No. __________

IN THE

Supreme Court of the United States

ROBERT M. KERR, in his official capacity as Director, South Carolina Department of Health and Human Services,

Petitioner,

v.

JULIE EDWARDS, on her behalf and on behalf of all others similarly situated, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Four days ago, this Court prudently granted certiorari to "reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983." *Health and Hospital Corp. of Marion County* v. *Talevski*, No. 21-806 (certiorari granted May 2, 2022). As the decision below highlights, the Court's "caselaw on implied private rights of action remains plagued by confusion and uncertainty." App.28a (Richardson, J., concurring). And "clarity" is badly needed. *Ibid.*

Granting the instant petition would ensure the Court provides such clarity next Term. First, this petition challenges a final judgment order that was affirmed on appeal (unlike *Talevski*). Second, this petition gives the Court an opportunity to resolve an "important and recurring" question at the heart of a deep circuit split: whether individual Medicaid recipients have a privately enforceable right to demand a provider of their choice. *Gee* v. *Planned Parenthood of Gulf Coast, Inc*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari).

The questions presented are:

1. Whether Spending Clause statutes ever give rise to privately enforceable rights under § 1983, and if so, what is the proper framework for deciding when they do?

2. Whether, assuming Spending Clause statutes ever give rise to privately enforceable rights under § 1983, the Medicaid Act's any-qualified-provider provision creates a privately enforceable right to challenge a state's determination that a provider is not qualified to provide certain medical services.

PARTIES TO THE PROCEEDING

Petitioner is Robert M. Kerr, the Director of the South Carolina Department of Health and Human Services. Respondents are Julie Edwards, who sued on her own behalf and on behalf of all others who are similarly situated, and her preferred Medicaid provider, Planned Parenthood South Atlantic.

LIST OF ALL PROCEEDINGS

1. United States Court of Appeals for the Fourth Circuit, No. 21-1043, *Planned Parenthood S. Atlantic* v. *Kerr*, judgment entered March 8, 2022.

2. United States District Court for the District of South Carolina, No. 3:18-cv-02078-MGL, Declaratory Judgment and Permanent Injunction entered December 14, 2020.

3. United States District Court for the District of South Carolina, No. 3:18-cv-02078-MGL, summary judgment opinion and order entered September 17, 2020.

4. United States Court of Appeals for the Fourth Circuit, No. 18-2133, *Planned Parenthood S. Atlantic* v. *Baker*, judgment entered October 29, 2019.

5. United States District Court for the District of South Carolina, No. 3:18-cv-02078-MGL, temporary restraining order and preliminary injunction ordered August 28, 2018.

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DECISIONS BELOW

The district court's opinion granting Respondents' motion for summary judgment is reported at 487 F. Supp. 3d 443 (D.S.C. 2020) and reprinted at App.31a–42a. The Fourth Circuit's opinion affirming that decision is reported at 27 F.4th 945 (4th Cir. 2022) and reprinted at App.1a–28a.

The district court's earlier opinion granting Respondents' motion for a temporary restraining order and preliminary injunction is reported at 326 F. Supp. 3d 39 (D.S.C. 2018) and reprinted at App.89a–109a. The Fourth Circuit's opinion affirming that decision is reported at 941 F.3d 687 (4th Cir. 2019) and reprinted at App.43a–88a.

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on March 8, 2022. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

PERTINENT STATUTES

The relevant portions of the pertinent statutes are reprinted at App.110a–111a.

INTRODUCTION

Deciphering the proper framework for deciding whether Congress's use of the spending power has created privately enforceable rights under § 1983 has bedeviled the lower courts. Hence this Court's grant of certiorari in *Talevski*. That grant is a welcome development. But given *Talevski*'s lingering mootness concerns and its lack of a circuit split on the statutory provisions there, clarity is far from guaranteed. This petition is an opportunity to answer the important questions raised in *Talevski* in a statutory context that best highlights the difficult questions the Court needs to resolve—as shown by the diametrically opposed results reached by seven courts of appeals.

Accordingly, this petition asks the Court to resolve the questions raised in *Talevski* alongside a mature circuit "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." *Gee*, 139 S. Ct. at 408 (Thomas, J., dissenting from denial of certiorari). Reviewing this case together with *Talevski* is crucial to ensuring the Court finally resolves the "important and recurring" questions raised by this appeal. *Id.* at 409.

In its first decision in this case, the Fourth Circuit joined "five of [its] six sister circuits" in holding that the Medicaid Act's any-qualified-provider requirement confers "a private right, enforceable under § 1983" on Medicaid recipients. App.59a. The Fifth Circuit subsequently reversed course, making the split 5-2. *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*,

981 F.3d 347, 350 (5th Cir. 2020) (en banc). But when this case came back up to the Fourth Circuit, it doubled down on its earlier ruling. App.1a–28a.

The lower court was wrong to read a privately enforceable right into the any-qualified-provider provision without a clear statutory directive. That mistake stemmed from confusion over a conflicting set of decisions from this Court.

As the Court has acknowledged, the framework for deciding whether Spending Clause legislation gives rise to a private right of action is far from clear. This Court's "opinions in this area may not be models of clarity." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278 (2002). As a result, the Court has repeatedly tried to resolve the "ambiguity" in its approach to private rights of action in this context. *Ibid.* Those efforts have not succeeded. See *id.*; *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015). To ensure the Court is in the best position to evaluate and determine the appropriate framework for deciding whether and under what circumstances Spending Clause statutes "give rise to private rights enforceable via Section 1983," Pet. for Writ of Cert. at ii, *Talevski*, No. 20-1664 (Nov. 23, 2021), this Court should grant review of the instant petition and consolidate it with *Talevski*.

STATEMENT OF THE CASE

A. Statutory background

1. Congress passes Medicaid Act to fund state efforts to provide free/low-cost medical services to people in need.

In 1965, Congress created Medicaid, "a federal program that subsidizes the States' provision of medical services" to families and individuals "whose income and resources are insufficient to meet the costs of necessary medical services." *Armstrong*, 575 U.S. at 323 (quoting 42 U.S.C. 1396–1). The program "is a cooperative federal-state program that provides medical care to needy individuals." *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012).

"Like other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong*, 575 U.S. at 323. States create plans and submit them to the Secretary of Health and Human Services for approval and disbursement of funds. 42 U.S.C. 1396-1. If the Secretary later finds that a state has failed to "comply substantially" with the Act's requirements in the administration of the plan, the Secretary may withhold all or part of the state's funds until "satisfied that there will no longer be any such failure to comply." 42 U.S.C. 1396c.

2. Congress adds any-qualified-provider requirement.

Two years later, Congress amended the Medicaid Act to add § 1396a(a)(23)(A) in response to concerns states were forcing recipients to use one of a limited number of providers. *E.g.*, President's Proposals for Revision in the Social Security System, Hearing on H.R. 5710 before the H. Comm. On Ways and Means, Part 4 (April 6 and April 11, 1967), at 2273 (in Puerto Rico, indigent patients "'forced' to receive hospital and medical services only in Commonwealth facilities"); 2301 (in Massachusetts, private physicians at "teaching hospitals" not being reimbursed).

The added provision requires that plans "must" allow "any individual eligible for medical assistance" to obtain "assistance from any [provider] qualified to perform the service … who undertakes to provide" it. 42 U.S.C. 1396a(a)(23)(A).

"This provision is sometimes referred to as the 'any-qualified-provider' or 'free-choice-of-provider' provision." *Kauffman*, 981 F.3d at 354. The latter label overlooks the express qualifier that beneficiaries may only choose from a "range of *qualified* providers." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). So § 1396a(a)(23)(A) is actually an "any-*qualified*-provider" requirement.

The Medicaid Act does not define "qualified." But it specifies that states retain broad authority to exclude providers "for any reason for which the Secretary could exclude the individual or entity from participation in" the *Medicare* program, "[i]n addition to any other authority" states retain to exclude providers. 42 U.S.C. 1396a(p)(1).

3. South Carolina creates procedures and remedies for excluded providers.

The Medicaid Act presumes states will provide administrative procedures and remedies for excluded providers. *E.g.*, 42 U.S.C. 1396a(a)(4)(A), (39), (41), (77); 1396a(p); 1396a(kk)(8)(B)(ii). And federal regulations require states to provide "administrative procedures" and "additional appeals rights that would otherwise be available under procedures established by the State." 42 C.F.R. 1002.210; 1002.213. So, South Carolina provides Medicaid providers the right to a hearing before an exclusion, suspension, or termination. S.C. CODE ANN. REGS. 126-404. South Carolina also provides an administrative appeal process to anyone, including providers through their enrollment agreements, "possessing a right to appeal." S.C. CODE ANN. REGS. 126-150.

B. Factual background

1. South Carolina deems Planned Parenthood unqualified.

On July 13, 2018, South Carolina's Governor issued an executive order directing the Department to (1) deem abortion clinics unqualified to provide family planning services, (2) terminate any enrollment agreements with them, and (3) deny future enrollment applications from them. App.121a.

The Governor's order follows from S.C. CODE ANN. § 43-5-1185, which prohibits the use of funds to pay for abortions, because "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." App.119a–120a (emphasis added). Disqualifying

abortion clinics also ensures that other agencies that do not perform abortions receive adequate funding to provide "access to necessary medical care and important women's health and family planning services." App.120a.

The same day, the Department sent a letter to Planned Parenthood South Atlantic notifying it of the order and explaining that Planned Parenthood was "no longer … qualified to provide services to Medicaid beneficiaries." App.123a–24a. Thus, Planned Parenthood's enrollment agreements were terminated. App.124a. Planned Parenthood could still qualify for state Medicaid funding by discontinuing abortions, but it has chosen not to do so.

2. Planned Parenthood and a client sue in federal court; Planned Parenthood eventually files administrative appeal.

Two weeks later, Planned Parenthood South Atlantic and Julie Edwards, one of its Medicaid clients, sued in federal court. Joint Appendix, *Planned Parenthood S. Atlantic* v. *Kerr*, No. 21-1043 (4th Cir. March 29, 2021) ("JA") at JA10. Three days after that, they moved for a preliminary injunction. JA24. They argued that by terminating Planned Parenthood's enrollment agreements, the Director violated Medicaid recipients' right to the "qualified provider of their choosing under 42 U.S.C. § 1396a(a)(23)." *Ibid.*

The Director opposed the motion because the any-qualified-provider provision "does not unambiguously create a federal right enforceable by providers and individual patients under 42 U.S.C. § 1983." Def.'s Mem. of Law in Opp'n to Pls.' Mot. for TRO and Prelim. Inj. at 5, *Planned Parenthood S. Atlantic* v.

Baker, 326 F. Supp. 3d 39 (D.S.C. 2018) (No. 3:18-cv-02078). Citing *O'Bannon*, the Director added that Planned Parenthood and Edwards were reading the alleged right too broadly. *Id.* at 8–10.

The Director's brief referenced Planned Parenthood's right to an administrative appeal and Planned Parenthood's apparent decision to forgo such an appeal several times. *Id.* at 3, 9, 11. On August 14, 2018—a day *after* the contractual, 30-day deadline—Planned Parenthood filed an administrative appeal.

C. Decisions below

1. District court grants preliminary injunction.

The district court granted Edwards's motion for a preliminary injunction and, because that ruling resolved the issue, declined to analyze Planned Parenthood's right to the same relief. App.90a, 109a. On the "issue of whether § 1396a(a)(23)(A) creates a private right of action enforceable through § 1983," the court applied the three factors this Court enunciated in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), and held that it does. App.95a–99a.

2. Fourth Circuit notes 5-1 circuit split and affirms.

On appeal, the Fourth Circuit affirmed, holding that (1) "Congress's intent to create an individual right enforceable under § 1983 in the free-choice-of-provider provision is unambiguous," and (2) "the provision's mandate … bars states from excluding providers for reasons unrelated to professional competency." App.46a.

On the first question, the court of appeals started with the *Blessing* factors, assessed whether "Congress expressly or implicitly *foreclosed* a § 1983 remedy," and "join[ed] the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits in finding … a private right enforceable under § 1983." App.58a–65a (emphasis added). The court mentioned—but did not discuss—the Eighth Circuit's contrary holding in *Does* v. *Gillespie*, 867 F.3d 1034 (8th Cir. 2017). App.59a, 65a.

While claiming to be "cautious in finding that a provision in Spending Clause legislation, such as the Medicaid Act, creates a private right enforceable under § 1983," App.67a, the court protested that courts should not relieve "sovereign signatories to a 'contract' such as the Medicaid Act" of the "consequences" of their agreement, including conferring private rights on third parties. App.68a. The court so held despite acknowledging that this Court's decisions "suggest a move away from inferring private rights of action in Spending Clause legislation." *Ibid.*

Judge Richardson's concurrence simply expressed frustration: "As lower court judges," they were "bound to do [their] level best to apply the law as it is, not how it may become." App.83a. "But when binding precedents present [the court] with a bit of 'a mess of the issue,'" its "job becomes particularly challenging." App.83a (quoting *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari)).

"The challenge here derives from a broader question lurking in the background," he said. App.84a. "What is the proper framework for determining whether a given statute creates a right that is privately enforceable?" *Ibid.* That question

begs a more specific one: has *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), "been repudiated (or even effectively overruled)?" *Ibid.* "There are indications that it has." *Ibid.* (citing *Armstrong*, 575 U.S. at 330 n.*). But lower courts "do not lightly conclude that the Supreme Court has overruled its prior cases—that job is for the Supreme Court alone." *Ibid.*

On the second question involving the scope of any alleged right created by the any-qualified-provider provision, the Fourth Circuit rejected the Director's argument that this Court in *O'Bannon* interpreted the provision "to apply only to providers that continue to be qualified in the [state's] Medicaid program as a matter of state law." App.74a–75a (cleaned up). Joining "three of the four circuits" that had addressed the issue, the court distinguished *O'Bannon* on the theory that it did not address the scope of the plaintiffs' substantive rights—only the alleged violation of their "procedural due process" right to a "pre-termination hearing before the state could close" the nursing home where they were residing. App.75a.

3. District court grants Plaintiffs' summary-judgment motion, mooting pending certiorari petition.

Following that decision, the Director asked this Court to resolve the circuit split over "[w]hether Medicaid recipients have a private right of action … to challenge a state's determination that a specific provider is not qualified to provide certain medical services." Pet. for Writ of Cert. at i, *Baker* v. *Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020) (No. 19-1186).

