcome that omission by reimagining the test. They insist the provision confers a right because it (1) "expressly refers to individual Medicaid recipients," and (2) uses "mandatory" language that "protects a very personal choice." Resp.Br.20. That's not enough.

1. Section 1396a references "individual(s)" more than 400 times, 46SCStateLegislators.Br.19, often in connection with benefits, Pet.Br.37–40. If that were enough to make a plan requirement rights-creating, *Gonzaga*'s high bar would drop to the floor. That would be especially unjustified here where (1) the Act's focus is on "the federal agency charged with approving state Medicaid plans," *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 331 (2015) (plurality); and (2) the Act sets up a substantial-compliance regime, 42 U.S.C. 1396c, suggesting an aggregate, not individual, focus, *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 373–74 (5th Cir. 2020) (Elrod, J., concurring). Absent clear rights-creating language, mentioning individuals does not manifest an intent to create a right. If it did, "many federal statutes" would clear *Gonzaga*'s bar. *Talevski*, 599 U.S. at 193 (Barrett, J., concurring).

Next, it is irrelevant that the alleged right is "very" "deeply," "intensely," "uniquely," and "inherently personal," or "important," "foundational," and "fundamental." Resp.Br.2, 4, 12–14, 19–21, 29, 31–33, 37. Those adjectives and "adverb[s] … simply [are] not part of the statutory language." *United States* v. *National Bank of Com.*, 472 U.S. 713, 730 n.14 (1985). And they can't substitute for clear rights-creating terms. Plaintiffs seeking rights in other provisions could just as easily say hearings are "fundamental," equal treatment is "foundational," timely provision of assistance is "important," and so on. Pet.Br.37–40 (discussing Section 1396a(a)(3), (10), and (34)).

2. "Mandatory" terms also are not enough. Respondents concede (as they must) that *Gonzaga* imposes a "*separate* requirement" of "*rights-creating* language." Resp.Br.38 (emphasis added); accord Pet.Br.19. And there is no rights-creating language in the any-qualified-provider provision. Pet.Br.20–36. "[T]he dearth of even synonyms for 'rights' in Section 1396a(a)(23) makes it harder to read the provision to unambiguously confer them." U.S.Br.25.

Respondents say Section 1396a's use of the word "must" makes this case like *Talevski*. Resp.Br.21–22. But they misread the statute. That reference is to what a *plan* "must" contain—and plan administration is subject to the substantial-compliance standard. Pet.Br.33–36. In contrast, the FNHRA provisions in *Talevski* plainly used rights-creating language and were nestled in a residents' bill of "rights." Those provisions—also part of the Medicaid Act—illustrate the atypical case where Congress intends to create private rights in a Spending Clause statute:

(c) Requirements relating to residents' rights

(1) General rights

(A) Specified rights

A nursing facility must protect and promote the rights of each resident, including each of the following rights:

(i) Free choice

The right to choose a personal attending physician ....

(ii) Free from restraints

The right to be free from ... restraints ....

(iii) Privacy

The right to privacy ....

(iv) Confidentiality

The right to confidentiality ....

(v) Accommodation of needs

The right (I) to reside and receive services with reasonable accommodation ..., and (II) to receive notice before the room or roommate ... is changed.

(vi) Grievances

The right to voice grievances ....

(vii) Participation in resident and family groups

The right ... to organize and participate in resident groups ... and the right of the resident's family to meet in the facility ....

(viii) Participation in other activities

The right of the resident to participate in social, religious, and community activities ....

(ix) Examination of survey results

The right to examine ... [a] survey of the facility ....

(x) Refusal of certain transfers

The right to refuse a transfer ....

(xi) Other rights

Any other right established by the Secretary.

* * *

(2) Transfer and discharge rights

* * *

(B) Pre-transfer and pre-discharge notice

[A "nursing facility must" notify, including providing "notice of the resident's right to appeal"]

Gonzaga also disproves Respondents' argument. FERPA protects "individual students and parents," binds the states, and is "couched in mandatory, rather than precatory, terms." *Gonzaga*, 536 U.S. at 295 (Stevens, J., dissenting) (cleaned up). FERPA even has the word "rights" in its title. *Id.* at 293, 296. Yet all that isn't enough because the Act's focus is on the Secretary of Education's authority to withhold funds. Pet.Br.28–30. If Respondents were right that using mandatory language and mentioning individuals sufficed, *Gonzaga* would have come out differently.

