No. 19-1186

In The Supreme Court of the United States

JOSHUA BAKER, Director, South Carolina Department of Health and Human Services,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR NEBRASKA, INDIANA, AND 17 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Amici States of Nebraska, Indiana, Alabama, Alaska, Arizona, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia add their voices to the many seeking this Court's guidance on "the appropriate framework for determining" when federal Spending Clause legislation creates "a cause of action . . . under [42 U.S.C.] 1983—an important legal issue . . . worthy of this Court's attention." *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari); accord Pet. App. 45a (Richardson, J., concurring) (expressing "hope that clarity will be provided"). Less than two years ago, 15 States asked this Court to take up that question in a Medicaid case similar to this one. Indiana et al. Amici Br., *Gee* v. *Planned Parenthood of Gulf Coast*, No. 17-1492. And just last year, 22 States sought clarity on that issue in a challenge to a State's foster-care-maintenance payments. Connecticut et al. Amici Br., *Poole* v. *N.Y. State Citizens' Coalition for Children*, No. 19-574.

Amici States have a substantial interest in this Court clarifying when federal statutes create private rights enforceable under Section 1983. This topic affects multiple areas of state law, ranging from Medicaid policies to foster-care programs. Improperly extending private causes of actions through Spending

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[1] Pursuant to Supreme Court Rule 37.2(a), amici timely notified the parties of their intent to file this brief.

Clause legislation exposes States to costly federal litigation and intrudes on areas traditionally entrusted to them. With so much at stake, Amici States ask this Court to grant review and provide guidance.

SUMMARY OF THE ARGUMENT

This case presents an issue of national importance and federal circuit conflict: whether the provider-choice plan requirement of the Medicaid Act is privately enforceable. Six circuits, including the Fourth Circuit in this case, have held that Medicaid recipients may bring suit to enforce the provision; one circuit has held that they may not. Three Justices of this Court have already recognized the significance of that conflict. *Gee*, 139 S. Ct. at 408 (Thomas, J., dissenting from denial of certiorari). That lower-court split is, on its own, a sufficient reason to grant certiorari.

In addition, private enforcement of the provider-choice plan requirement undermines the contractual nature of Medicaid and the related political accountability Congress implemented. Medicaid is a federal spending program, not a civil-rights statute. For this reason, federal law gives States substantial discretion to redesign or alter their Medicaid programs, with the understanding that the federal government may withhold funding if a State's program does not meet the Medicaid Act's requirements. Thus, the proper remedy when a State fails to comply with conditions in the Act is not a private lawsuit under Section 1983 but

withdrawal of federal funding by the Secretary of Health and Human Services.

Of perhaps even greater significance, this case presents an ideal opportunity to clarify the general framework for determining when Spending Clause statutes provide rights that are privately enforceable under Section 1983. This Court in *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), permitted private enforcement of a Medicaid plan requirement in 42 U.S.C. 1396a(a), but has since curtailed dramatically the circumstances in which private parties may enforce federal Spending Clause statutes. Most notably, *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), and *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), repudiated the permissive approach that *Wilder* and its progeny endorsed. But in the wake of those decisions, four critical aspects of the analytical framework remain unsettled and continue to perplex lower courts: (1) whether third-party beneficiaries of a contract between governmental entities may enforce that contract; (2) whether courts should still apply the multifactor balancing test that this Court announced in *Blessing* v. *Freestone*, 520 U.S. 329 (1997); (3) the relevance of congressionally prescribed enforcement mechanisms; and (4) the relevance of a statutory provision's placement within a directive to federal officials.

Amidst this uncertainty, lower courts are allowing pervasive private enforcement of Spending Clause statutes under Section 1983. This permeates many areas of the law, including Medicaid, foster-care, and

adoption funding. Permitting these private claims significantly burdens States, infringes their sovereignty, and upends the federal-state balance.

Faced with widespread confusion among the circuits and lower-court case law placing a heavy strain on the States, it is this Court's "job to fix" the situation. *Gee*, 139 S. Ct. at 410 (Thomas, J., dissenting from denial of certiorari). The Court can and should do that by granting certiorari in this case.

REASONS FOR GRANTING THE PETITION

I. The circuit conflict over private enforcement of the provider-choice plan requirement warrants review to ensure proper Medicaid Act accountability.