While that petition was pending, the district court granted Plaintiffs' motion for summary judgment on their claim the Director violated the any-qualified-provider provision. App.32a, 41a. Next, the court directed Plaintiffs to submit a draft order granting a permanent injunction. App.41a–42a. Five days later, Plaintiffs filed a supplemental brief in this Court arguing it should deny the Director's petition because it was about to become moot. Suppl. Br. for Resp'ts, *Baker*, 141 S. Ct. 550 (2020) (No. 19-1186). The Court denied the petition. *Baker*, 141 S. Ct. 550 (2020).

4. District court enters permanent injunction.

After the district court granted Plaintiffs summary judgment on their Count I, the parties stipulated to dismiss Plaintiffs' two remaining claims. JA300–01. Next, the district court entered an order permanently enjoining the Director and his successors from "terminating or excluding" Planned Parenthood from South Carolina's Medicaid program based on its performing abortions. App.30a.

5. Fourth Circuit notes change in circuit split but reaffirms its prior decision.

On appeal of that final judgment, the Fourth Circuit rejected the Director's argument that it should "reconsider [its] previous panel decision and hold that Edwards cannot sue under § 1983 to enforce" the any-qualified-provider provision. App.14a. While acknowledging that the en banc Fifth Circuit "recently came to a different conclusion," the Fourth Circuit took the "opportunity to reaffirm [its] prior decision," noting that it remained in "the majority of a rather lopsided

circuit split." *Id.* at 14a–15a. On the scope of the right, the court reiterated its belief that *O'Bannon* "resolved an entirely different question" and thus "has little to do with this case." *Id.* at 25a–26a.

Concurring only in the judgment, Judge Richardson wrote separately to express his hope that this Court will clear up the "confusion and uncertainty" that "plague[s]" the Court's "caselaw on implied private rights of action." App.28a. "*Gonzaga* arguably laid down a different test than *Wilder* and *Blessing*." *Ibid. Armstrong* "questioned *Wilder*'s reasoning and claimed later opinions 'plainly repudiate' its 'ready implication of a § 1983 action.'" *Ibid.* (quoting *Armstrong*, 575 U.S. at 330 n.*). But the lower courts "remain[] bound by *Blessing* and *Wilder*."

REASONS FOR GRANTING THE WRIT

1. Like *Talevski*, this case raises "fundamental questions about the appropriate framework for determining when a cause of action is available under § 1983—an important legal issue independently worthy of this Court's attention." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari).

Unlike *Talevski*, this Court's "own lack of clarity" on that broader issue has created deep "division in the lower courts" over the second question presented here: "whether Medicaid recipients have a private right of action to challenge a State's determination of 'qualified' Medicaid providers." *Id.* at 408, 409 (Thomas, J., dissenting from denial of certiorari). In *Talevski*, all three Circuits reached the same result—finding a privately enforceable right under certain FNHRA provisions. Pet. for Writ of Cert. at 29,

Talevski, No. 21-806 (Nov. 23, 2021). Not so here: five Circuits have held that Medicaid recipients have a privately enforceable right; two have held they do not.

This Court has "in many instances recognized" the value of such percolation: deciding a case against the backdrop of "diverse opinions" from the lower courts produces "a better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). As the discussion below shows, the "confusion" and "uncertainty" this Court's cases have sown can best be understood—and resolved—by examining the deep circuit split that has developed as "courts have relied on the same set of opinions," *Gonzaga*, 536 U.S. at 278, 283, to reach very different results.

2. Considering this case together with *Talevski* also would guard against the possibility of that case becoming moot. *Talevski* has not yet become final. And the petitioners there have "several factual defenses" that could prevail on remand as the case proceeds below while the appeal is pending. Br. in Opp'n at 18, *Talevski*, No. 21-806 (March 11, 2022). The judgment in this case, by contrast, is final.

3. Granting certiorari also would allow the Court to resolve a secondary circuit split over the meaning of this Court's decision in *O'Bannon* and the scope of the alleged right to choose a qualified provider.

4. Finally, this case raises important and recurring issues with far-reaching consequences, and the Fourth Circuit got it wrong.

The Court should grant the petition, consolidate this case for consideration with *Talevski*, and reverse.

I. This Court's conflicting caselaw has created a 5-2 circuit split over the enforceability of the any-qualified-provider provision and the broader framework issue underlying it.

Courts of appeals are split 5-2 over the narrower question presented here: whether Medicaid recipients have a private right of action to challenge a state's determination that a provider is not qualified to provide certain medical services. That conflict "can be explained in part by an evolution" in this Court's caselaw on the proper framework for determining whether a statute creates rights that are privately enforceable. *Does*, 867 F.3d at 1043.

A. In *Wright* and *Wilder*, the Court too easily infers privately enforceable rights from Spending Clause statutes.

Three decades ago, this Court decided two cases that undergird the circuit split at issue here. In *Wright* v. *Roanoke Redevelopment and Housing Authority*, a divided Court found a privately enforceable right to reasonable utility rates in the Housing Act. 479 U.S. 418, 419 (1987). Looking to "legislative history" and "agency actions" and drawing a negative inference from textual silence, the Court held that nothing in the Act or amendment "evidence[d] that Congress intended to *preclude* [a] § 1983 claim." *Id.* at 424–25, 429 (emphasis added).

Four justices dissented. Starting with "the face of the statute," they saw "nothing to suggest that Congress intended that utilities be *included* within the statutory entitlement." *Id.* at 434 (O'Connor, J., dissenting) (emphasis added). Nor did the law's

"legislative history, nor [the agency's] interpretation" support "the conclusion that Congress intended to create [such] an entitlement." *Id.* at 441.

Three years later in *Wilder*, an equally divided Court held that a Medicaid Act amendment "create[d] a right enforceable by health care providers" to "reasonable and adequate" reimbursement rates. 496 U.S. at 509–10. Providers were the intended beneficiaries. *Id.* at 510. *Wright* proved that "reasonable" requirements were not too "vague and amorphous" to be enforced. *Id.* at 511–12, 519. The amendment's language about what a plan "must" provide was "mandatory." *Id.* at 512. And the Secretary could "withhold funds for noncompliance." *Id.* at 512, 521. Considered together with the "legislative history," the Court inferred "Congress intended to require States to adopt rates that actually are reasonable and adequate" and for "health care providers [to] be able to sue in federal court" to enforce their rights. *Id.* at 515–16.

Citing the "traditional rule" that analysis starts and ends with the statutory text, the four-justice dissent chided the majority for "virtually ignor[ing]" it. *Id.* at 526–27 (Rehnquist, C.J., dissenting). The pertinent provision was "simply a part of the thirteenth listed requirement for [state] plans." *Id.* at 527. It did "not clearly confer any substantive rights on Medicaid services providers." *Ibid.* And the majority's contrary holding took serious "liberties with the statutory language." *Id.* at 528–29.

B. In *Suter* and *Blessing*, the Court pulls back—adding a multi-factored test and a rebuttable presumption.

Two years later, in *Suter* v. *Artist M.*, this Court reversed a Seventh Circuit decision that, "[r]elying heavily" on *Wilder*, had held "that the 'reasonable efforts' clause of the Adoption Act could be enforced" through § 1983. 503 U.S. 347, 353–54 (1992). Distinguishing *Wilder*, this Court held that "[c]areful examination of the [statutory] language," read "in the context of the entire Act," confirmed that "the 'reasonable efforts' language [did] *not* unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 359, 363 (emphasis added). Instead, the phrase could be "read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary" through his "authority to reduce or eliminate payments to a State" for non-compliance or for a "substantial failure" to comply with the state's own plan. *Id.* at 360, 363.

Only two justices dissented. In their view, the Court's conclusion conflicted with *Wilder*. *Id.* at 365 (Blackmun, J., dissenting). They complained that "the Court's reasoning [was] consistent with the *dissent* in *Wilder*," but that it "flatly contradict[ed] what the Court *held* in that case." *Id.* at 373. And it did so "by resurrecting arguments" *Wilder* "decisively rejected." *Id.* at 377.

Five years later, in *Blessing*, a unanimous Court continued *Suter*'s trajectory, reversing a decision holding that mothers whose children were eligible to receive child support services had a privately enforceable right under § 1983 to force a state to achieve "substantial compliance" with the Social Security Act's requirements. 520 U.S. at 332–33. The Ninth Circuit had "reconcil[ed] *Suter* and *Wilder*" by reading *Suter* as "an elaboration and amplification of the *Wilder* test rather than an unannounced and unacknowledged departure." *Freestone* v. *Cowan*, 68 F.3d 1141, 1148 (9th Cir. 1995).

This Court reversed, announcing a three-factored test. *Blessing*, 520 U.S. at 340. "First, Congress must have intended that the provision in question benefit the plaintiff." *Ibid.* "Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence." *Id.* at 340–41 (cleaned up). "Third, the statute must unambiguously impose a binding obligation on the States." *Id.* at 341. Finally, "[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983." *Ibid.* Under *Blessing*, that presumption can be rebutted if Congress has "expressly" forbidden "recourse to § 1983 in the statute itself," or if it has done so "impliedly" by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Ibid.*

Careful not to "foreclose the possibility that some provisions of Title IV–D give rise to individual rights," the Court held that the Ninth Circuit had painted "with too broad a brush." *Id.* at 342, 345. "[T]he substantial compliance standard [was] designed simply to trigger penalty provisions that increase the frequency of audits and reduce" the state's grant, so it did "not give rise to individual rights." *Id.* at 344.

Two justices concurred. Since they agreed with the Court's holding "under the test set forth" in *Wright* and *Wilder*, they found it "unnecessary to reach the question whether § 1983 *ever* authorizes the beneficiaries of a federal-state funding and spending agreement—such as Title IV-D—to bring suit." *Id.* at 349 (Scalia, J., concurring). The concurrence noted that the "law at the time § 1983 was enacted" appeared to be that a "third-party beneficiary was generally regarded as a stranger to the contract," and thus "could not sue upon it." *Id.* at 349–50. That argument "was not raised" in *Wright* or *Wilder*. *Id.* at 350. But the concurring justices joined the majority because it left open the "possibility that third-party-beneficiary suits simply do not lie." *Ibid.*

C. In *Gonzaga*, the Court tries to resolve the uncertainty in its cases, clarifying that only an unambiguously conferred right can create a private cause of action.

Five years after *Blessing*, this Court granted certiorari "to resolve [a] conflict among the lower courts." *Gonzaga*, 536 U.S. at 278. In *Gonzaga*, the Washington Supreme Court had held that a student could sue his private university to enforce FERPA, the Family Educational Rights and Privacy Act,

which prohibited "federal funding of educational institutions [with] a policy or practice of releasing education records to unauthorized persons." *Id.* at 276, 278. This Court reversed, holding that the relevant provisions did not create any "personal rights to enforce" under § 1983. *Id.* at 276. Recognizing that its opinions "may not be models of clarity," the Court tried to reconcile them. *Id.* at 278.

First, the Court noted it had never held "spending legislation drafted in terms resembling those of FERPA can confer enforceable rights." *Id.* at 279. To the contrary, "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Id.* at 280 (quoting *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 17, 28 & n.21 (1981)).

Second, the *Gonzaga* Court distinguished *Wright* and *Wilder* because the provisions at issue there had "explicitly conferred specific monetary entitlements *upon the plaintiffs*." *Id.* at 280 (emphasis added).

Third, the Court reiterated that its "more recent decisions [had] rejected attempts to infer enforceable rights from Spending Clause statutes." *Id.* at 281 (discussing *Suter* and *Blessing*). Eschewing any "loose standard" and referencing *Blessing*'s "factors," the Court noted that some of its opinions "might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983." *Id.* at 282. The Court made sure to "now reject the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283.

Fourth, the Court rebuffed the idea "that [its] implied right of action cases are separate and distinct from [its] § 1983 cases." *Ibid. Wilder* appeared "to support [that] notion." *Ibid.* But *Suter* and *Pennhurst* appeared "to disavow it." *Ibid.* So the Court clarified that its "implied right of action cases should guide" analysis under § 1983. *Ibid.* Under both, if "the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit." *Id.* at 286. Period.

Fifth, the Court rebutted the dissent's separation-of-powers argument. *Ibid.* Appearing to disparage *Blessing*'s three-factored test, the Court "fail[ed] to see how relations between the branches are served by having courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983." *Ibid.* If "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute." *Ibid.* (emphasis added, cleaned up).

Accordingly, there was "no question that FERPA's nondisclosure provisions fail[ed] to confer enforceable rights." *Id.* at 287. The statute's "focus" on the Secretary of Education's "distribution of public funds to educational institutions" was "two steps removed from the interests of individual students and parents." *Id.* at 287, 290. And "[r]ecipient institutions" could "avoid termination of funding so long as they" substantially complied "with the Act's requirements." *Id.* at 288. The provisions "therefore create[d] no rights enforceable under § 1983." *Id.* at 290.

Two justices concurred; two dissented. The dissent accused the majority of requiring "more of plaintiffs" than the test "articulated in *Blessing*," *id.* at 302 (Stevens, J., dissenting), and believed the majority had "*sub silentio* overrule[d] cases such as *Wright* and *Wilder*" by endorsing the implied-right-of-action framework. *Id.* at 300 n.8.

D. Three Circuits find privately enforceable rights under the any-qualified-provider provision.

Even after *Gonzaga*, lower courts continued to apply *Blessing*'s test and to rely heavily on *Wilder*'s discredited decision to find privately enforceable rights in Spending Clause statutes.

In *Harris* v. *Olszewski*, the Sixth Circuit did so regarding the Medicaid Act's any-qualified-provider provision. 442 F.3d 456 (6th Cir. 2006). After applying *Blessing*—and drawing mainly from *Wilder*—the court rejected the State's argument that the Act's enforcement scheme "implicitly foreclose[s]" private enforcement. *Id.* at 461–63.

Six years later, the Seventh Circuit likewise held that the provision "unambiguously creates private rights presumptively enforceable by § 1983." *Planned Parenthood of Ind., Inc.* v. *Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974–75 (7th Cir. 2012) (cleaned up). That holding allowed the plaintiff to challenge a law eliminating "indirect subsidization of abortion" by "prohibiting abortion providers from receiving *any* state-administered funds." *Id.* at 967.