Section 1396a's "duty[-]creating language" also does not "focus[] on the benefited class." *Universities Rsch. Ass'n* v. *Coutu*, 450 U.S. 754, 772 n.23 (1981) (quoting *United States ex rel. Glynn* v. *Capeletti Bros.*, 621 F.2d 1309, 1314 (5th Cir. 1980)). "[T]he duty created by the statutory language," if any, "is imposed upon [states] to ensure that certain provisions are included" in their plans. *Ibid.* (quoting *Capeletti*, 621 F.2d at 1314). As a result, "under the specific language of the Act, the benefits flowing to [recipients] are derived indirectly and not as a result of any right conferred directly upon their class." *Capeletti*, 621 F.2d at 1314.

Respondents look to 1396a(a)(23)(B)—the family-planning provision—for help. Resp.Br.20–21. But the word "choice" does not "confer[] an individual right" absent rights-creating language. Resp.Br.21. And FNHRA's "Free choice" provision shows Congress can speak clearly on this: a "nursing facility must protect and promote the *rights* of each resident," including the "*right to choose* a personal attending physician." 42 U.S.C. 1396r(c)(1)(A)(i) (emphasis added). Congress did not use similar language in 1396a(a)(23)(B).

In sum, "[a]s *Talevski* illustrates, even within the Medicaid framework, Congress knows how to create individual rights." U.S.Br.26. In FNHRA, Congress "created a separate, separately subtitled provision focused expressly on rights." *Ibid.* "If Congress intended to single out the any-qualified-provider provision as the 'atypical case,' one would expect the statutory structure" and text "to reflect that choice, as in *Talevski*." *Id.* at 23. Instead, the provision "serves primarily to direct the Federal Government's distribution of public funds." *Id.* at 26 (cleaned up) (quoting *Talevski*, 599 U.S. at 183–84). Congress's decision to draft Section 1396a(a)(23)(A) without explicit rights-creating text and structure is dispositive. Pet.Br.26.

B. Respondents misstate Petitioner's arguments and fail to rebut them.

1. *Gonzaga*'s test doesn't require magic words—just rights-creating ones.

Petitioner's reading of *Gonzaga*'s test would require plaintiffs to identify language in a statute's operative text that (1) "mentions the word 'right' *or its functional equivalent*," or (2) has the same "deeply rooted, rights-creating pedigree" as the Fifth Amendment's "No person shall." Pet.Br.20, 23, 27 (emphasis added). Respondents demean this test as a "magic-words requirement." Resp.Br.3; accord *id.* at 13, 25–26, 28. Not true. The words Congress uses need not be talismanic. But they must be "clear," "unambiguous," and "explicit" in their "rights-creating terms." *Gonzaga*, 536 U.S. at 280, 284. That's not a magic-words test; it's a rights-creating-words test. And Respondents have not identified any such words in the any-qualified-provider provision.

Like any clear-statement rule, *Gonzaga* "sets a demanding bar," *Talevski*, 599 U.S. at 180, as even Respondents' cases prove, Resp.Br.25–26. "Congress must speak unequivocally." *Federal Aviation Admin.* v. *Cooper*, 566 U.S. 284, 299 (2012). And it must make its intent "unmistakably clear in the language of the statute." *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 49 (2024) (cleaned up). "[M]andatory language," "however emphatic," is not enough. *Henderson* v. *Shinseki*, 562 U.S. 428, 439 (2011) (cleaned up). Because "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced" under Section 1983, this Court has required clear "'rights-creating' language." *Gonzaga*, 536 U.S. at 283, 287. And Congress's choice not to use clear rights-creating language is dispositive.

2. *Wilder* and *Wright* do not save Respondents' case.

Respondents rely heavily on *Wilder* and *Wright*. Resp.Br.26, 28. The statutes in those cases "did not use the word 'right'" or its equivalent. *Ibid.* And rather than looking for rights-creating text, the cases relied heavily on legislative history, *Wilder*, 496 U.S. at 516–18, and regulations, *Wright*, 479 U.S. at 431. Those are *bugs* of those cases—not features.