Three Justices have already recognized that the first question raised in the petition "present[s] a conflict on a federal question with significant implications: whether Medicaid recipients have a private right of action to challenge a State's determination of 'qualified' Medicaid providers under 42 U.S.C. § 1396a(a)(23) and Rev. Stat. § 1979, 42 U.S.C. § 1983." *Gee*, 139 S. Ct. at 408 (Thomas, J., dissenting from denial of certiorari). That conflict alone justifies this Court's review. *Ibid.* ("Because of this Court's inaction, patients in different States—even patients with the same providers—have different rights to challenge their State's provider decisions."). The Court's attention is especially critical because private enforcement of the provider-choice

plan requirement undermines the contractual nature of Medicaid and the related political accountability Congress implemented.

The Medicaid Act is not a civil-rights statute imposing duties and restraints on States concerning healthcare financing. Rather, it creates a program that States may use to finance their own healthcare benefits for the poor and disabled. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 541–42 (2012). States have substantial discretion to design and administer their Medicaid programs within broad federal guidelines. *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 439 (2004) (there are "various ways that a State could implement the Medicaid Act"); *Alexander* v. *Choate*, 469 U.S. 287, 303 (1985) ("The [Medicaid] Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage"). States may, for example, establish eligibility standards, provide coverage for other medical services, define the amount and scope of services, and determine the payment methodology and payment rate for services. See Barbara S. Klees, Christian J. Wolfe & Catherine A. Curtis, Ctrs. for Medicare & Medicaid Servs., *Brief Summaries of Medicare & Medicaid: Title XVIII & Title XIX of the Social Securities Act* 23–30 (Nov. 20, 2017), *available at* https://bit.ly/3cgDvAh.

If a State has established a healthcare-benefit program satisfactory to the Secretary of Health and Human Services, it may seek federal matching grants. In particular, Section 1396a(a) establishes conditions under which States may qualify to receive federal

funding and begins as follows: "A State plan for medical assistance must. . . ." 42 U.S.C 1396a(a). Each subsection then delineates requirements and prohibitions (with varying degrees of specificity) for a State's plan to qualify for federal matching grants. In context, these provisions say nothing about individual rights, even if some may incidentally yield individually recognizable benefits.

Critically, however, States are in no way obligated to implement a Medicaid program in accordance with the conditions required for federal funding. States participating in Medicaid remain free to amend their programs, even if that means the Secretary will deny federal funding as a consequence. See 42 U.S.C. 1396c. Section 1396c recognizes a State's continuing prerogative to alter its Medicaid program even after accepting federal funds. Any State that administers a non-compliant program runs the risk that the Secretary will turn off the funding spigot, but this remains a *lawful* option for the State under the statute. "[T]he *sole remedy* Congress provided for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary." *Armstrong*, 575 U.S. at 328 (emphasis added).

Furthermore, because the States' Medicaid participation is "in the nature of a contract," Congress may create an enforceable private right only if the States "knowingly accept[]" such rights as a condition on funding, which is possible only if "Congress speak[s] with a clear voice." *Pennhurst State Sch. & Hosp.* v.

Halderman, 451 U.S. 1, 17 (1981). Subjecting States to private causes of action when Congress did not unambiguously create a private right breaches the Medicaid agreement just as surely as the federal government's withholding of funds from States that meet all plan requirements.

Affording a private right of action without clear congressional direction not only defeats the States' contractual expectations, it also erodes the political accountability the Medicaid Act embraces, particularly with respect to provider qualifications. The Act says that "any individual eligible for medical assistance . . . may obtain such assistance from any institution . . . *qualified* to perform the service or services required." 42 U.S.C. 1396a(a)(23) (emphasis added). The meaning of "qualified" provider, however, comes not merely from the Act itself, but from state-federal contracts that implement it. Under federal regulations, "a State may exclude an individual or entity from participation in the Medicaid program for any reason for which the Secretary could exclude that individual or entity from participation" or "for any reason . . . authorized by state law." 42 C.F.R. 1002.3 (implementing 42 U.S.C. 1396a(p)(1)). In other words, politically accountable state officials may adopt as law whatever qualifications they like, and the presidentially accountable Secretary decides whether the federal government will reimburse the State's Medicaid expenditures in light of those qualifications.