Like the Sixth, the Seventh Circuit applied the *Blessing* factors, found them satisfied, and held that Indiana failed to rebut the resulting presumption that the provision creates privately enforceable rights. *Id.* at 973. Indiana's position was "hard to reconcile" with *Wilder*. *Id.* at 976. And the state's "categorical argument" that Spending Clause statutes cannot create privately enforceable rights went further than this Court had gone in *Gonzaga*. *Ibid.*

Less than a year later, the Ninth Circuit followed suit, "joining the only two other circuits that [had] decided the issue." *Planned Parenthood Ariz. Inc.* v. *Betlach*, 727 F.3d 960, 963 (9th Cir. 2013). Like the courts before it, the Ninth Circuit applied the *Blessing* factors, quoting *Gonzaga* out of context to declare that, if "all three prongs are satisfied, 'the right is presumptively enforceable' through § 1983." *Id.* at 966 (quoting *Gonzaga*, 536 U.S. at 284).

E. In *Armstrong*, this Court repudiates *Wilder*, and a plurality applies contract principles to reject an argument for a private right under part of the Medicaid Act.

Less than two years after *Betlach*, this Court cast even more doubt on *Wilder*, holding that Medicaid providers cannot sue to enforce a provision requiring plans to reimburse them at sufficiently high rates. *Armstrong*, 575 U.S. at 324–25, 329. The providers had argued for such a right either under the Supremacy Clause or the Court's equitable powers. *Id.* at 326–27. The Court rejected both arguments. *Id.* at 327–29.

In a footnote, the Court added that the providers had "not claim[ed] that *Wilder* establishes precedent for a private cause of action." *Id.* at 330 n.*. The Court's "later opinions [had] plainly repudiate[d] the ready implication of a § 1983 action that *Wilder* exemplified." *Ibid.* For example, *Gonzaga* had "expressly reject[ed]" *Wilder*'s implicit notion that "anything short of an unambiguously conferred right" can support a § 1983 action. *Ibid.* (cleaned up).

In a plurality portion, four justices went further: "The last possible source of a cause of action" was "the Medicaid Act itself," which the providers "rightly" did not claim. *Id.* at 331. "[P]hrased as a directive to the federal agency charged with approving" state plans, the provision "lack[ed] the sort of rights-creating language needed to imply a private right of action." *Ibid.* And "the explicitly conferred means" of enforcement, namely "the Secretary's withholding [of] funding," indicated that "other means" were "precluded." *Id.* at 331–32.

"Spending Clause legislation like Medicaid," the plurality emphasized, "is much in the nature of a contract." *Id.* at 332 (cleaned up). And "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." *Ibid.* (cleaned up). Moreover, "a private right of action under federal law is not created by mere implication." *Ibid.* It "must be unambiguously conferred." *Ibid.* (cleaned up). And "[n]othing in the Medicaid Act suggests that Congress meant to change that" for the reimbursement provision. *Ibid.*

F. Three more Circuits reach conflicting results over private rights of action under the any-qualified-provider provision.

Following *Armstrong*, three more Circuits—the Fifth, Eighth, and Tenth—weighed in on the second question presented here.

The Fifth Circuit went first, "[j]oining every other circuit" to address the issue and holding that the any-qualified-provider provision created "a private right of action under § 1983." *Planned Parenthood of Gulf Coast, Inc.* v. *Gee*, 862 F.3d 445, 457 (5th Cir. 2017). The court applied the *Blessing* factors, *id.* at 458–59, cited other Circuits reaching the same result, *ibid.*, and distinguished a portion of *Armstrong*'s majority opinion, *id.* at 461–62. The court did not discuss the plurality's application of contract principles to Spending Clause legislation. The full court divided 7-7 over en banc rehearing. 876 F.3d 699 (5th Cir. 2017).

In *Does*, the Eighth Circuit took a more principled approach. Rather than rely on *Wilder* or apply the three *Blessing* factors, the court applied *Gonzaga* and *Armstrong* and examined the plain statutory text—concluding that the any-qualified-provider provision "does not unambiguously create a federal right for individual patients that can be enforced under § 1983." *Does*, 867 F.3d at 1037.

Gonzaga and *Armstrong* proved that the "standard for identifying enforceable federal rights in spending statues is more rigorous" than "*Wilder* and *Blessing* might have suggested." *Id.* at 1039 (cleaned up). While the statutory provisions in *Wilder* had since been repealed—leaving the Court "no occasion formally to overrule" it—the Court's "repudiation" of

Wilder was "the functional equivalent of overruling" because "the Court uses the terms interchangeably." *Id.* at 1040 (cleaned up). And the any-qualified-provider provision could not clear the "more rigorous" bar. *Id.* at 1039, 1041–43.

A dissenting judge would have applied *Blessing* and "join[ed] the four other circuit courts" finding a private right of action. *Id.* at 1049 (Melloy, J., dissenting). In his view, *Gonzaga* merely "amended the first prong of the [*Blessing*] analysis." *Ibid.*[1] And *Armstrong* was distinguishable. *Id.* at 1052.

The Tenth Circuit soon joined the circuit majority. *Planned Parenthood of Kan.* v. *Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018). Quoting *Gonzaga* out of context, the court posited that, "if the plaintiff satisfies the three *Blessing* requirements, 'the right is presumptively enforceable' under § 1983." *Id.* at 1225 (quoting *Gonzaga*, 536 U.S. at 284). Reasoning that the factors were satisfied, *id.* at 1225–28, *Armstrong* was distinguishable and not entirely binding, *id.* at 1226–29, and "*Wilder* still is," *id.* at 1229 & n.16, the court felt "comfortable joining four out of the five circuits" that had ruled on the any-qualified-provider provision's private enforceability, *id.* at 1224.

[1] Others have tried to reconcile *Blessing* and *Gonzaga* differently. *E.g.*, *Health Sci. Funding, LLC* v. *N.J. Dep't of Health & Human Servs.*, 658 F. App'x 139, 141 (3d Cir. 2016) ("We have interpreted *Gonzaga University* as requiring us to first apply the three components of the *Blessing* test and then, to inquire into whether the statutes in question unambiguously confer a substantive right.") (cleaned up).

G. The en banc Fifth Circuit moves a 6-1 circuit split to 5-2.

A year later, a Fifth Circuit panel decided another any-qualified-provider case after Texas terminated its provider agreements with Planned Parenthood affiliates. *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc* v. *Smith*, 913 F.3d 551, 554 (5th Cir. 2019). The panel was "constrained" by its decision in *Gee* "to affirm the district court's conclusion that the plaintiffs possess[ed] a private right of action." *Id.* at 554. But Judge Jones wrote a separate concurring opinion to urge rehearing en banc on that issue, "which has divided the appellate courts." *Ibid.*

In her concurrence, Judge Jones primarily argued that "*Gee* is inconsistent with [this] Court's decision in *O'Bannon*." *Id.* at 571–72 (Jones, J., concurring). But she also highlighted the Eighth Circuit's decision in *Does* and its reasoning that "structural indications" in the Medicaid Act conflict with *Gonzaga*'s requirement that "Congress clearly intended to create an enforceable federal right." *Id.* at 572 (quoting *Does*, 867 F.3d at 1039).

The en banc Fifth Circuit overruled its prior panel opinion in *Gee* and reversed. *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Kauffman*, 981 F.3d 347, 350 (5th Cir. 2020). The *Kauffman* court held that individuals who had received or sought services from abortion providers could *not* "bring a § 1983 suit to contest the State's determination that the Providers were not 'qualified' providers." *Id.* at 353.

The court based that decision "primarily on two independent bases: (1) [this] Court's decision in *O'Bannon v. Town Court Nursing Center*, and (2) the text and structure" of the any-qualified-provider provision, "which does not unambiguously provide that a Medicaid patient may contest a State's determination that a particular provider is not 'qualified.'" *Id.* at 350 (footnote omitted). Accordingly, and without applying the *Blessing* factors, the Fifth Circuit vacated the preliminary injunction "prohibiting the termination" of Planned Parenthood's Medicaid provider agreements. *Id.* at 352.

H. The Fourth Circuit continues to apply *Wilder* and *Blessing* while mostly ignoring *Armstrong*, and a concurring judge pleads for clarity.

The Fourth Circuit's decisions below present an ideal vehicle for this Court to resolve the substantial disagreement among the lower courts over the state of play post-*Gonzaga* and *Armstrong*. In its first opinion, the Fourth Circuit aligned itself with the circuit majority, applying the *Blessing* factors—reading *Gonzaga* as merely a gloss on the first—and then, citing *Wilder*, asserting that this Court has "already held that the Medicaid Act's administrative scheme is not sufficiently comprehensive to foreclose a private right of action enforceable under § 1983." App.63a. Recognizing that *Gonzaga* had "cut back" on *Wilder*, the court maintained that "*Wilder*'s reasoning as to the comprehensiveness of the Medicaid Act's enforcement scheme has not been overturned." App.63a–64a.

Even worse, the court ignored the *Armstrong* plurality's position that "intended beneficiaries" to "contracts between two governments" do not have a right to sue to enforce those contracts. *Armstrong*, 575 U.S. at 332. Instead, the court cited two words from that part of the opinion—the phrase "unambiguously conferred"—and turned the plurality's position on its head by insisting courts should not relieve "sovereign signatories to a contract" of the "consequences" of their agreement, including conferring private rights of action on third parties. App.68a (cleaned up).

In its second opinion—which was briefed and argued *after* the Fifth Circuit issued its en banc decision in *Kauffman*—the Fourth Circuit doubled down on its earlier conclusions. The court again applied the three *Blessing* factors and found them satisfied, adding that "if this statute does not survive the *Blessing* factors, we cannot imagine one that would." App.22a. And the court rejected the Director's argument that "*Gonzaga* effectively abrogated *Blessing*" because, according to the court of appeals, "*Gonzaga* never indicated that *Blessing* is no longer good law." App.22a–23a.

Against this backdrop, it is easy to appreciate Judge Richardson's repeated pleas for this Court to provide "clarity." App.28a, App.88a. The lower courts disagree vigorously over whether *Wilder* has "been repudiated (or even effectively overruled)." App.84a. The same goes for the *Blessing* factors. App.86a. In *Gonzaga*, the Court "seemed to consider this multifactor test problematic, to say the least." *Ibid.* But so far, only two Circuits have followed *Gonzaga* and *Armstrong* to their logical end. *Does*, 867 F.3d at 1039–43; *Kauffman*, 981 F.3d at 350.

"So are *Wilder*, specifically, and the *Blessing* factors, generally, still good law?" App.87a. Lower courts feel powerless to answer these questions. App.84a ("But we do not lightly conclude that the Supreme Court has overruled its prior cases—that job is for the Supreme Court alone."). Accord *Sabree*, 367 F.3d at 194 ("While the analysis and decision of the [lower court] may reflect the direction that future Supreme Court cases in this area will take, currently binding precedent supports the decision of the Court.") (Alito, J., concurring).

After years of confusion and litigation, this Court must definitively answer these questions. Answering them against the backdrop of this mature circuit split will ensure a "better informed and more enduring final pronouncement by this Court." *Evans*, 514 U.S. at 23 n.1 (Ginsburg, J., dissenting).

II. This case implicates the same broad questions as *Talevski* and provides a more secure vehicle for making sure those questions are resolved.

When this case last came before this Court, 137 Members of Congress filed a brief in support of the petition. Br. for 137 Members of Cong. as Amici Curiae Supporting Cert., *Baker* v. *Edwards*, 141 S. Ct. 550 (2020) (No. 19-1186). In their brief, those Members advanced the same arguments in support of granting certiorari in this case as the petitioners are making in *Talevski*: "because Spending Clause legislation is contractual, it cannot give rise to third-party suits, absent an expressly granted right *and* remedy." *Id.* at 3.

The Members of Congress are correct in their assertion that, "if Congress intends to allow private parties to enforce Spending Clause legislation, it should explicitly create a private right *and* a private remedy." Br. for 137 Members of Cong. at 20, *Baker*, 141 S. Ct. 550 (2020) (No. 19-1186). As are the petitioners in *Talevski*.

Unfortunately, mootness concerns due to the case's interlocutory posture likely explain why the Court did not resolve that question the last time this case came before it. And given that *Talevski* is in a similar interlocutory posture—arising from the court of appeals' reinstatement of claims—similar mootness issues could arise that would prevent the Court from resolving these important and recurring questions in that case, too. The petitioners there have "several factual defenses" that could still prevail as the case proceeds below while the appeal is pending. Br. in Opp'n at 18, *Talevski*, No. 21-806 (March 11, 2022). And because the plaintiffs in *Talevski* only raised claims for damages—unlike the plaintiffs here who sought injunctive relief—this Court's recent decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219, 2022 WL 1243658 (U.S. Apr. 28, 2022), could provide the *Talevski* petitioners with yet another viable defense.

This case, by contrast, raises no mootness concerns now that Petitioner is appealing a decision affirming the grant of a permanent injunction. Indeed, when Respondents appeared to suggest below that Edwards had chosen not to seek medical care from Planned Parenthood since before filing her complaint, Petitioner flagged the issue in his reply brief so Respondents could provide evidence that

Edwards still intends to use Planned Parenthood in the future. And Respondents did so, producing a supplemental declaration from Edwards explaining that she had "seen no other providers for such care since her appointment with Planned Parenthood in 2018," that she recently "had made an appointment for future care with Planned Parenthood," and that if "Planned Parenthood [were] not able to provide this care under Medicaid," she would "be forced to look elsewhere." App.12a. That evidence resolved any potential mootness concerns, so the Fourth Circuit held that the case still "presents a live case or controversy." App.14a.

Given the ongoing mootness concerns in *Talevski*, and the fact that any such concerns have been resolved in this case, Members of Congress are preparing to file a brief in support of this petition, asking the Court to grant the petition alongside *Talevski* to ensure that a justiciable controversy exists until the Court has an opportunity to rule. The Court should grant that request.

III. This case also implicates a second circuit split over the proper reading of this Court's decision in *O'Bannon*.

The second question presented here also implicates a second circuit split over the meaning of this Court's decision in *O'Bannon* and the scope of the alleged right to choose a qualified Medicaid provider.

In its first opinion, the Fourth Circuit read the any-qualified-provider provision broadly to "confer[] an individual right on Medicaid recipients to select the willing and competent provider of their choice." App.76a. But as the Fifth Circuit explained in

Kauffman, this Court's decision in *O'Bannon* proves that the lower court's understanding of the scope of the alleged right is "demonstrably incorrect." *Kauffman*, 981 F.3d at 365, 366.