That's why this Court has since disavowed the "relatively loose standard" courts gleaned from both cases, *Gonzaga*, 536 U.S. at 282. And it's why this Court has limited them to provisions that "explicitly confer[] specific monetary entitlements." *Id.* at 280, 288 n.6. If anything, the lack of clear rights-creating terms in both cases is a reason to overrule them. Pet.Br.45–52; SCMedicaidPractitioners.Br.4–15.

3. Congress did not use a synonym for "right" in the any-qualified-provider provision.

Respondents say Congress can use "synonyms." Resp.Br.28–29. But "may obtain" is not a synonym for "right." If Section 1396a(a) said, "*a plan must provide* that a beneficiary *may obtain* an exam," that would create a benefit. If it said, "*a state must protect* a beneficiary's *right* to obtain an exam," that would create a right. "Right" and "obtain" do different work.

Likewise, depending on context, a "choice" can be a right. See 42 U.S.C. 1396r(c)(1)(A)(i) (requiring that a "nursing home facility must protect and promote the rights of each resident," including the "right to choose a personal attending physician"). Or it can be a benefit. See 42 U.S.C. 1396a(a)(12) (plans must provide that recipients "may select" a physician or an optometrist). Without more, "may obtain" and "choice" are not clearly rights-creating.

Respondents' IRS hypothetical underscores the ambiguity when Congress does *not* use clear rights-creating terms. Respondents imagine Congress wrote: "The [IRS] must provide that any individual may obtain a refund of overpaid taxes." Resp.Br.27. They claim "[e]veryone would understand that provision to give taxpayers a right." *Ibid.* But that language might simply confer a benefit. After all, Congress could have written: "The IRS must not violate any individual's *right* to obtain a refund …." Or: "*No person shall be denied* a refund …." The resulting "[a]mbiguity precludes enforceable rights." *31 Foster Child.* v. *Bush*, 329 F.3d 1255, 1270 (11th Cir. 2003). The difference is clear rights-creating language.

4. The only directive is to the HHS Secretary—not the states.

Reimagining the any-qualified-provider provision as a directive to states, Respondents rewrite 1396a(a), claiming "Congress said that *a State* 'must' provide" that a recipient may obtain healthcare from any qualified provider. Resp.Br.27 (quoting 42 U.S.C. 1396a(a)) (emphasis added). But Congress said "[a] State *plan*" must provide that. 42 U.S.C. 1396a(a) (emphasis added). And states don't even need to submit a plan if they don't seek Medicaid funding. Accord U.S.SenatorsAndRepresentatives.Br.5–6.

As a result, the statute's only "directive [is] to the federal agency charged with approving state Medicaid plans." *Armstrong*, 575 U.S. at 331 (plurality). Subject to certain exceptions, the statute directs the Secretary of Health and Human Services to "approve any plan which fulfills the conditions specified in subsection (a)." 42 U.S.C. 1396a(b). "[S]uch language reveals no congressional intent to create a private right of action." *Armstrong*, 575 U.S. at 331 (plurality) (cleaned up).

Instead, that directive to the Secretary makes the any-qualified-provider provision "two steps removed from the interests of individual" recipients and precludes a finding of privately enforceable rights. *Gonzaga*, 536 U.S. at 287. Respondents cannot escape that conclusion by writing the word "plan" out of the statute. Resp.Br.27.

For the same reasons, Respondents miss the mark in analogizing to FNHRA. Resp.Br.21–23. In addition to including clear rights-creating terms, the residents' bill-of-rights provisions in *Talevski* are directives *to the regulated entities*—nursing facilities:

- The restraints provision says a "*nursing facility must* protect and promote the rights of each resident … to be free from" unnecessary restraints. 42 U.S.C. 1396r(c)(1)(A)(ii) (emphasis added).
- The discharge provision says a "*nursing facility … must not* transfer or discharge" a resident without meeting certain preconditions. 1396r(c)(2)(A) (emphasis added).
- And the free-choice provision says a "*nursing facility must* protect and promote … [t]he right to choose a personal attending physician." 1396r(c)(1)(A)(i).

Coupled with the clear rights-creating terms in those "residents' rights" provisions, Section 1396r(c), it makes sense to conclude "they confer individual rights," Resp.Br.29. By contrast, the any-qualified-provider provision does not contain rights-creating language *or* a clear directive to the states. Instead, it's part of a much broader directive to the Secretary to "approve" plans containing the any-qualified-provider provision—along with all the other provisions 1396a(a) requires. 42 U.S.C. 1396a(b).