In this case, however, the respondents' lawsuit disrupted that combination of state-federal political

accountability. South Carolina deemed abortion clinics unqualified to provide Medicaid services. If the respondent clinic disputes whether that order (and its subsequent termination as a provider) violates state law, it may avail itself of state administrative and judicial remedies. S.C. Code Regs. 126-404. But the Secretary, not a federal court, is responsible for determining in the first instance whether South Carolina's actions are consonant with eligibility for federal Medicaid reimbursement. See 42 U.S.C. 1396a(b).

Indeed, by its terms, the Medicaid Act imposes legal obligations *only* on the Secretary, who must ensure that States substantially comply with plan requirements. 42 U.S.C. 1396c. If the Secretary finds that a State's plan "has been so changed that it no longer complies" with the requirements of 42 U.S.C. 1396a or that "in the administration of the plan there is a failure to comply substantially with any such provision," the Secretary "shall notify [the] State . . . that further payments will not be made" or that "payments will be limited to . . . parts of the State plan not affected by [the] failure" to comply. *Ibid.*

That sort of executive judgment, made by an official appointed and removable by the President, and subject to judicial review at the State's request, is critical to the proper functioning of Medicaid. It permits appropriate assessment not only of a State plan's conformity with federal law, but also of the degree to which any departure from federal law is significant. The Secretary may adjust the funding spigot (gradually if so desired), but in all events the law permits a State to do

as it sees fit. In contrast, a federal court in a lawsuit like this may only issue an injunction that upsets the federal-state tradeoffs put in place by politically accountable officials.

Here, the Fourth Circuit, by decreeing which healthcare providers will receive public funding, interfered with vital medical, ethical, and fiscal policies rightly belonging to States. See *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari) (choices of approved providers seek to promote "the public interest"). It also interfered with States' ability "to manage Medicaid" because the court of appeals' decision "give[s] Medicaid providers an end run around" the process for judicial review prescribed "in the state's statutory scheme." *Ibid.* (cleaned up). State tribunals are better "suited to handle these cases based on their more intimate familiarity with the agencies, the regulation of the practice of medicine, and state administrative law." *Planned Parenthood of Greater Texas Family Planning & Preventative Health Servs., Inc* v. *Smith*, 913 F.3d 551, 571 (5th Cir. 2019) (Jones, J., concurring).

As the Eighth Circuit recognized, Medicaid enforcement via Section 1983 "result[s] in a curious system for review of a State's determination that a Medicaid provider is not 'qualified.'" *Does* v. *Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017). It sets up two tracks for judicial assessment of qualifications. On the one hand, the Medicaid Act requires that States provide a terminated provider the "opportunity for administrative appeal and judicial review in the state courts." *Ibid.*

And on the other hand, "individual patients" will "separately . . . litigate or relitigate the qualifications of the provider in federal court." *Ibid.* The result of this two-track system will be "parallel litigation and inconsistent results," *id.* at 1041–42, or, as here, federal judicial interference with a State's Medicaid plan and its procedures for determining whether a provider is qualified, see Pet. App. 11a.

In sum, this Court should grant certiorari because this case is a great vehicle to reaffirm the States' legitimate authority over their Medicaid programs, preserve the balance of public accountability that the Medicaid Act envisions, and resolve the circuit conflict over the provider-choice plan requirement.

II. Uncertainty surrounds the general framework for determining when Spending Clause statutes create private rights enforceable under Section 1983.

The Court's opinions addressing when federal statutes create private rights enforceable under Section 1983 are not "models of clarity." *Gonzaga*, 536 U.S. at 278. As a result, confusion surrounding private rights of action to enforce Spending Clause legislation is hardly limited to the provider-choice plan requirement or even the Medicaid Act (though both generate plenty of cases). Accordingly, this case presents the Court with a critical opportunity to address an issue relevant to federal legislation covering an array of topics and interests.