In *O'Bannon*, this Court held that the any-qualified-provider provision "gives recipients the right to choose among a range of *qualified* providers, without government interference." 447 U.S. at 785. "But it clearly does not confer a right on a recipient to [seek services from] an unqualified [provider] and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care [from a provider] that has been decertified." *Ibid.*

The Fourth Circuit reached the exact opposite conclusion below. And even after the Fifth Circuit explicitly pointed out its earlier error, the Fourth Circuit stood by its erroneous reading of *O'Bannon*. App.25a. (*O'Bannon* "actually resolved an entirely different question and, to the extent that it has any application here, it only supports the existence of a private right.").

Accordingly, this petition's second question presented also offers the Court an opportunity to resolve a 3-1 circuit split over the scope of any alleged right under the any-qualified-provider provision and the proper reading of *O'Bannon*. App.75a (joining "three of the four circuits to have addressed this issue," one of which, the Fifth, reversed course in *Kauffman*). *See also Does*, 867 F.3d at 1046 (Shepherd, J., concurring) (*O'Bannon* "tells us the right created by § 23(A) is far more narrow: the right to choose among a range of qualified providers").

IV. This case raises important and recurring issues with far-reaching consequences, and the Fourth Circuit got it wrong.

1. Whether Medicaid's any-qualified-provider provision creates a privately enforceable right is a recurring question of great national importance. More than "70 million Americans are on Medicaid, and the question[s] presented directly affect[ ] their rights." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari). "Tens of thousands of provider entities are subject to the Medicaid program's detailed scheme of integrated federal and state regulation." *Smith*, 913 F.3d at 570 (Jones, J., concurring). And "[b]ecause of this Court's [past] inaction, patients in different States—even patients with the same providers—have different rights to challenge their State's provider decisions." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari).

Moreover, the Medicaid "program is already one of the most expensive components of state budgets." *Smith*, 913 F.3d at 571 (Jones, J., concurring). And the majority rule imposes the "threat of a federal lawsuit—and its attendant costs and fees—whenever [a state makes] changes" to its plan. *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari).

2. Even if the Court concludes that a Spending Clause statute can create rights privately enforceable under § 1983, the decisions below are wrong under *Gonzaga* and *Armstrong*.

First, in deciding the threshold question, the Fourth Circuit misread and misapplied *Gonzaga* while applying *Blessing*'s three-factored test and the

rebuttable presumption. App.18a–25a, 58a–65a. In *Gonzaga*, this Court did not apply *Blessing*'s "multifactor balancing test." 536 U.S. at 286. Instead, it repeatedly criticized *Blessing* and the "confusion" it has inspired, ultimately "reject[ing] the notion that [the Court's] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 282–83, 286.

The Eighth Circuit's decision in *Does* and the Fifth Circuit's *Kauffman* decision exemplify principled, post-*Gonzaga* approaches to deciding whether a given statute creates privately enforceable rights under § 1983. For example, applying *Gonzaga*, the Eighth Circuit highlighted three "significant difficulties with the contention" that the any-qualified-provider provision "unambiguously creates an enforceable federal right." 867 F.3d at 1041. First, the "focus" of the provision—on the "federal agency charged with approving" state plans—is "two steps removed from the interests of the patients who seek services from a Medicaid provider." *Ibid.* "Second, Congress expressly conferred another means of enforcing" compliance: the "withholding of federal funds by the Secretary." *Ibid.* And "[t]hird, statutes with an 'aggregate' focus," like the Medicaid Act's "substantial compliance regime," do not "give rise to individual rights." *Id.* at 1042 (quoting *Gonzaga*, 536 U.S. at 288).

The Eighth Circuit's reasoning is sound. And it proves that, untethered from *Blessing*'s "multifactor balancing test," *Gonzaga*, 536 U.S. at 286, courts can more easily heed this Court's admonition that nothing "short of an unambiguously conferred right," *id.* at 283, can confer a cause of action under § 1983.

Second, the Fourth Circuit relied heavily on the dubious *Wilder* decision. App.63a–64a. According to the court below, this "Court has already held [in *Wilder*] that the Medicaid Act's administrative scheme" does not "foreclose a private right of action." App.63a. But courts should place "little stock in [*Wilder*'s] paradigm after *Armstrong*'s express disavowal of *Wilder*'s mode of analysis." *Does*, 867 F.3d at 1042.

Third, like the majority in a recent Second Circuit decision, the Fourth Circuit "misconstrue[d] the controlling precedent provided by [this] Court's 2015 *Armstrong* decision." *N.Y. State Citizens' Coal. for Child.* v. *Poole*, 922 F.3d 69, 97–98 (2d Cir. 2019) (Livingston, J., dissenting). *Armstrong* emphasized that the "sole remedy … 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." 575 U.S. at 328. And the majority rejected the "dissent's complaint" that the "cut-off of funding" is "too massive to be a realistic source of relief." *Id.* at 331.

Resurrecting that overruled complaint, the Fourth Circuit dismissed Congress's chosen remedy as a "drastic" and "illogical" means of "vindicating the interests of individual Medicaid beneficiaries." App.63a. The court also got *Armstrong*'s plurality portion backwards, claiming that it was refusing to relieve "sovereign signatories to a contract" of the "consequences" of their agreement, App.68a (cleaned up), even though the signatories themselves have made no such claim.

In sum, this case is "not about abortion rights." *Gee*, 139 S. Ct. at 410 (Thomas, J., dissenting from denial of certiorari). It is about "private rights of action under the Medicaid Act." *Ibid.* And by extension, it is about every Spending Clause statute "in the nature of a contract" between states and the federal government. *Armstrong*, 575 U.S. at 332. Certiorari is warranted to eradicate confusion in this Court's caselaw and to make clear that Spending Clause statutes like the Medicaid Act do not—and cannot—create privately enforceable rights "by mere implication." *Ibid.* No court should be reading private rights into silent statutory text.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MAY 2022

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1043

PLANNED PARENTHOOD SOUTH ATLANTIC; JULIE EDWARDS, on her behalf and on behalf of all others similarly situated,

Plaintiffs – Appellees,

v.

ROBERT M. KERR, in his official capacity as Director, South Carolina Department of Health and Human Services,

Defendant – Appellant.

REPRODUCTIVE RIGHTS AND JUSTICE ORGANIZATIONS AND ALLIED ORGANIZATIONS; NATIONAL HEALTH LAW PROGRAM; SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER; VIRGINIA POVERTY LAW CENTER; NORTH CAROLINA JUSTICE CENTER; CHARLOTTE CENTER FOR LEGAL ADVOCACY; IPAS; SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES; AMERICAN ACADEMY OF FAMILY PHYSICIANS; AMERICAN ACADEMY OF PEDIATRICS;

AMERICAN COLLEGE OF NURSE-MIDWIVES; AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; AMERICAN COLLEGE OF PHYSICIANS; AMERICAN MEDICAL ASSOCIATION; AMERICAN PSYCHIATRIC ASSOCIATION; NURSE PRACTITIONERS IN WOMENS HEALTH; SOCIETY FOR MATERNAL-FETAL MEDICINE; SOCIETY OF GYNECOLOGIC ONCOLOGY; SOCIETY OF OB/GYN HOSPITALISTS,

Amici Supporting Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Mary G. Lewis, District Judge. (3:18-cv-02078-MGL)

Argued: January 26, 2022

Decided: March 8, 2022

Before WILKINSON, WYNN, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Wynn joined. Judge Richardson wrote an opinion concurring in the judgment.

ARGUED: John J. Bursch, ALLIANCE DEFENDING FREEDOM, Washington, D.C., for Appellant. Nicole A. Saharsky, MAYER BROWN, LLP, Washington, D.C., for Appellees. **ON BRIEF:** Kelly M. Jolley, Ariail B. Kirk, JOLLEY LAW GROUP, LLC, Columbia, South Carolina, for Appellant. Avi M. Kupfer, MAYER BROWN LLP, Chicago, Illinois; Alice Clapman, PLANNED PARENTHOOD FEDERATION OF AMERICA, Washington, D.C.; M. Malissa Burnette, Kathleen McDaniel, BURNETTE, SHUTT & MCDANIEL, PA, Columbia, South Carolina, for Appellees. Julie Rikelman, Pilar Herrero, Joel Dodge, CENTER FOR REPRODUCTIVE RIGHTS, New York, New York; Da Hae Kim, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, Washington, D.C., for Amici Reproductive Rights and Justice Organizations and Allied Organizations. Martha Jane Perkins, Catherine McKee, Sarah Jane Somers, Sarah Grusin, NATIONAL HEALTH LAW PROGRAM, Chapel Hill, North Carolina, for Amici The National Health Law Program, South Carolina Appleseed Legal Justice Center, Virginia Poverty Law Center, North Carolina Justice Center, Charlotte Center for Legal Advocacy, IPAS, and Sexuality Information and Education Council of the United States. Janice M. Mac Avoy, Alexis R. Casamassima, Danielle M. Stefanucci, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, New York, New York, for Amici American Academy of Family Physicians, American Academy of Pediatrics, American College of Nurse-Midwives, American College of Obstetricians and Gynecologists, American College of Physicians, American Medical Association, American Psychiatric Association, Nurse

Practitioners in Women's Health, Society for Maternal-Fetal Medicine, Society of Gynecologic Oncology, and Society of OB/GYN Hospitalists.

WILKINSON, Circuit Judge:

This case arises out of South Carolina's termination of Planned Parenthood South Atlantic's Medicaid provider agreement, an action that South Carolina took because Planned Parenthood offers abortion services. But this case is not about abortion. It is about Congress's desire that Medicaid recipients have their choice of qualified Medicaid providers. Here South Carolina terminated Planned Parenthood's agreement notwithstanding the fact that all parties agree that Planned Parenthood is perfectly competent to provide the non-abortive healthcare the individual plaintiff sought and requested. To allow the State to disqualify Planned Parenthood would nullify Congress's manifest intent to provide our less fortunate citizens the opportunity to select a medical provider of their choice, an opportunity that the most fortunate routinely enjoy.

At the outset of this litigation, the district court issued a preliminary injunction preventing South Carolina from terminating Planned Parenthood's provider agreement. We affirmed its decision then. South Carolina now returns to our court to appeal the district court's subsequent permanent injunction. For the following reasons, we again affirm the district court's judgment.

I.

A.

Congress created Medicaid in 1965 to provide "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980). The program furnishes "medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. In this way, Medicaid effectively serves as a nationwide system of public health insurance for those who cannot afford medical care on their own.

Although it is federal in scope, Medicaid is administered by the states and, "[l]ike other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323 (2015). The scheme of the Medicaid program reflects the cooperative nature of this enterprise. Under the Medicaid Act, the federal government is tasked with crafting general eligibility requirements and standards. *See* 42 U.S.C. § 1396 *et seq*. States then submit Medicaid plans for approval by the Secretary of Health and Human Services, who reviews these plans to ensure that they comply with the statutory and regulatory requirements governing Medicaid. *See Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012). Upon approval, states receive federal matching funds that they may use to reimburse

providers. *See id.* at 611. On the other hand, the Secretary may withhold funds if he finds "that in the administration of the plan there is a failure to comply substantially" with the requirements of the Medicaid Act. 42 U.S.C. § 1396c.

Over the first two years of the Medicaid program, Congress grew concerned that states might deny recipients the opportunity to choose the provider of their choice. In Puerto Rico, for instance, indigent patients could receive medical services "only in Commonwealth facilities." *President's Proposals for Revision in the Social Security System: Hearing on H.R. 5710 before the H. Comm. on Ways & Means, Part 4*, 90th Cong. 2273 (1967). And in Massachusetts, private physicians at teaching hospitals were not reimbursed under Medicaid. *Id.* at 2301.

Accordingly, Congress amended the Medicaid Act to include the free-choice-of-provider provision, which is at issue here. That provision states:

> A State plan for medical assistance must . . . provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services. . . .

42 U.S.C. § 1396a(a)(23).

B.

Planned Parenthood South Atlantic offers patients a number of family planning and reproductive health services at two South Carolina health centers in Charleston and Columbia. These services

include, for instance, contraception and contraceptive counseling, cancer screenings, screenings and treatment for sexually transmitted infections, pregnancy testing, and physical exams. Planned Parenthood also performs abortions, although South Carolina Medicaid only covers abortions in certain rare circumstances required by federal law, such as rape, incest, or the need to protect the mother's life. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, div. H, tit. V, §§ 506–07, 134 Stat. 1182, 1622 (Hyde Amendment).

Julie Edwards, the individual plaintiff in this case, is insured through Medicaid and suffers from Type 1 diabetes, for which she has obtained frequent medical attention. She has been advised by doctors that, due to high blood pressure and high blood sugar, it would be dangerous for her to try to carry a pregnancy to term. After finding that local Medicaid providers were unable or unwilling to provide her with the contraceptive care that she sought, Edwards made an appointment at Planned Parenthood's office in Columbia. Doctors there inserted an intrauterine device to prevent pregnancy and told her that her blood pressure was very high, for which she sought follow-up care. Edwards was impressed with her visit and planned to shift "all [her] gynecological and reproductive health care there," including her "annual well woman exam." J.A. 61. However, she stated that she "[would] not be able to continue going there if the services are not covered" by Medicaid and she is required "to pay out of pocket." J.A. 61.

In July 2018, the Governor of South Carolina issued an executive order directing South Carolina's Department of Health and Human Services (DHHS)

"to deem abortion clinics . . . that are enrolled in the Medicaid program as unqualified to provide family planning services and, therefore, to immediately terminate them upon due notice and deny any future such provider enrollment applications for the same." J.A. 54. The Governor stated that the purpose of this decision was to prevent South Carolina from indirectly subsidizing the practice of abortion. On that same day, DHHS sent Planned Parenthood a letter stating that it was "no longer . . . qualified to provide services to Medicaid beneficiaries" and that its "enrollment agreements with the South Carolina Medicaid programs [were] terminated" effective immediately. J.A. 56.

Two weeks later, Planned Parenthood and Edwards filed suit under 42 U.S.C. § 1983 against the Director of DHHS in federal district court, alleging that South Carolina had violated the Medicaid Act and the Fourteenth Amendment. The plaintiffs soon moved for a preliminary injunction and a temporary restraining order, contending that they were likely to succeed on their claim that South Carolina's termination of Planned Parenthood's Medicaid provider agreement violated the Medicaid Act's free-choice-of-provider provision. South Carolina opposed this motion, arguing that the plaintiffs lacked a cause of action under § 1983 to sue to enforce that provision.