C. Respondents get the context and history all wrong.

1. Legislative history is irrelevant to whether a statute contains unambiguous rights-creating language.

Given the lack of clear rights-creating terms in the any-qualified-provider provision, Respondents rely extensively on legislative history. Resp.Br.29–33. But that reliance is unavailing because legislative history is irrelevant when applying a clear-statement rule. See *Gonzalez* v. *Thaler*, 565 U.S. 134, 164–65 (2012) (Scalia, J., dissenting) ("I know of no precedent for the proposition that legislative history can satisfy a clear-statement requirement."). After all, clear-statement rules require "a clear statement in the *text* of the statute," *Sossamon* v. *Texas*, 563 U.S. 277, 290 (2011) (emphasis added), not sundry statements made during the legislative process.

Respondents cite *Kirtz*, Resp.Br.25–26, but they misread its importance. There, the Court applied a clear-statement rule to determine whether the Fair Credit Reporting Act "effects a clear waiver of sovereign immunity." 601 U.S. at 50. The unanimous Court recognized that the proper analysis eschewed legislative history: "Necessarily, this inquiry trains on statutory text rather than legislative history." *Id.* at 49. "Because any ambiguities in the statutory language are to be construed in favor of immunity, no amount of legislative history can supply a waiver that is not clearly evident from the language of the statute." *Ibid.* (cleaned up).

That led the Court in *Kirtz* to reject the government's citation to an older case that relied on legislative history. *Id.* at 55–58. Such cases were "relics from a bygone era of statutory construction." *Id.* at 58 (cleaned up). The Court had "since repeatedly disavowed the decision's methodological approach." *Ibid.* So the prior case's outmoded reliance on legislative history could not save the government's case. *Ibid.*

Kirtz's rule applies with greater force here. "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 304 (2006). "[T]he well-established requirement that Congress must have 'unambiguously conferred' a § 1983-enforceable right in a Spending Clause statute ensures [states receive] the clear notice" they deserve. *Talevski*, 599 U.S. at 180 n.8. Forcing state officials to wade through hundreds of pages of legislative or enactment history to discern what individual legislators might have meant by their vote would reduce clear notice to a fool's errand.

To decide whether a Spending Clause statute unambiguously confers a private right, courts must instead examine the statute's "text and structure" to look for "the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." *Gonzaga*, 536 U.S. at 286–87 (cleaned up). And a court charged with answering *that* question will have "its answer long before it might have reason to consult the Congressional Record." *Kirtz*, 601 U.S. at 49.

So it makes no difference that some legislators might have colloquially used the word "right" when referring to a Medicaid recipient's ability to choose a provider, nor that committee reports used similar phrasing. Resp.Br.30–32. The "statute, and not the Committee Report, … is the authoritative expression of the law, and the statute prominently *omits* reference" to a right. *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 337 (1994). "Because any ambiguities" in the text "are to be construed" against a right, "no amount of legislative history can supply a [right] that is not clearly evident from the language of the statute." *Kirtz*, 601 U.S. at 49 (cleaned up).

That a section title in the Social Security Amendments of 1967 contains the phrase "free choice" does not add that missing clarity. Resp.Br.30. The analogous section in the Medicare Act is titled "Free choice by patient *guaranteed*" and has a subsection titled "Basic freedom of choice," 42 U.S.C. 1395a(a) (emphasis added). In contrast, Congress's amendment to the Medicaid Act said nothing about a guarantee and did *not* add the "free choice" section title to Section 1902(a) itself. Pub. L. No. 90-248, § 227, 81 Stat. 903 (1967). That explains why the title does not appear in Section 1396a of Title 42 of the Code. And it explains why states would not be able to find it when consulting Section 1396a(a)'s list of plan requirements. Instead, Congress simply added the any-qualified-provider provision to that list under a subsection titled "Contents." Pet.Br.3, 20. And, as noted, the words "free choice" are not clearly rights-creating anyway. *Supra* pp. 6, 9.

Respondents thus prove nothing by claiming the any-qualified-provider provision was a "targeted response to practices" Congress found "objectionable." Resp.Br.30. "[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced" under Section 1983. *Gonzaga*, 536 U.S. at 283. And the text and structure of the any-qualified-provider provision do not unambiguously show Congress intended to confer anything more than a benefit.