A. The evolution of private-enforceability doctrine has left critical questions unanswered.

One of this Court's early decisions on the private enforceability of Spending Clause legislation explained that for "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*, 451 U.S. at 28 (emphasis added). Only two of this Court's subsequent decisions—*Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), and *Wilder*—have held that a Spending Clause provision created rights enforceable under Section 1983. Construing those cases, *Blessing* said three factors guide the analysis: (1) whether Congress "intended" the "provision in question [to] benefit the plaintiff," (2) whether the asserted right is "vague and amorphous," and (3) whether the statute "impose[s] a binding obligation on the States." 520 U.S. at 340–41.

Then, in 2002, this Court decided *Gonzaga*, which lower courts have called a "game-changer." *Jones* v. *District of Columbia*, 996 A.2d 834, 845 (D.C. 2010). *Gonzaga* held that Spending Clause legislation must "unambiguously confer[]" private rights on the plaintiff; it is not enough that the plaintiff "falls within the general zone of interest that the statute is intended to protect." 536 U.S. at 283. Throughout its opinion, the *Gonzaga* Court "consider[ed] [*Blessing*'s] multifactor

test problematic, to say the least." Pet. App. 43a (Richardson, J., concurring); see *Gonzaga*, 536 U.S. at 286 (criticizing the "multifactor balancing test" as enabling courts "to pick and choose which federal requirements may be enforced by § 1983 and which may not").

Gonzaga thus rejected the analysis in cases like *Wright* and *Wilder*. The dissent recognized this right away. *Gonzaga*, 536 U.S. at 300 n.8 (Stevens, J., dissenting) (explaining that the majority's "framework *sub silentio* overrules cases such as *Wright* and *Wilder*" because the statutes in those cases "did not 'clearly and unambiguously' intend *enforceability under § 1983*") (cleaned up). And a majority of the Court made that explicit in *Armstrong*, observing that *Gonzaga* "plainly repudiate[s] the ready implication of a § 1983 action that *Wilder* exemplified." 575 U.S. at 331 n.*.

The evolution of the Court's jurisprudence has left unsettled many important aspects of the framework for determining when Congress creates private rights enforceable under Section 1983. At least four critical questions remain unanswered.

1. Do third-party beneficiaries of a contract between governmental entities have a right to enforce the agreement?

Many Members of the Court have raised this crucial threshold question, but a majority has yet to squarely address it. *E.g.*, *Armstrong*, 575 U.S. at 332 (plurality op.) (discussing whether "intended beneficiaries" of "the federal-state Medicaid agreement" "can

sue to enforce the [contractual] obligations"); *Blessing*, 520 U.S. at 349–50 (Scalia, J., concurring) (similar); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (acknowledging "serious questions as to whether third parties may sue to enforce Spending Clause legislation").

"Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it. . . . This appears to have been the law at the time § 1983 was enacted." *Blessing*, 520 U.S. at 349–50 (Scalia, J., concurring) (citing 1 William W. Story, *A Treatise on the Law of Contracts* 549–50 (4th ed. 1856)); see also *National Bank* v. *Grand Lodge*, 98 U.S. 123, 124 (1878) ("No doubt the general rule is that . . . privity must exist" to sue for breach of contract). Even today, "modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—much less to contracts between two governments." *Armstrong*, 575 U.S. at 332 (plurality op.) (citing 13 Richard A. Lord, *Williston on Contracts* §§ 37:35–37:36, pp. 256–71 (4th ed. 2013)).

These contract principles cast serious doubt on whether Section 1983 affords private causes of action to third-party beneficiaries of Spending Clause legislation. Settling that threshold issue is one way to bring much-needed consistency to this area of the law.

2. Do the *Blessing* factors still apply?

The *Gonzaga* Court criticized and did not apply *Blessing*'s "multifactor balancing test." 536 U.S. at 286. Instead, it looked to "the text and structure of [the] statute" to decide whether "Congress intend[ed] to create new individual rights" enforceable under Section 1983. *Ibid.*

Despite this, many lower courts continue to apply the *Blessing* factors in various ways. Some say that *Gonzaga* simply amended the first *Blessing* factor, requiring courts to ask whether a statute unambiguously confers rights on (rather than merely benefits) the plaintiffs. *E.g.*, *S.D. ex rel. Dickson* v. *Hood*, 391 F.3d 581, 602 (5th Cir. 2004). Others "apply the three components of the *Blessing* test" and then, per *Gonzaga*, "inquire into whether the statutes in question unambiguously confer a substantive right." *E.g.*, *Grammer* v. *John J. Kane Reg'l Centers—Glen Hazel*, 570 F.3d 520, 527 (3d Cir. 2009).