The district court granted the preliminary injunction, concluding that Edwards had demonstrated that she was likely to succeed on her Medicaid Act claim since the free-choice-of-provider provision conferred a private right enforceable under § 1983 and since South Carolina had violated that provision by terminating Planned Parenthood's

Medicaid provider agreement. *See Planned Parenthood S. Atl. v. Baker*, 326 F. Supp. 3d 39, 44–48 (D.S.C. 2018). The district court concluded that the other equitable factors also favored Edwards and it enjoined South Carolina from terminating Planned Parenthood's provider agreement during the pendency of the litigation. *See id.* at 48–50. Because it held that preliminary relief was warranted on the basis of Edwards's Medicaid Act claim, it declined to consider whether such relief would also be appropriate on the basis of Planned Parenthood's claim. *See id.* at 50.

South Carolina appealed and this panel affirmed. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 691 (4th Cir. 2019). After applying the three factors articulated by the Supreme Court in *Blessing v. Firestone*, 520 U.S. 329 (1997), we first concluded that the free-choice-of-provider provision conferred on Edwards a private right enforceable under § 1983. *See Baker*, 941 F.3d at 696–98. We noted that the statute was couched in terms of individual beneficiaries and that it used the phrase "any individual," indicating Congress's specific intention to confer a right on the class of Medicaid recipients. *Id.* at 697. In addition, the statute was not so "vague and amorphous" as to strain judicial competence and the text clearly imposed a "binding obligation on the States." *Id.* (quoting *Blessing*, 520 U.S. at 340–41). Since the enforcement scheme did not indicate that Congress had foreclosed a remedy under § 1983, we concluded that Edwards could sue under that statute to enforce the free-choice-of-provider provision. *See id.* at 698–700.

Next, we determined that a provider was "qualified to perform the service or services required" under the terms of the statute, 42 U.S.C. § 1396a(a)(23), if it was professionally competent to do so, although states retained discretionary authority to disqualify providers as professionally incompetent. *See id.* at 701–06. Since South Carolina's exclusion of Planned Parenthood had "nothing to do with professional misconduct" or with Planned Parenthood's "ability to safely and professionally perform plaintiff's required family-planning services," we agreed with the district court that Edwards had demonstrated a substantial likelihood of success on her Medicaid Act claim. *Id.* at 705. Likewise, we concluded that the district court had not abused its discretion in determining that the remaining equitable factors favored Edwards and we affirmed its judgment. *See id.* at 706–07.

Following our decision, South Carolina petitioned for a writ of certiorari, which the Supreme Court denied. *Baker v. Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020). The district court subsequently granted summary judgment to the plaintiffs on Edwards's Medicaid Act claim, noting that, under this panel's previous decision, "Edwards, as a matter of law, may seek to enforce the free-choice-of-provider provision in this § 1983 action" and that it was "required to follow Fourth Circuit precedent" on this question. *Planned Parenthood S. Atl. v. Baker*, 487 F. Supp. 3d 443, 446, 448 (D.S.C. 2020). Since it concluded that South Carolina had violated this provision, the district court entered summary judgment for the plaintiffs. *See id.* The parties stipulated to a dismissal of their remaining

Fourteenth Amendment claims, following which the district court entered a declaratory judgment in favor of the plaintiffs and "permanently enjoined" South Carolina "from terminating or excluding [Planned Parenthood] from participation in the South Carolina Medicaid Program on the grounds it is an abortion clinic or provides abortion services." J.A. 302–03. South Carolina now appeals.

II.

Before we turn to the merits of South Carolina's appeal, however, we must satisfy ourselves that we have jurisdiction. South Carolina contends for the first time on this appeal that it believes this case is moot. We do not share that view.

Under Article III of the Constitution, our jurisdiction is limited to "the adjudication of actual cases and controversies." *Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003). This requirement "extends throughout the pendency of the action," *id.*, and "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Powell v. McCormack*, 395 U.S. 486, 496 (1969). As such, mootness is closely related to standing and we have made clear that "a case is moot if, at any point prior to the case's disposition, one of the elements essential to standing, like injury-in-fact, no longer obtains." *Am. Fed'n of Gov't Emps. v. Office of Special Counsel*, 1 F.4th 180, 187 (4th Cir. 2021).

To establish standing, the plaintiff must allege an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). In

its reply brief, South Carolina alleges for the first time that Edwards no longer satisfies these requirements, on the grounds that she has not used Planned Parenthood's services since filing her complaint and therefore faces no concrete injury if South Carolina terminates Planned Parenthood's Medicaid provider agreement. Although this contention is offered late in the day, we are bound to consider it fully.

Upon doing so, however, we are satisfied that Edwards's claims are not moot. It is uncontested that Edwards is insured through Medicaid and that she has previously relied on Planned Parenthood for gynecological and reproductive healthcare. In addition, Edwards asserts in a supplemental declaration that she has seen no other providers for such care since her appointment with Planned Parenthood in 2018. In this declaration, executed in July of last year, Edwards states that she in fact had made an appointment for future care with Planned Parenthood before learning of South Carolina's mootness argument. If Planned Parenthood is not able to provide this care under Medicaid, Edwards will be forced to look elsewhere and she will experience a concrete, particularized injury.

South Carolina has not undermined Edwards's declaration or the contents thereof; instead, it suggests that her stated intentions to seek care from Planned Parenthood are insufficient to establish a concrete or imminent injury for Article III purposes. But a future injury satisfies Article III as long as "the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S.

149, 158 (2014)). Here there is a substantial risk that Edwards will be harmed, given that she has previously used Planned Parenthood for gynecological and reproductive care, has seen no other providers for this care since, and has made a future appointment to receive this care from Planned Parenthood. And while Edwards may not have visited Planned Parenthood as regularly as she predicted in her complaint, the frequency of medical appointments may not be so perfectly predicted in advance. It is commonplace for patients to see multiple providers and equally routine to defer care until the need arises or until symptoms in some way manifest themselves. We are given no reason to doubt Edwards's contention that she intends Planned Parenthood to be her medical provider for certain forms of healthcare. The fact that she did not require such care in the time between the outset of this litigation and the present may simply reflect the happenstance of medical need, coupled with the unique hindrances of the covid pandemic.

We note that our conclusion here is a narrow one, drawn from the particular facts of Edwards's situation. And we are fully mindful of the Supreme Court's admonition that "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Here, however, Edwards has made just the "concrete plans" that *Lujan* requires. And while the plaintiffs in *Lujan* asserted injury on the basis of abstract and indefinite intentions to visit certain countries, *see id.*, it is far more likely that Edwards will fulfill her stated

intention to seek gynecological or reproductive care from Planned Parenthood in the future, given the fact that Planned Parenthood's proximity and match with her medical needs led her to seek its services in the past. Under the particular circumstances present here, we conclude this case presents a live case or controversy. To hold otherwise would be to deprive Edwards both of the access to court which is her due and of the access to her chosen qualified medical provider.

III.

On the merits, South Carolina argues that we should reconsider our previous panel decision and hold that Edwards cannot sue under § 1983 to enforce the free-choice-of-provider provision.[1] In essence, South Carolina suggests that we reverse the district court for applying a legal conclusion that we previously set forth in a binding opinion. This is a striking request, and one that cannot be reconciled with the nature of precedent in our judicial system. In any event, we remain persuaded that our previous holding is correct and we take this opportunity to reaffirm our prior decision.

A.

In asking us to reconsider our previous decision, South Carolina would deny it any precedential weight. The State's position here is quite misguided. While law is indeed not static, it is also not open to

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[1] Notably, South Carolina does not challenge the district court's determination (and our own previous conclusion) that South Carolina violated this provision by terminating Planned Parenthood's Medicaid provider agreement.

reversal in the manner that appellant suggests. After all, the question at issue here is identical to the legal question we resolved in the prior case: whether § 1983 provides a cause of action to enforce the Medicaid Act's free-choice-of-provider provision. We answered that question as a legal matter after full briefing and oral argument, and we presented our conclusion in a published opinion. Such a decision "is binding on other panels unless it is overruled by a subsequent en banc opinion of the court or a superseding contrary decision of the Supreme Court." *United States v. Dodge*, 963 F.3d 379, 383 (4th Cir. 2020) (quoting *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005)).

South Carolina points to no such en banc opinion or Supreme Court decision. Instead, the only intervening change highlighted by South Carolina is that the Fifth Circuit recently came to a different conclusion than our own. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 353 (5th Cir. 2020) (en banc). Even setting aside the fact that we remain on the majority of a rather lopsided circuit split,[2] it is hard to see how that could justify our reconsideration of the case. If we were free to overturn our own prior position whenever another circuit took

[2] *Compare Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 965–66 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 968 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006) (all finding a right of action under § 1983) *with Kauffman*, 981 F.3d at 353; *Does v. Gillespie*, 867 F.3d 1034, 1037 (8th Cir. 2017) (finding no right of action under § 1983).

a different view, it would utterly destabilize the law of our circuit, placing it at the sufferance of any circuit court anywhere that took a contrary step—something that often happens between the courts of appeals. As useful as we may find decisions from the other circuits, they of course carry only persuasive weight in our own.

Against these pressing considerations, South Carolina suggests that the law-of-the-circuit framework is inapposite here. It contends instead that only law-of-the-case governs where a panel rehears a legal issue stemming from the same case as a prior opinion. But we need not dance on the head of a pin as to whether our previous decision implicates law-of-the-case or whether it's binding law-of-the-circuit. As between the two, South Carolina loses either way. Without exception, this court has understood that the resolution of a purely legal issue, absent a change in controlling law, governs subsequent panels, including in later appeals following a prior interlocutory appeal. *L.J. v. Wilbon*, 633 F.3d 297, 308 (4th Cir. 2011); *U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 925 (4th Cir. 1995); *see also Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 560 n.5 (4th Cir. 2017) (noting that a previous opinion by an identical panel in the same case constituted both "law of the case" and "Fourth Circuit precedent"). We are hardly alone in this understanding. *See Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (collecting cases from the other courts of appeals).

"What has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed."

Benjamin N. Cardozo, *The Paradoxes of Legal Science* 29–30 (1928). Justice Cardozo's predecessor on the Supreme Court was of the same mind and once commented, in response to an article criticizing the common law: "We must add that we sincerely hope that the editors will fail in their expressed desire to diminish the weight of precedents with our courts. We believe the weight attached to them is about the best thing in our whole system of law." Oliver Wendell Holmes Jr., *Summary of Events*, 7 Am. L. Rev. 579, 579 (1873). We agree with our forebears. Our fidelity to our previous decisions is a necessary service to the parties before us, as well as to the public generally. It ensures stability in the law and provides clear signals to litigants so that they may rely on our decisions. The alternative is a legal system where each thing is up for grabs every time. The very guidance that law purports to provide for human conduct would by degrees recede. So even assuming, purely arguendo, that we were free to reexamine our precedents, we would not do so here. Our previous decision was handed down as a matter of law and resolved the precise legal issue upon which South Carolina now seeks review. For the above multiplicity of reasons we stand by it. In Latin: *stare decisis*.

B.

Furthermore, we take this occasion to reaffirm our prior holding. To reiterate, the legal question is whether individuals such as Edwards may sue under 42 U.S.C. § 1983 to enforce the Medicaid Act's free-choice-of-provider provision. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983. The Supreme Court has interpreted the phrase "and laws" to provide a cause of action for individuals who are deprived of a right, privilege, or immunity secured by federal statute. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). As the Supreme Court has cautioned, however, a litigant seeking to assert a cause of action under § 1983 "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340.

As we explained in our previous opinion, rights of action brought under § 1983 are different from private rights of action inferred directly from a statute. *See Baker*, 941 F.3d at 694–95. The Supreme Court has warned against readily finding statutory rights of action under § 1983. It is not enough for a plaintiff to fall "within the general zone of interest" of a federal statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Rather, nothing "short of an unambiguously conferred right," rather than the "broader or vaguer" notion of "'benefits' or 'interests'" may support a cause of action under § 1983. *Id.* This is particularly important in the Spending Clause context since such legislation is akin to a contract and "[t]he legitimacy of Congress' power to legislate under the spending power thus 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). But where it is clear and unambiguous that Congress intended to create a private right, we are obliged to follow its intention. As we noted, "[c]ourts cannot deprive the sovereign signatories to a 'contract' such as the Medicaid Act of the benefit of their bargain." *Baker*, 941 F.3d at 701.

1.

In *Blessing*, the Supreme Court articulated three factors to determine whether a statute creates a private right enforceable under § 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory terms.

520 U.S. at 340–41 (citations omitted). If these three factors are satisfied, there is "a rebuttable presumption that the right is enforceable under § 1983," provided that Congress has not expressly or implicitly foreclosed a § 1983 remedy. *Id.* at 341.

To repeat, the free-choice-of-provider provision states that "[a] State plan for medical assistance *must* . . . provide 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) (emphases added). "It is difficult to imagine a clearer or more affirmative directive." *Baker*, 941 F.3d at 694. The statute plainly reflects Congress's desire that individual Medicaid recipients be free to obtain care from any qualified provider and it implements this policy in direct and unambiguous language. For this reason, all three of the *Blessing* factors are met.

As to the first factor, the free-choice-of-provider provision "unambiguously gives Medicaid-eligible patients an individual right" to their choice of qualified provider. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012). The provision clearly and expressly identifies the intended beneficiaries: "any individual eligible for medical assistance" under Medicaid. 42 U.S.C. § 1396a(a)(23)(A). And as we noted, "Congress's use of the phrase 'any individual' is a prime example of the kind of 'rights-creating' language required to confer a personal right on a discrete class of persons—here, Medicaid beneficiaries." *Baker*, 941 F.3d at 697. Indeed, this phrase closely mirrors the common example that the Supreme Court has given of such language. See *Gonzaga*, 536 U.S. at 287 ("No person . . . shall . . . be subjected to discrimination."). The statutory text therefore unmistakably evinces Congress's intention to confer on Medicaid beneficiaries a right to the free choice of their provider.