2. Without more, a plan requirement is not rights-creating.

That a provision is on a list that a plan "must" include cannot overcome a lack of clear rights-creating language. Consider the provision in *Armstrong*. It appears in the same list—Section 1396a(a)—as the any-qualified-provider provision. And based on Section 1396a(b)'s directive that the HHS Secretary "approve any plan which fulfills the conditions specified in subsection (a)," the *Armstrong* plurality concluded that "such language 'reveals no congressional intent to create a private right of action.'" 575 U.S. at 331 (plurality) (cleaned up). It takes an "atypical" statute—like FNHRA's residents' bill of rights—to show that mere plan requirements are rights-creating. *Talevski*, 599 U.S. at 183.

Respondents again argue that the any-qualified-provider provision creates rights because it was "modeled on" a sister Medicare provision, Section 1395a. Resp.Br.34. But no court has held that Section 1395a(a) creates a private right. Resp.Br.34 n.7. And for good reason. *Supra* p. 14.

As noted above, (1) Section 1395a says the free choice is "guaranteed," while Section 1396a does not; (2) Section 1395a(a) has a subheading, "Basic freedom of choice," whereas Section 1396a(a)(23) does not; and (3) Section 1395a(a) is a standalone provision, while Section 1396a(a)(23) is part of the same list as the provision in *Armstrong*. In contrast, FNHRA's "Free choice" provision protects each nursing-home resident's "*right* to choose a personal attending physician." 42 U.S.C. 1396r(c)(1)(A)(i) (emphasis added).

Respondents also say that Congress's enactment of 42 U.S.C. 1320a-2 "rejected the argument that a state plan requirement cannot be privately enforceable under Section 1983." Resp.Br.34. True, a plan requirement *can* be rights-creating if Congress uses clear rights-creating language; FNHRA's "atypical" text and structure illustrate how Congress can do so. But Section 1320a-2 cannot mean that courts must *ignore* "the structure of [1396a] and its focus on a federal regulator who is two steps removed from individual" beneficiaries, the "alternative means to enforce compliance" with the any-qualified-provider provision's requirements, and the "aggregate focus of the statute in light of its connection between funding and substantial compliance with the condition." *Does* v. *Gillespie*, 867 F.3d 1034, 1045 (8th Cir. 2017). "Congress must still create new rights in clear terms that show unambiguous intent before they are enforceable under § 1983." *Ibid.*

While Section 1320a-2's text is "hardly a model of clarity," *id.* at 1044 (quoting *Sanchez* v. *Johnson*, 416 F.3d 1051, 1057 n.5 (9th Cir. 2005)), it should not be read to mean more than it says. The first sentence says a "provision is not to be deemed unenforceable

because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. 1320a-2 (emphasis added). The phrase "because of" means "by reason of: on account of." 1 Webster's Third New Dictionary 194 (1966). Using that definition, this Court has held that the prohibition on employers taking "adverse action 'because of' age" requires "that age was the 'reason' that the employer decided to act"—the "but-for" or decisive reason—and not a mere "motivating factor." *Gross* v. *FBL Fin. Servs.*, *Inc.*, 557 U.S. 167, 176 (2009).

Applying those principles here means that Section 1320a-2 merely forbids a court from invoking a provision's inclusion in a list of state plan requirements as the *but-for* or *decisive* reason for declaring it unenforceable. It does not bar courts from considering that aspect of a provision's text and structure together with other factors indicating that Congress did not intend to create a private right. Yet that appears to be how Respondents read it. Resp.Br.34–35.

Notably, the *Armstrong* plurality—in a ruling two decades after Section 1320a-2's enactment—did not think that the statute prohibited it from considering this aspect of 1396a's structure in its analysis. There, the Court considered a Medicaid provision—on the same list as the any-qualified-provider provision—related to provider reimbursement rates. *Armstrong*, 575 U.S. at 323 (citing 42 U.S.C. 1396a(a)(30)(A)). Even though Section 1320a-2 had been raised in the briefing, the plurality relied in part on the fact that Section 1396a was "phrased as a directive to the federal agency charged with approving state Medicaid plans." 575 U.S. at 331 (plurality).