No matter the form, the continued use of the *Blessing* factors is concerning. The "practical consequences of . . . a multifactor test" include less "predictability" and more "open-ended" analysis. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Such standards give too much "discretion [to] trial judges" and generally "produce[ ] disparate results." *Murphy* v. *Smith*, 138 S. Ct. 784, 790 (2018). Consistent jurisprudence will remain elusive while the *Blessing* factors reign.

Tellingly, judges who find private rights enforceable under Section 1983 continue to apply the *Blessing* factors, while those who do not follow *Gonzaga*'s focus on statutory text and structure. This happens in Medicaid cases like this one. Compare *Gillespie*, 867 F.3d at 1039–42 (following *Gonzaga* and finding no private right), with *id.* at 1049–51 (Melloy, J., dissenting) (applying *Blessing* and finding a private right). The same goes for foster-care-payment cases. Compare *New York State Citizens' Coal. for Children* v. *Poole*, 922 F.3d 69, 79 (2d Cir. 2019) (applying *Blessing*, saying "*Blessing*'s three factor test remains good law," and finding a private right), with *id.* at 94 (Livingston, J., dissenting) (following *Gonzaga*, noting that *Gonzaga* "calls into question the vitality of the *Blessing* test," and finding no private right). Resolving whether the *Blessing* factors still apply will go a long way toward bringing stability to the law.

3. What is the relevance of congressionally prescribed enforcement mechanisms?

The *Gonzaga* Court held that the statute's prescribed enforcement mechanism confirmed Congress's intent not "to create individually enforceable private rights" under Section 1983. 536 U.S. at 289–90. And in *Armstrong*, the plurality reiterated that "the explicitly conferred means of enforcing compliance . . . by the [federal government's] withholding funding suggests that other means of enforcement are precluded." 575 U.S. at 331–32. Those decisions conflict with *Wilder*,

which considered the statute's enforcement mechanism only after finding an enforceable private right and only to assess whether the "remedial scheme" was "sufficient to displace the remedy provided in § 1983." 496 U.S. at 520–23.

Downplaying *Gonzaga* and *Armstrong*, some lower courts, including the Fourth Circuit here, continue to apply *Wilder*'s approach. Unlike what this Court did in *Gonzaga* and *Armstrong*, the Fourth Circuit said nothing about the Medicaid Act's prescribed means of enforcement when asking whether the Act "unambiguously gives Medicaid-eligible patients an individual right." Pet. App. 16a–18a (citation omitted). Rather, the court considered the prescribed remedies only when analyzing (under *Wilder*) whether Congress's "enforcement scheme" was "sufficiently 'comprehensive' " to "rebut[ ]" its finding of a private right enforceable under Section 1983. Pet. App. 19a–23a; accord *Planned Parenthood of Kansas* v. *Andersen*, 882 F.3d 1205, 1224–29 (10th Cir. 2018) (same). In contrast, the Eighth Circuit reasoned that the Medicaid Act's explicit enforcement mechanism shows that "Congress did not intend to create an enforceable right for individual patients under § 1983." *Gillespie*, 867 F.3d at 1041. As these cases illustrate, the lower courts need direction from this Court on how Congress's prescribed enforcement mechanisms factor into this analysis.

4. What is the relevance of a statutory provision's placement within a directive to federal officials?

Statutory "[t]ext may not be divorced from context." *Univ. of Texas Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 356 (2013). That is why the *Armstrong* plurality analyzed 42 U.S.C. 1396a(a)(30)—a subsection parallel to the provider-choice plan requirement at issue here—as "a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." 575 U.S. at 331. Such directives "'reveal[] no congressional intent to create a private right of action.'" *Ibid.* (quoting *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001)); see also *Gonzaga*, 536 U.S. at 287 (statute directing federal official to withhold funds from regulated entities is "two steps removed from the interests of individual[s]" and "does not confer the sort of '*individual* entitlement' that is enforceable under § 1983").