As to the second factor, the provision is hardly so "vague and amorphous" as to preclude judicial enforcement, *Blessing*, 520 U.S. at 340, since it merely

requires courts to make two discrete assessments: (i) that the provider is "qualified to perform the service or services required" and (ii) that the provider "undertakes" to provide those services, 42 U.S.C. § 1396a(a)(23)(A). By way of comparison, the Supreme Court has concluded that a statute does not confer an enforceable right where it simply required a state to make "'reasonable efforts' to maintain an abused or neglected child in his home" without any "further statutory guidance." *Suter v. Artist M.*, 503 U.S. 347, 359–60 (1992). Here, by contrast, the statute does not require courts to "engage in any balancing of competing concerns or subjective policy judgments, but only to answer factual, yes-or-no questions: Was an individual denied the choice of a (1) qualified and (2) willing provider?" *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 967 (9th Cir. 2013). Courts are routinely tasked with resolving questions just like these.

Indeed, the facts of this case make it particularly easy to apply the free-choice-of-provider provision. Planned Parenthood has provided the medical services that Edwards seeks for almost four decades, without any apparent challenge to its professional competence until now. We of course would give due respect and weight to South Carolina's judgment that a particular provider is unqualified. But the language of the statute makes clear that the relevant qualifications are medical qualifications, and, as we noted in our prior decision, South Carolina "does not the contest the fact" that Planned Parenthood "is professionally qualified to deliver the services that the individual plaintiff seeks." *Baker*, 941 F.3d at 702. Given these facts, it is straightforward to apply the

free-choice-of-provider provision here.

Finally, as to the third factor, the statute is couched in just the "mandatory, rather than precatory terms" that the Supreme Court has required, *Blessing*, 520 U.S. at 341, since states "must provide" a Medicaid recipient with her choice of qualified provider. Again, a comparison makes the point clear: the Supreme Court found that provisions "were intended to be hortatory, not mandatory" where they were expressed only as "findings respecting the rights of persons with developmental disabilities," such as that these persons have a right to "appropriate treatment." *Pennhurst*, 451 U.S. at 13, 24. Here, by contrast, the text clearly imposes a definite obligation on state governments; indeed, it is hard to imagine how Congress could have more plainly used mandatory language.

In short, if this statute does not survive the *Blessing* factors, we cannot imagine one that would. Congress used emphatic, mandatory language to affirm the right of Medicaid recipients to receive the healthcare of their choice from a willing provider, and there is nothing about this inquiry that would strain the judicial role. In every respect, the statute resembles those laws which the Supreme Court has determined confer enforceable rights and we do not see how we could hold otherwise without repudiating Congress's clear intention.

In fact, South Carolina does not dispute our analysis of the *Blessing* factors. Rather, it argues that we erred altogether in applying these factors and suggests that the Supreme Court's decision in *Gonzaga* effectively abrogated *Blessing*. But *Gonzaga*

never indicated that Blessing is no longer good law; instead, it simply criticized courts that interpreted *Blessing* “as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect.” 536 U.S. at 282–83. Indeed, our court has held that the *Blessing* factors continue to govern following *Gonzaga*. *Doe v. Kidd*, 501 F.3d 348, 355 (4th Cir. 2007).

While South Carolina contends we disregarded *Gonzaga* in our prior decision, we in fact took pains to heed *Gonzaga*’s instruction that there must be an “unambiguously conferred right to support a cause of action brought under § 1983.” *Gonzaga*, 536 U.S. at 283; *see Baker*, 941 F.3d at 695, 697, 700. As we stated, “courts are most definitely not at liberty to imply private rights of action willy-nilly.” *Baker*, 941 F.3d at 700. But where Congress’s intent to make a right enforceable under § 1983 is indeed “clear and unambiguous,” *Gonzaga*, 536 U.S. at 290, we are bound to respect it. Because Congress’s intent is clear and unambiguous here, we conclude that the free-choice-of-provider provision confers on Medicaid recipients an individual right.

2.

Since the *Blessing* factors are satisfied, the free-choice-of-provider provision may be enforced under § 1983 unless the Medicaid Act evinces Congress’s intent to “specifically foreclose[] a remedy under § 1983.” *Blessing*, 520 U.S. at 341 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984)). “We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy.” *Smith*, 468 U.S. at

1012. And as we explained at length in our previous opinion, the statute here does no such thing. *See Baker*, 941 F.3d at 698–700.

The Medicaid Act provides three potential remedies in this context: the Secretary of Health & Human Services may take the drastic step of cutting off Medicaid funds, providers may follow state administrative processes to challenge termination decisions, or Medicaid recipients may use similar procedures to challenge claim denials. *See id.* at 698. None of these remedies provides individual Medicaid recipients any mechanism to contest the disqualification of their preferred provider, even though the statutory language benefits these individual recipients specifically and even though the Supreme Court has instructed us to focus on whether "an aggrieved individual lack[s] any federal review mechanism." *Gonzaga*, 536 U.S. at 290. And as we noted previously, *see Baker*, 941 F.3d at 698–99, the Supreme Court has already held in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), that the Medicaid Act does not foreclose remedies under § 1983 for just these reasons, *see id.* at 521–23.

In response, South Carolina argues that we erroneously relied on *Wilder* and that this decision has been repudiated by the Supreme Court. This suggestion misreads both our previous decision and the Supreme Court's discussion of *Wilder*. To be sure, § 1983 does not operate as some sort of ubiquitous backstop conferring a private right of action where the underlying statute fails to do so. The Court has made clear that we should not rely on *Wilder*'s mode of analysis in determining whether a statute confers a private right enforceable under § 1983. *See*

Gonzaga, 536 U.S. at 283 (rejecting the view "that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983"); *Armstrong*, 575 U.S. at 330 n* (noting that "our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified"). But the Supreme Court has never extended this criticism to *Wilder*'s subsequent analysis as to whether a statute's remedial scheme forecloses the enforcement of a plainly conferred cause of action under § 1983. In fact, the Court approvingly cited *Wilder* on this point following *Gonzaga*. *See City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005).

Suffice it to say that it is difficult to imagine that Congress would have passed such an emphatic provision and yet would not have approved some private enforcement mechanism on the part of those very people whom the statute was designed to benefit. It would be an odd state of affairs if Congress had categorically precluded enforcement on the part of these very beneficiaries, and there is nothing in the statute to suggest that it did.

3.

Finally, we conclude that the Supreme Court's decision in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), does not undermine this analysis. South Carolina interprets *O'Bannon* to hold that the free-choice-of-provider provision does not confer any individual rights on Medicaid recipients. But that case actually resolved an entirely different question and, to the extent that it has any application here, it only supports the existence of a private right.

In *O'Bannon*, the plaintiffs were residents of a nursing home who argued that they were entitled under the Due Process Clause to a hearing before the government decertified their home. *See id.* at 775–77. The state sought to do so upon the recommendation of the federal government and had cited a number of reasons for decertification, all of which had to do with professional competence. *See id.* at 775–76 & n.3. The plaintiffs did not argue that they could sue to enforce the terms of the Medicaid Act but only that the Act granted them a "property right to remain in the home of their choice absent good cause for transfer" or that such a transfer would deprive them of life or liberty. *Id.* at 784. So, as we noted previously, *see Baker*, 741 F.3d at 704, the Supreme Court had no reason to consider the existence or scope of a statutory cause of action to enforce the Medicaid Act, and none of its reasoning bears on that question. The Court simply rejected the procedural due process claim brought by the plaintiffs, concluding that the decertification of an unqualified facility "does not amount to a deprivation of any interest in life, liberty, or property." *O'Bannon*, 447 U.S. at 787.

O'Bannon therefore has little to do with this case. But to the extent that it is at all applicable, language from that decision only supports the plaintiff's position here. While the Court rejected the notion that plaintiffs might possess some constitutional interest to receive benefits from an unqualified provider, it repeatedly indicated that the free-choice-of-provider provision "gives recipients the right to choose among a range of *qualified* providers without government interference." *Id.* at 785; *see also id.* n.18 (noting that "the statute referred to above would prohibit any . . .

interference with the patient's free choice among qualified providers"). As the Court made clear, a patient has "no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified" but *does* have "a right to continued benefits to pay for care in the qualified institution of his choice." *Id.* at 786. Here, of course, the issue is precisely that Planned Parenthood remains a qualified institution under the terms of the statute, and South Carolina's termination of its Medicaid provider agreement impinges on Edwards's "right to choose among a range of qualified providers without government interference." *Id.* at 785.

IV.

In sum we refuse to nullify Congress's undeniable desire to extend a choice of medical providers to the less fortunate among us, individuals who experience the same medical problems as the more fortunate in society but who lack under their own means the same freedom to choose their healthcare provider. In the Medicaid Act, Congress attempted a modest corrective to this imbalance. If we were to restrict the opportunity that these individuals have to access prenatal care that would both assist the mother and help bring healthy babies into this world, we would be reaching what we think is a legally impermissible result.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

RICHARDSON, Circuit Judge, concurring in the judgment:

Despite some reservations, I agree that the case is not moot given the facts before this Court. The State's attempt to introduce information outside the record, which allegedly comes from an internal database, cannot establish mootness.

I also continue to believe that "applying existing Supreme Court precedents requires that we find § 1396a(a)(23) to unambiguously create a right privately enforceable under § 1983 to challenge a State's determination of whether a Medicaid provider is 'qualified.'" *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 707 (4th Cir. 2019) (Richardson, J., concurring). As a result, it matters not whether our previous decision is binding circuit precedent or the "law of the case." I would reach the same result either way.

At the same time, the caselaw on implied private rights of action remains plagued by confusion and uncertainty. *Id.* at 708–10. This confusion stems from recent Supreme Court cases which cast doubt on—but fail to explicitly overrule—earlier precedent. *Gonzaga* arguably laid down a different test than *Wilder* and *Blessing*. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). And *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 n.* (2015), questioned *Wilder*'s reasoning and claimed later opinions "plainly repudiate" its "ready implication of a § 1983 action." Yet this Court remains bound by *Blessing* and *Wilder*. *Baker*, 941 F.3d at 709–10 (Richardson, J., concurring). So I am left hoping that clarity will soon be provided.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

PLANNED PARENTHOOD SOUTH ATLANTIC and JULIE EDWARDS, *on her behalf and on behalf of all others similarly situated*, Plaintiffs, v. JOSHUA BAKER, *in his official capacity as Director, South Carolina Department of Health and Human Services*, Defendant.	§ § § § § § § § § § § § § § § §	Civil Action No.: 3:18-2078-MGL **DECLARATORY JUDGMENT AND PERMANENT INJUNCTION**

This Court having granted Plaintiffs' Motion for Summary Judgment based on the Court's holding that Defendant Joshua Baker's decision to terminate Planned Parenthood South Atlantic (PPSAT) from Medicaid violates the Medicaid Act as a matter of law:

IT IS HEREBY DECLARED that Baker's decision to terminate PPSAT from Medicaid violates the Medicaid Act, is unlawful, and will be void and of no effect;

IT IS FURTHER ORDERED that Baker and his successors are permanently enjoined from terminating or excluding PPSAT, including its employees, contractors, or successors, from participation in the South Carolina Medicaid Program on the grounds it is an abortion clinic or provides abortion services.

IT IS SO ORDERED.

Signed this 14th day of December 2020, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

PLANNED PARENTHOOD SOUTH ATLANTIC and JULIE EDWARDS,	§	
Plaintiffs,	§	Civil Action No.: 3:18-2078-MGL
vs.	§	
JOSHUA BAKER, *in his official capacity as Director, South Carolina Department of Health and Human Services*,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT ONE OF THE COMPLAINT

I. INTRODUCTION

Plaintiffs Planned Parenthood South Atlantic (PPSAT) and Julie Edwards (Edwards) (collectively, Plaintiffs) brought this action against Defendant Joshua Baker (Baker), the director of the South Carolina Department of Health and Human Services (SCDHHS), alleging Baker's termination of PPSAT from South Carolina's Medicaid program violates 42 U.S.C. § 1396a(a)(23)(A), a provision of the Medicaid Act (the Act), as well as the Fourteenth Amendment of the United States Constitution. The Court has jurisdiction over this matter under 28 U.S.C. § 1331.

Pending before the Court is Plaintiffs' motion for summary judgment as to Count One of the complaint. Having carefully considered Plaintiffs' motion, the response, the reply, the record, and the applicable law, it is the judgment of the Court Plaintiffs' motion will be granted.

II. FACTUAL AND PROCEDURAL HISTORY

This action arises out of SCDHHS's termination of PPSAT from South Carolina's Medicaid program. SCDHHS is the state agency that administers South Carolina's Medicaid program.

PSSAT operates two health centers in South Carolina: one in Charleston and one in Columbia. Prior to SCDHSS' termination of PPSAT from South Carolina's Medicaid program, PPSAT treated patients insured through Medicaid at both of its South Carolina locations. PPSAT offers its patients, including but not limited to those insured through Medicaid, a range of family planning, reproductive health, and preventive care services at its Charleston

and Columbia health centers.

PPSAT performs abortions at its South Carolina health centers, but South Carolina Medicaid does not cover abortions, except under limited circumstances required by federal law. Edwards is a South Carolina resident insured through Medicaid, who has been treated at the Columbia location of PPSAT.

On August 24, 2017, South Carolina Governor Henry McMaster (McMaster) issued Executive Order No. 2017-15, directing all State agencies to "take any and all necessary actions . . . to cease providing State or local funds . . . to any physician or professional medical practice affiliated with an abortion clinic and operating concurrently with and in the same physical, geographic location or footprint as an abortion clinic."

On July 13, 2018, Governor McMaster issued Executive Order No. 2018-21, instructing SCDHHS to "deem abortion clinics . . . and any affiliated physicians or professional medical practices . . . enrolled in the Medicaid program as unqualified to provide family planning services and, therefore, to immediately terminate them upon due notice and deny any future such provider enrollment applications for the same." That same day, SCDHHS notified PPSAT it was no longer qualified to provide services to Medicaid beneficiaries, and SCDHHS was therefore terminating PPSAT's Medicaid enrollment agreements effectively immediately.

Plaintiffs filed their complaint in this matter on July 27, 2018. Edwards initially brought suit on her own behalf and as the representative of a purported class of South Carolina Medicaid beneficiaries who have obtained or seek to obtain covered healthcare

services from PPSAT. As the Court noted above, in Plaintiffs' complaint, they allege Baker's actions in terminating PPSAT from South Carolina's Medicaid program violate the Act, as well as the Fourteenth Amendment of the United States Constitution.