Accepting the view that courts can never consider a provision's placement on a list of plan requirements to support the conclusion that the provision does not create a private right would thus require the Court to "conclude that the *Armstrong* plurality overlooked § 1320a-2 or misunderstood it." *Gillespie*, 867 F.3d at 1046. "Neither is likely." *Ibid.*

3. A substantial-compliance regime makes private rights less likely.

When a statute conditions funding on substantial compliance with the statutory terms, private rights are less likely to attach. Pet.Br.34–36. That's because a substantial-compliance regime assumes funding can continue even while "a sizeable minority of its beneficiaries may nonetheless fail to receive the full panoply of offered benefits." *Midwest Foster Care & Adoption Ass'n* v. *Kincade*, 712 F.3d 1190, 1200–01 (8th Cir. 2013). While that arrangement alone is not enough to foreclose private enforceability, it does make it less likely. *Armstrong*, 575 U.S. at 328.

In response, Respondents build a strawman. Resp.Br.35–36. They claim Petitioner argues that a substantial-compliance statute "*cannot* give rise to a privately enforceable right." Resp.Br.36 (emphasis added). That's not what Petitioner said. And *Talevski* isn't "inconsistent with" Petitioner's point that, "[a]bsent a *Talevski*-like bill of rights," a substantial-compliance regime makes private rights less likely. Pet.Br.34; contra Resp.Br.36. *Talevski* just shows that Congress can overcome that negative inference by creating—atypically—a standalone bill of rights and repeatedly using clear rights-creating language, as it did in FNHRA. Congress did not do that here.

Respondents also contend that the Secretary's ability to withhold funding is such a "drastic" remedy that Congress only required substantial compliance to avoid it because Congress thought private enforcement would be available. Resp.Br.35–36. But that argument runs squarely into *Armstrong*, *Gonzaga*, and *Blessing*. *Armstrong* deemed "mistaken" the "dissent's complaint that the sanction available to the Secretary (the cut-off of funding) is too massive to be a realistic source of relief." 575 U.S. at 331. The Court rightly "doubt[ed] that the Secretary's notice to a State that its compensation scheme is inadequate [would] be ignored." *Ibid.* And *Gonzaga* analogized FERPA's substantial-compliance scheme to the statute invoked in *Blessing*, which had "failed to support a § 1983 suit in part because it only required 'substantial compliance' with federal regulations." *Gonzaga*, 536 U.S. at 288. Those statements doom Respondents' claim that the Act's substantial-compliance regime somehow "supports (rather than undercuts) the view that Congress intended private enforcement here." Resp.Br.36.

4. Respondents' theory will result in more federal lawsuits.

Respondents' low bar for creating private rights in Spending Clause statutes will inevitably increase Section 1983 actions. Contra Resp.Br.37–40. States make "hundreds of Medicaid disqualification decisions" annually. 311StateLegislators.Br.5. In 2017, for example, Louisiana alone "took 182 disqualification actions." *Kauffman*, 981 F.3d at 374 n.4 (Elrod, J., concurring).

Moreover, courts routinely use the relaxed *Wilder* and *Wright* standards to discover private rights in Spending Clause statutes. *E.g.*, *Bryson* v. *Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) (finding private right in 42 U.S.C. 1396a(a)(8)); *Sabree* v. *Richman*, 367 F.3d 180, 192 (3d Cir. 2004) (same for 1396a(a)(8), (a)(10), (a)(15)); *California Ass'n of Rural Health Clinics* v. *Douglas*, 738 F.3d 1007, 1011–13 (9th Cir. 2013) (same for 1396a(bb)); *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Hum. Servs.*, 443 F.3d 1005, 1013–16 (8th Cir. 2006), *vacated in part* 551 U.S. 1142 (2007) (same for 1396a(a)(30)(A)). Ruling for Respondents would lead to even more such "discovery."

Respondents confusingly suggest courts could find no private rights in provisions worded similarly to the any-qualified-provider provision—but without explaining how that doesn't sink their case. Resp.Br.38. And the one case Respondents highlight shows how far courts must reach under Respondents' preferred approach to rightly conclude that a Spending Clause statute with no clear rights-creating language doesn't create a private right. See *Polk* v. *Yee*, 36 F.4th 939, 945 (9th Cir. 2022) (assigning weight to the fact that the statute was "phrased in terms of what the state may *not* do … rather than in terms of what providers [were] to receive"). Contra *Talevski*, 599 U.S. at 185 n.12 ("The Fourteenth Amendment hardly fails to secure § 1983-enforceable rights because it directs state actors *not* to deny equal protection.") (emphasis added).