Spurning *Armstrong*, many circuits continue to ignore this broader statutory context. And quite a few (including the court below) have done so because of 42 U.S.C. 1320a-2, which says that a "provision is not to be deemed unenforceable because of its inclusion in a section . . . requiring a State plan or specifying the required contents of a State plan." *E.g.*, Pet. App. 24a–25a (citing Section 1320a-2 to reject the State's argument that the provider-choice provision is a "'plan requirement,' rather than an individual right"); *Planned Parenthood of Ind., Inc.* v. *Comm'r of*

Ind. State Dep't Health, 699 F.3d 962, 976 n.9 (7th Cir. 2012) (similar).

But as the Eighth Circuit has explained, those courts ignore that Section 1320a-2—hardly a "model of clarity" itself—simply overturned a narrow part of the Court's analysis in *Suter* v. *Artist M.*, 503 U.S. 347 (1992). *Gillespie*, 867 F.3d at 1044. That provision did not otherwise displace this Court's case law or "limit or expand the grounds for determining the availability of private actions to enforce State plan requirements." *Id.* at 1044–45 (quoting 42 U.S.C. 1320a-2). Notably, the *Armstrong* plurality did not consider Section 1320a-2 an impediment to its analysis. *Id.* at 1045–46 & n.7. But the inconsistency in the circuits confirms that they need more guidance on this issue.

* * * * *

These four unanswered questions show that uncertainty and conflict permeate the framework for deciding whether Spending Clause legislation creates a private right enforceable under Section 1983. Because disagreement and confusion arise at every turn, this Court should grant review.

B. Cases finding private rights enforceable under Section 1983 spawn widespread lawsuits, burden state resources, and intrude on state sovereignty.

Expanding private cause of actions too far, as some lower courts have done, exposes States to far-reaching lawsuits and infringes state sovereignty.

1. The breadth of lawsuits that lower courts have licensed is staggering. Starting with just the subsections of 42 U.S.C. 1396a(a) in the Medicaid Act, lower courts have found a vast array of private rights enforceable under Section 1983:

- As this case shows, individuals may challenge States' decisions to terminate or decline to add healthcare providers. Pet. 20–28 (discussing split of authority interpreting 42 U.S.C. 1396a(a)(23)); accord *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari) (mentioning challenges to "the *failure* to list particular providers").

- Healthcare providers may challenge States' notice-and-comment process for setting payment rates. *E.g.*, *BT Bourbonnais Care, LLC* v. *Norwood*, 866 F.3d 815, 824 (7th Cir. 2017) (applying 42 U.S.C. 1396a(a)(13)(A)).

- Individuals may object to not receiving "medical assistance . . . with reasonable promptness." *E.g.*, *Doe* v. *Kidd*, 501 F.3d 348, 355–57 (4th Cir. 2007) (applying 42 U.S.C. 1396a(a)(8)); *Bryson* v. *Shumway*, 308 F.3d 79, 88–89 (1st Cir. 2002) (same).

- And individuals may enforce the federal statute requiring a State's plan to "mak[e] medical assistance available" to eligible "individuals." *E.g.*, *Bontrager* v. *Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 606–07 (7th Cir. 2012) (applying 42 U.S.C. 1396a(a)(10)); *Sabree ex rel. Sabree* v. *Richman*, 367 F.3d 180, 189–92 (3d Cir. 2004) (same).

Looking beyond 42 U.S.C. 1396a(a), courts have held that many other federal Medicaid provisions grant private rights enforceable under Section 1983. Here are just a few:

- Individuals eligible for home- and community-based services may sue under so-called "free choice" provisions. *E.g.*, *Ball* v. *Rodgers*, 492 F.3d 1094, 1117 (9th Cir. 2007) (applying 42 U.S.C. 1396n(c)(2)(C) & (d)(2)(C)).

- Qualified healthcare centers may challenge States' reimbursement rates. *E.g.*, *Legacy Cmty. Health Servs., Inc.* v. *Smith*, 881 F.3d 358, 371–73 & n.13 (5th Cir. 2018) (applying 42 U.S.C. 1396a(bb) and collecting cases).