Plaintiffs sought declaratory and injunctive relief, and the Court granted Plaintiffs' motion for a temporary restraining order and preliminary injunction. *See Planned Parenthood S. Atl. v. Baker*, 326 F. Supp. 3d 39, 49 (D.S.C. 2018) (*Baker I*). Baker appealed that decision to the Fourth Circuit, which effectively stayed the proceedings before this Court. Thereafter, the Fourth Circuit affirmed the Court's decision. *See Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 699–700 (4th Cir. 2019) (*Baker II*).

Plaintiffs subsequently filed the instant motion, after which the Court denied Plaintiffs' motion for class certification and Baker's motions to dismiss for lack of subject matter jurisdiction and for a failure to state a claim.

III. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be granted under Rule 56 when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists "if the evidence is such

that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it might "affect the outcome of the suit under the governing law." *Id.* On a motion for summary judgment, all evidence must be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123–24 (4th Cir. 1990).

"If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e). The adverse party must show more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If an adverse party completely fails to make an offer of proof concerning an essential element of that party's case on which that party will bear the burden of proof, then all other facts are necessarily rendered immaterial and the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 322–23. Hence, the granting of summary judgment involves a three-tier analysis.

First, the Court determines whether a genuine issue actually exists so as to necessitate a trial. Fed. R. Civ. P. 56(e). An issue is genuine "if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Second, the Court must ascertain whether that genuine issue pertains to material facts. Fed. R. Civ. P. 56(e). The substantial law of the case identifies

the material facts, that is, those facts that potentially affect the outcome of the suit. *Anderson*, 477 U.S. at 248. Third, assuming no genuine issue exists as to the material facts, the Court will decide whether the moving party shall prevail solely as a matter of law. Fed. R. Civ. P. 56(e).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). The primary issue is whether the material facts present a substantive disagreement as to require a trial, or whether the facts are so sufficiently one-sided that one party should prevail as a matter of law. *Anderson*, 477 U.S. at 251–52. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of summary judgment.

IV. DISCUSSION AND ANALYSIS

Plaintiffs have moved for summary judgment solely on Count One of the complaint: Edwards's claim that Baker's actions violate the Act by denying PPSAT's patients the right to choose any willing, qualified healthcare provider in the Medicaid program. The Act provides, in relevant part, that "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services . . . ."

As an initial matter, the Act's free-choice-of-provider provision creates a private right of enforcement under § 1983. *See Baker II*, 941 F.3d at 699–700 ("Because South Carolina has not rebutted the presumption that a private right of action exists, we join the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits in finding that the free-choice-of-provider provision creates a private right enforceable under § 1983.") (citing cases). Thus, in the Fourth Circuit, Edwards, as a matter of law, may seek to enforce the free-choice-of-provider provision in this § 1983 action.

Turning to Plaintiffs' claim PPSAT is a medically and professionally qualified provider, there is no dispute as to whether Baker asserts PPSAT afforded less than adequate care to its patients. He does not. *See id.* at 692 (Baker "did not contend that PPSAT was providing subpar service to its Medicaid patients, or to any other patients. Instead, PPSAT was terminated solely because it performed abortions outside of the Medicaid program.") (footnote omitted).

And, Baker, in his response in opposition to Plaintiffs' motion, fails to dispute PPSAT is unqualified to perform any services under the Act. Consequently, the record is void of any argument or evidence PPSAT was unqualified to perform any services as set forth in the Act.

In Baker's response, however, he sets forth nine arguments as to why the Court should deny Plaintiffs' motion.

First, Baker argues Plaintiffs' motion should be denied and the case should move forward with a ruling on his then-pending motions to dismiss. This argument is now moot, as the Court has since denied

Baker's motions to dismiss for lack of subject matter jurisdiction and for a failure to state a claim.

Second, Baker asserts the motion should be denied as a result of the dispute resolution sections of the Enrollment Agreements PPSAT entered into with SCDHHS which, according to Baker, foreclose PPSAT from pursuing a § 1983 claim in a federal forum. Baker opines "[s]ince PPSAT waived its right to pursue a § 1983 claim in a federal forum by entering into its Enrollment Agreements with the SCDHHS, this Court lacks subject matter jurisdiction over its claims and PPSAT should be dismissed as a plaintiff, not granted summary judgment." Baker's Response at 5.

But, Baker misreads Plaintiffs' motion for summary judgment. Both plaintiffs have moved for summary judgment solely as to Edwards's first claim in the complaint. Thus, Baker's objection regarding PPSAT's claims has no relevancy to this motion.

Third, Baker avers the motion should be denied due to PPSAT's failure to exhaust all administrative remedies under South Carolina law. Much in line with his second argument, Baker confuses PPSAT moving for summary judgment on Edwards' first claim with improperly making arguments as to why it should be allowed to move for summary judgment on its own § 1983 claim. Thus, the Court need not address this argument.

Fourth, Baker complains the motion should be denied because Edwards has failed to meet the injury-in-fact requirement of the Article III standing analysis. However, this Court already held Edwards meets the injury-in-fact element of the standing

analysis. *See Baker I*, 326 F. Supp. 3d at 49 ("Ms. Edwards . . . will suffer irreparable harm in the absence of an injunction because [she] will be deprived of [her] statutory right to the qualified provider of [her] choice."). The Court reaffirmed this holding in a subsequent ruling. *See Planned Parenthood S. Atl. v. Baker*, No. 3:18-02078, 2020 WL 1434946 at *3 (D.S.C. Mar. 23, 2020) ("Edwards meets the injury-in-fact element of the standing analysis."). The Court's previous holdings apply here. *See United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) ("[T]he doctrine of the law of the case posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.").

Fifth, Baker argues Edwards' claim is not ripe for adjudication. Whether Edwards's action is ripe for adjudication has also already been answered in the affirmative by the Court. *See Planned Parenthood S. Atl. v. Baker*, No. 3:18-02078, 2020 WL 1434946 at *3 (Edwards's "claims are ripe for adjudication.").

Sixth, Baker posits the case should move forward via his filing of an answer and commencing discovery, assuming his motions to dismiss are denied. As the Court mentioned above, Baker's motions to dismiss for lack of subject matter jurisdiction and a failure to state a claim were denied, so the Court must analyze only whether Baker is entitled to discovery.

Baker seeks discovery from Plaintiffs in the following areas: (1) Impact on PPSAT, (2) Impact on Edwards, (3) Class allegations, (4) Affirmative Defenses to be filed when appropriate, and (5) information known to the four fact witnesses listed by

Plaintiffs in their Local Rule 26.03 interrogatories.

Plaintiffs have agreed that, if the Court grants their motion for summary judgment on Count One of the complaint, it is unnecessary for the Court to consider their remaining claims inasmuch as such a ruling would dispose of the controversy. Thus, in light of the Court's decision to grant Plaintiffs' motion, this Order properly ends the case, and no further discovery is needed.

Seventh, Baker insists Plaintiffs' motion should be denied because the Court, according to Baker, "has no record on which to adjudge summary judgment for the simple fact that there is no factual record in this case aside from affidavits and declarations filed by the parties in August, 2018 which have not been updated or vetted through the discovery process." Baker's Response at 9.

When entertaining Plaintiffs' motion, the Court has one overarching objective: to determine whether the movant shows there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). As discussed in detail above, the record demonstrates to the Court it can adjudicate Plaintiffs' motion based only on questions of law. Thus, the scant factual record Baker speaks of is of no consequence.

Eighth, Baker contends the Fourth Circuit incorrectly held (1) the Medicaid Act's free-choice-of-provider provision affords a private right of action to a Medicaid recipient and (2) the Act does not authorize a private right of action under § 1983 to collaterally attack a state agency's decision to exclude a provider from the state's Medicaid program. This argument is made to the wrong court. The Court is

required to follow Fourth Circuit precedent, and no argument from Baker will persuade the Court otherwise.

Ninth, Baker avows "judicial economy is best served by allowing discovery and mediation to proceed in this matter as set forth in this Court's Amended Scheduling Order." Baker's Response at 10.

If a legal matter before the Court consists purely of a question of law, as opposed to a question of fact, judicial economy mandates a timely decision, without discovery, by the Court. Furthermore, the existence of an Amended Scheduling Order is merely a procedural mechanism that has no bearing on the merits of the underlying action. Regardless, with this Order, the need for further proceedings ends, so Baker's contention is now moot.

VI. CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' motion for summary judgment as to Count One of the complaint, and their request for a declaratory judgment that Baker's decision to terminate PPSAT from Medicaid violates the Medicaid Act is, and will be, void and of no effect.

In addition, the Court will issue a permanent injunction enjoining Baker and his agents, employees, appointees, delegates, and successors from terminating PPSAT from Medicaid as a result of its provision of lawful abortion-related services to PPSAT clients.

As per Local Civil Rule 7.10, except as modified herein, within seven days from the entry of this Order, Plaintiffs' counsel shall provide to the Court

and to opposing counsel a draft order granting Plaintiffs' request for a permanent injunction. *See* Fed. R. Civ. P. 65(d).

Defense counsel shall have seven days after receiving the draft order to submit any comments on the proposed order to the Court.

IT IS SO ORDERED.

Signed this 17th day of September 2020, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2133

PLANNED PARENTHOOD SOUTH ATLANTIC; JULIE EDWARDS, on her behalf and on behalf of all others similarly situated,

Plaintiffs – Appellees,

v.

JOSHUA BAKER, in his official capacity as Director, South Carolina Department of Health and Human Services,

Defendant – Appellant.

ACCESS REPRODUCTIVE CARE-SOUTHEAST; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; AMERICAN COLLEGE OF PHYSICIANS; AMERICAN MEDICAL ASSOCIATION; CENTER FOR REPRODUCTIVE RIGHTS; IPAS; IN OUR OWN VOICE: NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL HEALTH LAW PROGRAM; NATIONAL LATINA

INSTITUTE FOR REPRODUCTIVE HEALTH; SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES; SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; SOCIETY FOR MATERNAL FETAL MEDICINE; WOMEN'S RIGHTS AND EMPOWERMENT NETWORK,

Amici Supporting Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Mary G. Lewis, District Judge. (3:18-cv-02078-MGL)

Argued: September 20, 2019

Decided: October 29, 2019

Before WILKINSON, WYNN, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Wynn and Judge Richardson joined. Judge Richardson wrote a concurring opinion.

ARGUED: Kelly McPherson Jolley, JOLLEY LAW GROUP, LLC, Columbia, South Carolina, for Appellant. Alice Joanna Clapman, PLANNED PARENTHOOD FEDERATION OF AMERICA,

Washington, D.C., for Appellees. **ON BRIEF**: Ariail B. Kirk, JOLLEY LAW GROUP, LLC, Columbia, South Carolina, for Appellant. M. Malissa Burnette, Kathleen McDaniel, BURNETTE, SHUTT & MCDANIEL, PA, Columbia, South Carolina, for Appellees. Jane Liu, Mariah Lindsay, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, Washington, D.C.; Julie Rikelman, Pilar Herrero, Amy Myrick, Carolina Van Der Mensbrugghe, CENTER FOR REPRODUCTIVE RIGHTS, New York , New York, for Amici Access Reproductive Care-Southeast, Center for Reproductive Rights, In Our Own Voice: National Black Women's Reproductive Justice Agenda, National Asian Pacific American Women's Forum, National Latina Institute for Reproductive Health, and Women's Rights and Empowerment Network. Janice M. Mac Avoy, Andrew B. Cashmore, Alexandra Verdi, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, New York, New York, for Amici American College of Obstetricians and Gynecologists, American Medical Association, Society for Maternal Fetal Medicine, American Academy of Pediatrics, American College of Physicians, and Society for Adolescent Health and Medicine. Martha Jane Perkins, Sarah Jane Somers, NATIONAL HEALTH LAW PROGRAM, Carrboro, North Carolina, for Amici National Health Law Program, IPAS, and Sexuality Information and Education Council of the United States.

WILKINSON, Circuit Judge:

This case raises a question of statutory construction. We ask whether, and on what basis, the Medicaid Act's free-choice-of-provider provision affords a private right of action to challenge a state's exclusion of a healthcare provider from its Medicaid roster. The district court here issued a preliminary injunction in favor of the individual plaintiff, a Medicaid recipient, in her suit challenging South Carolina's decision to terminate Planned Parenthood South Atlantic's (PPSAT) provider agreement because it offers abortion services. The plaintiff was likely to succeed on the merits of this claim, the district court held, for two interrelated reasons: first, the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23)(A), confers on "any individual" a private right to sue that may be enforced under 42 U.S.C. § 1983; and second, South Carolina denied plaintiff the right to select the willing, qualified family-planning provider of her choice.

We now affirm. Based on the Supreme Court's precedents, Congress's intent to create an individual right enforceable under § 1983 in the free-choice-of-provider provision is unambiguous. In addition, a plain-language reading of the provision's mandate—that states "must" furnish Medicaid recipients the right to choose among providers "qualified to perform the service or services required"—bars states from excluding providers for reasons unrelated to professional competency. *See* 42 U.S.C. § 1396a(a)(23)(A), (p)(1). Finding the remaining preliminary injunction factors satisfied, we shall uphold the trial court's judgment.

I.

A.

Medicaid is the nation's public health insurance program for those of limited means. The original beneficiaries of this program were low-income children and their parents, the indigent elderly, the blind, and the disabled. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981). Since 1965, Congress has periodically expanded the program, adding, for instance, pregnant women with family incomes up to 133% of the federal poverty level as a distinct beneficiary class. *See* 42 U.S.C. § 1396a(a)(10)(A)(i), (*l*); Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 302, 102 Stat. 683, 750; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6401, 103 Stat. 2106, 2258.

A joint federal-state effort ensures that the healthcare needs of these beneficiaries are met. In broad strokes, the Medicaid Act "offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1382 (2015). The Act, to that end, charges the federal government with crafting baseline eligibility requirements for recipients and providers, determining covered medical services, and establishing reimbursement standards to the states. *See* 42 U.S.C. § 1396 *et seq.*; *NFIB v. Sebelius*, 567 U.S. 519, 541-42 (2012). Cooperating states then implement the program, agreeing to abide by federal conditions in return for federal matching funds that are used for expenses such as provider reimbursements. *See Armstrong*, 135

S. Ct. at 1382. Such funds are substantial; federal coffers finance anywhere from fifty to eighty-three percent of state expenses, 42 U.S.C. § 1396d(b), an aggregate figure that accounts for over ten percent of most states' total revenue, *NFIB*, 567 U.S. at 542.