In sum, recognizing a private right in the any-qualified-provider provision would have the same impact "articulated by Justice Breyer in *Armstrong*—'increased litigation, inconsistent results, and disorderly administration of highly complex federal programs.'" FamilyPolicyAlliance.Br.17 (quoting *Armstrong*, 575 U.S. at 335 (Breyer, J., concurring)). And that increased litigation is assured given Section 1983's attorney-fee shifting. See 42 U.S.C. 1988. The Court need not—and should not—impose that result.

D. Section 1396a's enforcement scheme reinforces the lack of a private right.

Petitioner doesn't make a *Talevski* "step 2" enforcement-scheme argument. So it's unclear why Respondents pretend she did. Resp.Br.40–42.

Rather, Petitioner discussed other enforcement mechanisms because *Gonzaga* makes clear they are relevant to the step 1 analysis. 536 U.S. at 289 (noting that the Court's "conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is *buttressed* by the mechanism that Congress chose to provide for enforcing those provisions") (emphasis added); accord *Suter* v. *Artist M.*, 503 U.S. 347, 360–61 & n.11 (1992) (using enforcement scheme to inform step 1 analysis); contra Resp.Br.41. And here, as in *Gonzaga*, those mechanisms further demonstrate that the any-qualified-provider provision does not create a private right.

First, the Secretary may withhold funds. Respondents call this remedy both "limited" and "drastic." Resp.Br.44. But the same was true in *Armstrong*, and this Court recognized that "the withholding of Medicaid funds by the Secretary" "suggests that Congress intended to preclude other[]" remedies. *Armstrong*, 575 U.S. at 328 (majority opinion) (citing *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001)). Accord *Suter*, 503 U.S. at 360–61 (the Secretary's "authority to reduce or eliminate payments to a State" shows that the absence of an enforceable right does not make a plan provision "a dead letter").

Second, a Medicaid beneficiary may challenge a claim denial—but not a provider disqualification—through state administrative proceedings. Respondents complain this remedy is too narrow. Resp.Br.44. But the fact that "[t]here is no analogous provision for Medicaid beneficiaries when a particular *provider* is deemed unqualified" is a strong "indicat[ion] that there is no" right for beneficiaries to challenge provider disqualifications. *Kauffman*, 981 F.3d at 362 (emphasis added).

Third, the Medicaid Act expressly contemplates an administrative appeal for providers. Pet.Br.6 (citing 42 U.S.C. 1396a(kk)(8)(B)(ii) and 42 C.F.R. 1002.213). Respondents say these appeals are limited to certain grounds. Resp.Br.46 (citing S.C. Code Ann. Reg. 126-400(E), 126-404). But the regulation Respondents cite—Section 126-404—provides advance review for certain decisions such as "recoupment of overpayments" or exclusion due to "abuse" or a "conviction." S.C. Code Regs. 126-404(A). For an excluded provider, Section 126-404 says, "the provisions of 42 C.F.R., Part 1001, shall apply." *Ibid.*

One of those provisions—42 C.F.R. 1002.213—makes clear that an excluded entity "must also be given any additional appeals rights that would otherwise be available under procedures established by the State," including the broad appeal rights Petitioner discussed. Pet.Br.6. Such a broad appeal opportunity "buttresse[s]" the conclusion that the any-qualified-provider provision "fail[s] to confer enforceable rights." *Gonzaga*, 536 U.S. at 289.

Respondents claim alternatively that Petitioner has admitted the state administrative process would "be futile." Resp.Br.45. But that's not what the record reflects. Petitioner's counsel merely stated, as a good advocate would, "that a hearing officer *should* find that the [State] acted appropriately," so an administrative appeal "*may* be futile." J.A.53, 56 (emphasis added). As Petitioner has explained, an administrative "appeal is *not* a rubberstamp process for agency determinations." Pet.Br.6 (citation omitted).

Notably, Respondents do not contest PPSAT's right to pursue judicial review of any administrative appeal. *Ibid.* Nor do they contest that PPSAT agreed this appeal process was its "exclusive remedy." *Ibid.* That makes sense because the any-qualified-provider provision "does not contemplate—either by its express terms or its administrative implementation—enforcement through private-party lawsuits." *Kauffman*, 981 F.3d at 373 (Elrod, J., concurring). That's consistent with the lack of clear rights-creating language in the provision's text and structure.