- Nursing-home residents may sue States under the Federal Nursing Home Reform Amendments (FNHRA) for failing to ensure their "highest practicable physical, mental and psychosocial well-being." *E.g.*, *Grammer*, 570 F.3d at 524–25, 532 (applying 42 U.S.C. 1396r(b)(2) and related provisions); see also Pet. 32–33 (noting the split of authority).

- Nursing-home residents may file federal lawsuits to force States to provide "specialized services." *E.g.*, *Rolland* v. *Romney*, 318 F.3d 42, 51–56 (1st Cir. 2003) (applying various provisions in 42 U.S.C. 1396r).

- Trustees of pooled trust accounts may involve federal courts in Medicaid reimbursement disputes between States and trust beneficiaries. *E.g.*, *Ctr. for Special Needs Tr. Admin., Inc.* v. *Olson*, 676 F.3d 688, 698–700 (8th Cir. 2012) (applying 42 U.S.C. 1396p(d)(4)(C)).

- And individuals may enforce the federal statute requiring that a State's plan temporarily continue Medicaid benefits for recipients who no longer meet income eligibility requirements. *E.g.*, *Rabin* v. *Wilson-Coker*, 362 F.3d 190, 201–02 (2d Cir. 2004) (applying 42 U.S.C. 1396r-6(a)).

This private-enforcement issue also transcends Medicaid. For example, courts have held that several federal statutes addressing foster-care and adoption funding create private rights enforceable under Section 1983:

- Foster parents may contest the amount of foster-care-maintenance payments that States pay. *Poole*, 922 F.3d at 73–74, 76 (noting circuit split and applying parts of 42 U.S.C. 671, 672, & 675).

- Foster children may challenge States' case-plan procedures. *Henry A.* v. *Willden*, 678 F.3d 991, 1006 (9th Cir. 2012) (noting split and applying 42 U.S.C. 671(a)(16) & 675(1)).

- And adoptive parents may challenge States' budgetary decisions reducing adoption-assistance payments. *ASW* v. *Oregon*, 424 F.3d 970, 975–78 (9th Cir. 2005) (applying 42 U.S.C. 673(a)(3)).

As these illustrative (but by no means comprehensive) lists show, existing case law on the enforceability of Spending Clause legislation exposes States to widespread litigation across many areas of the law, including core "area[s] of state concern" like "[f]amily relations." *Moore* v. *Sims*, 442 U.S. 415, 435 (1979).

2. These private lawsuits impose substantial burdens on States. The sheer breadth of federal provisions that lower courts have found to create enforceable rights, the more than 70 million current Medicaid recipients, and the nation's recent rise in foster children all ensure that these lawsuits will not be isolated or few. See *Gee* Cert. Pet. 19 (Louisiana faced more than 350 federal claims in less than 2 years contesting the disqualification of a Medicaid provider). What is more, the availability of attorney fees under 42 U.S.C. 1988 encourages these suits, prolongs the proceedings (as fees are litigated), and multiplies the financial risk to States. See *Poole*, 922 F.3d at 97 n.13 (Livingston, J., dissenting) (noting the benefits to the attorneys who bring these claims).

The high cost of all this federal litigation is not easily quantified. But above all, the deluge of lawsuits diverts scarce state resources away from administering the Medicaid and foster-care programs that serve needy families and children, risking harm to those

vulnerable citizens. See *Smith*, 913 F.3d at 571 (Jones, J., concurring). And the burden on States is only compounded by the "inconsistent results" that these suits threaten to produce. *Poole*, 922 F.3d at 97 (Livingston, J., dissenting); cf. *Gonzaga*, 536 U.S. at 290 (raising consistency concerns from allowing "private suits to be brought before thousands of federal- and state-court judges").

* * * * *

When courts fail to respect Spending Clause limits, private enforcement intrudes upon "sensitive areas of traditional state concern." *Davis Next Friend LaShonda D.* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting); see *Gonzaga*, 536 U.S. at 286 n.5 (no indication that Congress intended to interfere with an area traditionally belonging to States). Exposing States to lawsuits like this one violates the bargain that they struck when accepting federal funding. To preserve the "dignity" and "residual sovereignty of the States," *Bond* v. *United States*, 564 U.S. 211, 221 (2011), the Court should grant review and clarify the framework for determining when Spending Clause legislation creates private rights enforceable under Section 1983.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

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