II. Planned Parenthood is not qualified under South Carolina law.

The United States gives states broad authority to exclude Medicaid providers. Since 1992, the Department has said that nothing in Section 1396a(p)(1)'s implementing regulations "limit[s] a State's own authority to exclude an individual or entity from Medicaid *for any reason* or period *authorized by State law*." 42 C.F.R. 1002.3(b) (emphasis added). Petitioner had ample reasons to exclude PPSAT: "the payment of taxpayer funds to abortion clinics, for any purpose, results in the subsidy of abortion and the denial of the right to life." Pet.App.157a–58a. Petitioner does not concede PPSAT is "qualified" under state law. Contra Resp.Br.7.

Respondents' efforts to impugn Petitioner's disqualification of PPSAT fall flat. Respondents note that South Carolina has a "shortage of primary care providers." Resp.Br.5. But Planned Parenthood is an abortion provider, *not* a primary healthcare provider. AAPLOG.Br.5–19. That's why South Carolina excluded PPSAT from its Medicaid program. Pet.Br.7. No "underserved communities" are losing access to their primary-care doctors. Contra Resp.Br.6.

And no matter how much PPSAT claims birth control and basic screenings "cost" relative to their Medicaid reimbursement rates, Resp.Br.10, taxpayer funds still subsidize PPSAT's general overhead. AAPLOG.Br.22. As a *Forbes* article estimates, "it is as if taxpayers pay the full cost of 250,000 abortions a year, with about 70,000 financed by federal taxpayers and 180,000 financed by state taxpayers," despite prohibitions on taxpayer-funded abortion. *Ibid.*

PPSAT also claims Petitioner understates the services it offers. Resp.Br.7. But Petitioner's list came from the same PPSAT website that PPSAT itself cites. Compare Pet.Br.10 with Resp.Br.7. And while PPSAT says that "its board-certified physicians and other healthcare professionals treat most of the conditions that petitioner lists," it does *not* say they treat those conditions at Planned Parenthood. Resp.Br.7.

PPSAT says it resolved "with a minor fine" its state investigation for alleged records, disposal, and reporting violations. Resp.Br.7. But PPSAT elides the $1.5 million fine it paid for "allegedly … submitting claims for Medicaid service not provided as claimed." 311StateLegislators.Br.19–20. And even that fine does not address the stomach-turning practices in which Planned Parenthood's doctors and executives have been involved. LibertyCounsel.Br.5–11. Nor does it account for the horrid state of affairs the New York Times recently exposed at Planned Parenthood facilities, documenting a "conveyor belt" mentality that resulted in clients receiving the wrong medications, being sent to the wrong rooms, and being prepped for the wrong procedures as employees "scrambled to move people in and out." Benner, *supra*.

Per the New York Times exposé, Planned Parenthood also has been directing dollars away from medical care. "Over the last five years, the national office has distributed more than $899 million to affiliates to help them deliver care, but none of it went directly to medical services." *Ibid.* "Much of [it] went" instead "to legal support, public campaigns to expand abortion access[,] and subsidies for patient navigators who help" expectant mothers find places to get abortions. *Ibid.*

Indeed, on the very website that lists PPSAT's services, see Resp.Br.7, the banner headline proclaims Planned Parenthood's commitment to keep "fighting" "South Carolina's 6[-]week abortion ban," *About This Health Center – Columbia, SC*, Planned Parenthood, perma.cc/JP6P-2RNH. The people of South Carolina deserve better than to see their taxpayer dollars funneled to an organization that is actively trying to thwart the very policies their elected representatives have enacted. And nothing in the any-qualified-provider provision gives federal courts the authority to force states to keep funding disqualified providers.

CONCLUSION

The judgment of the courts of appeals should be reversed.

Respectfully submitted,

MARCH 2025

KELLY M. JOLLEY
ARIAIL B. KIRK
JOLLEY LAW GROUP, LLC
1320 Main Street
Suite 300
Columbia, SC 29201
(803) 830-6500

JOHN J. BURSCH
Counsel of Record
JAMES A. CAMPBELL
ERIN M. HAWLEY
CHRISTOPHER P. SCHANDEVEL
CAROLINE C. LINDSAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org