Congress designed the Medicaid program to ensure that states dispense federal funds in compliance with federal rules. At the outset, states must propose and submit Medicaid plans for the approval of the Centers for Medicare and Medicaid Services. *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012). State departures from federal requirements provide grounds for the Secretary of Health and Human Services (HHS) to withhold Medicaid funding, either in whole or in part. *See* 42 U.S.C. § 1396c; 42 C.F.R. § 430.12(c). If federal requirements are met, however, states have "substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients.'" *Alexander v. Choate*, 469 U.S. 287, 303 (1985) (quoting 42 U.S.C. § 1396a(a)(19)).

At issue here is the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), which states:

> A State plan for medical assistance must—provide that any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services . . . .

42 U.S.C. § 1396a(a)(23)(A). That provision guarantees patients access to qualified and willing providers. A state plan must generally allow Medicaid recipients to obtain care from any provider who is "qualified to perform the service or services required" and "who undertakes to provide . . . such services."

In its mechanics, the free-choice-of-provider provision comports with the Medicaid Act's dual emphasis on federal standard-setting and state flexibility. While Medicaid beneficiaries may generally seek medical services from willing providers of their choice, states retain discretionary authority to determine whether entities are medically "qualified to perform the service or services required." States may also exclude providers from their plans "for any reason for which the [federal] Secretary of [Health and Human Services] could exclude the individual or entity," 42 U.S.C. § 1396a(p)(1), or on certain state-law grounds, *see* 42 C.F.R. § 431.51(c)(2).

B.

This dispute arose following South Carolina's termination of two Planned Parenthood centers as Medicaid providers. PPSAT operates two healthcare centers in South Carolina, one in Charleston and the other in Columbia. These centers provide a range of family planning and preventative care services, including physical exams, cancer screenings, contraceptive counseling, and pregnancy testing. For four decades, PPSAT has been a South Carolina Medicaid provider that receives reimbursements for care provided to Medicaid beneficiaries. In recent years, PPSAT's South Carolina centers have treated hundreds of patients insured through Medicaid

annually.

Among those patients is the individual plaintiff in this case, who suffers from diabetes and its resulting complications. J.A. 75-78. Because doctors have advised that these complications would make it quite dangerous for her to carry a pregnancy to term, the plaintiff considers it imperative that she have access to safe, effective birth control. After the plaintiff had difficulty finding a doctor who accepted Medicaid patients and was willing to provide her preferred form of birth control, she turned to PPSAT's Columbia center. At her PPSAT appointment, the doctors inserted an intrauterine device to prevent pregnancy and informed her that her blood pressure was elevated. As a result, she sought follow-up care from her endocrinologist to control her blood pressure. Because the plaintiff was impressed with the care she received at PPSAT, she planned to switch her gynecological and reproductive health care there.

In July 2018, South Carolina's Department of Health and Human Services (SCDHHS) terminated PPSAT's Medicaid provider agreement. SCDHHS did not contend that PPSAT was providing subpar service to its Medicaid patients, or to any other patients. Instead, PPSAT was terminated solely because it performed abortions outside of the Medicaid program.[1]

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[1] South Carolina does not provide Medicaid reimbursements for abortion services except in cases where it is required to do so by federal law. Such cases involve rape, incest, or the need to protect the mother's life. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. H, tit. V, §§ 506-507, 132 Stat. 348, 763-64 (Hyde Amendment).

According to SCDHHS, PPSAT's termination was part of a plan by Governor Henry McMaster designed to prevent the state from indirectly subsidizing abortion services. In 1995, the South Carolina legislature passed a law preventing state funds appropriated for family planning services from being used to fund abortions. S.C. Code Ann. § 43-5-1185 (1995). After taking office in 2017, Governor McMaster issued two executive orders designed to further this objective. The first, Executive Order 2017-15, directed state agencies "to take any and all necessary actions . . . to the extent permitted by law, to cease providing State or local funds . . . to any physician or professional medical practice affiliated with an abortion clinic . . . ." J.A. 56-58. The second, Executive Order 2018-21, directed SCDHHS to "deem abortion clinics . . . and any affiliated physicians or professional medical practices . . . that are enrolled in the Medicaid program as unqualified to provide family planning services and, therefore, to immediately terminate them . . . ." J.A. 70-71. SCDHHS responded quickly. On the day the second order was issued, SCDHHS Officer of Health Programs Amanda Williams notified PPSAT by letter that "[t]he Governor's actions result in Planned Parenthood no longer being qualified to provide services to Medicaid beneficiaries" and that PPSAT's enrollment agreement with South Carolina was terminated effective immediately. J.A. 73. As a result, PPSAT's two South Carolina centers began to turn away Medicaid patients. J.A. 13-14.

C.

On July 27, 2018, PPSAT and the individual plaintiff (collectively, "plaintiffs") filed suit in federal

district court in South Carolina against Joshua Baker, in his official capacity as Director of SCDHHS. The individual plaintiff brought suit on her own behalf and that of a purported class of South Carolina Medicaid beneficiaries who received, or would like to receive, healthcare services at PPSAT. Plaintiffs brought this action under 42 U.S.C. § 1983, seeking injunctive and declaratory relief on the grounds that SCDHHS violated their rights under the Medicaid Act and the Fourteenth Amendment. On July 30, plaintiffs filed for preliminary injunctive relief solely on the basis of their Medicaid Act claims. The district court held hearings on plaintiffs' motion on August 23. In their complaint and at the hearing, plaintiffs argued that the Medicaid Act's free-choice-of-provider provision confers on recipients a private right, enforceable under 42 U.S.C. § 1983, to use the qualified and willing provider of their choice, and that South Carolina violated this right when it terminated PPSAT for reasons unrelated to its professional competence to provide medical services.

The district court agreed with the plaintiffs and granted a preliminary injunction on August 28, 2018. Because the district court held that injunctive relief was appropriate based on the individual plaintiff's Medicaid Act claim alone, it did not analyze PPSAT's Medicaid Act claim. First, it held that the individual plaintiff's Medicaid Act claim was likely to succeed on the merits. It agreed that the free-choice-of-provider provision confers a private right, enforceable under 42 U.S.C. § 1983, on Medicaid-eligible patients, guaranteeing their right to choose any willing provider "qualified to perform" the relevant service. Critically, the court held that "qualified" should be given its

ordinary meaning—professionally competent. Relatedly, the district court rejected South Carolina's contention that § 1396a(p)(l) of the Medicaid Act gives a state plenary authority to exclude providers from its program "for any reason whatsoever as long as the reason is bolstered by State law." *Planned Parenthood S. Atl. v. Baker*, 326 F. Supp. 3d 39, 47-48 (D.S.C. 2018). To the contrary, it held that the state's authority to exclude providers is limited by the free-choice-of-provider provision.

Finally, the district court found that the other conditions necessary for a preliminary injunction—irreparable harm, balancing of the equities, and the public interest—were satisfied. In weighing the equities, the district court rejected South Carolina's argument that the state would be forced to subsidize abortions if it were enjoined from terminating PPSAT's provider agreement. *Baker*, 326 F. Supp. 3d at 49-50. First, because South Carolina's Medicaid program does not cover abortions except in the narrow circumstances required by federal law, there was no direct subsidization of non-covered abortions. *See id.* at 47. Second, because "PPSAT is reimbursed for Medicaid services on a fee-for-service basis," *id.* at 49, at rates that do not cover its costs, PPSAT's participation in Medicaid did not generate excess funds that could be used to indirectly subsidize abortions. *See id.* at 47, 49-50. Accordingly, the district court granted a preliminary injunction preventing South Carolina from terminating PPSAT's Medicaid enrollment agreement.

South Carolina timely appealed.

II.

The free-choice-of-provider provision lies at the heart of this appeal. As noted above, the provision states that:

> A State plan for medical assistance *must*—provide that *any individual* eligible for medical assistance (including drugs) *may obtain* such assistance from *any institution*, agency, community pharmacy, or person, *qualified to perform the service or services required* (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services . . . .

42 U.S.C. § 1396a(a)(23)(A) (emphases added).

It is difficult to imagine a clearer or more affirmative directive. The provision applies to "*any* individual" eligible for Medicaid; grants these individuals the right to obtain medical treatment from "*any* institution" willing and "qualified to perform the service or services required"; and provides that state plans "*must*" comply.[2]

Congress could have made an exception for providers offering abortion services. But it did not do so. Because we "presume that a legislature says in a statute what it means and means in a statute what it

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[2] Violation of a Medicaid recipient's statutory right under the free-choice-of-provider provision visits "concrete" harm that is "real" and "tangible," because the recipient can no longer receive care at his or her provider of choice. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016). This is the exact harm that Congress intended the provision to prevent. *See id.*

says there," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), this court cannot write into a statute an exception that Congress did not create. Accordingly, we take the free-choice-of-provider provision to mean that a Medicaid recipient has the right to challenge a state's exclusion of a provider from its Medicaid plan on grounds unrelated to that provider's willingness and professional competency to furnish the required medical service.

III.

A.

It is important at the outset to place this case in proper context. As a matter of black letter law, inferring a private right of action is a matter of statutory interpretation. If Congress is silent or ambiguous, courts may not find a cause of action "no matter how desirable that might be as a policy matter." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

But it was not always this way, and a brief overview of this history is useful background to the present lawsuit. We begin with *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), where the Supreme Court stated that federal courts were partners of Congress, making it "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. *Id.* at 433. During the *Borak* era, the "exercise of judicial power" was not "justified in terms of statutory construction," but rather as a means of crafting "substantive social policy." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402, 402 n.4 (1971) (Harlan, J., concurring in

judgment).

Some years later, Justice Powell derided *Borak*'s approach in an oft-quoted dissent. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting). In Powell's view, freely implying private rights of action posed two related constitutional problems. First, to infer from silence the right to file suit in federal court interferes with Congress's Article III power to set "the jurisdiction of the lower federal courts." *Id.* at 730. Second, an expansive approach to implied private rights of action "cannot be squared with the doctrine of the separation of powers." *Id.* This is because a court's "substitut[ion of] its own views as to the desirability of private enforcement," *id.* at 740, dispatches Congress's Article I "policymaking authority" to the Third Branch of government, *id.* at 743. "When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Id.* at 730-31. Therefore, "[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action." *Id.* at 731.

Justice Powell's dissent primed the Court for a doctrinal about-face. The Court incrementally swore "off the habit of venturing beyond Congress's intent," *Sandoval*, 532 U.S. at 286-87 (tracing this doctrinal evolution), instead limiting its focus to the specific statutory text at issue. In *Sandoval*, the Court summed up the result of this doctrinal progression: "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286.

But there was a loose end remaining—what to do with implied rights of action brought under § 1983. Some litigants argued that § 1983 provided plaintiffs with a separate cause of action if they fell "within the general zone of interest" of a federal statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282-83 (2002) (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)). The Court swiftly corrected this misunderstanding in *Gonzaga*, instructing that § 1983 creates a cause of action to enforce a federal statute only when the underlying statute itself unambiguously "confers an individual right" on the plaintiff. *Id.* at 284-85. If so, the § 1983 remedy follows as a matter of course; litigants need not separately demonstrate Congress's intent to create a private remedy. *Id.*

B.

With this background as guidance, we review the district court's entry of a preliminary injunction for "abuse of discretion, accepting the court's findings of fact absent clear error, but reviewing its conclusions of law *de novo*." *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.*, 373 F.3d 589, 593 (4th Cir. 2004). To that end, the individual plaintiff "must establish that [s]he is likely to succeed on the merits, that [s]he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in h[er] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We are mindful at once that a preliminary injunction is an "extraordinary remedy," *id.* at 22, but its issuance "is committed to the sound discretion of the trial court," *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (quoting *Quince Orchard*

Valley Citizens Ass'n v. Hodel, 872 F.2d 75, 78 (4th Cir. 1989)).

IV.

First we consider the threshold question whether the Medicaid Act's free-choice-of-provider provision creates a private right enforceable under § 1983. Section 1983 creates a federal remedy against anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Of course, it "does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005). Rather a plaintiff seeking redress "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340.

Three factors guide us in determining whether a statute creates a private right enforceable under § 1983. *Id.* at 340-41. "First, Congress must have intended that the provision in question benefit the plaintiff." *Id.* at 340. "Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence." *Id.* at 340-41. "Third, the statute must unambiguously impose a binding obligation on the States" by speaking "in mandatory, rather than precatory, terms." *Id.* at 341. If these three factors are satisfied, there is "a rebuttable presumption that the right is enforceable under § 1983," *id.*, which may be defeated by showing that Congress expressly or implicitly foreclosed a § 1983 remedy, *City of Rancho Palos Verdes*, 544 U.S. at 120.

Applying these principles, we agree with the district court—and five of our six sister circuits to have addressed this issue—that the free-choice-of-provider provision confers a private right, enforceable under § 1983, on Medicaid recipients. *See Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1224 (10th Cir. 2018); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 965-66 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 968, 972-74 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006). *But see Does v. Gillespie*, 867 F.3d 1034, 1037, 1041, 1046 (8th Cir. 2017).

Taking the first *Blessing* factor, the free-choice-of-provider provision "unambiguously gives Medicaid-eligible patients an individual right" to their choice of provider qualified to perform a medical service. *Planned Parenthood of Ind.*, 699 F.3d at 974. The provision has an "unmistakable focus," *Gonzaga*, 536 U.S. at 284, on its intended class of beneficiaries: "any individual eligible for medical assistance" under the Medicaid Act, 42 U.S.C. § 1396a(a)(23)(A). *See Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (finding that 42 U.S.C. § 1396a(a)(8), which refers to "all individuals wishing to make application for medical assistance," confers an individual right).

Congress's use of the phrase "any individual" is a prime example of the kind of "rights-creating" language required to confer a personal right on a discrete class of persons—here, Medicaid beneficiaries. *See, e.g.*, *Sandoval*, 532 U.S. at 288 (providing an example of rights-creating language: "No person

. . . shall . . . be subjected to discrimination . . . ."). Put differently, by adopting as its benchmark whether the "needs of any particular person have been satisfied," *Gonzaga*, 536 U.S. at 288, Congress left no doubt that it intended to guarantee each Medicaid recipient's free choice of provider.

As for the second *Blessing* factor, the free-choice-of-provider provision is not so "vague and amorphous," *Blessing*, 520 U.S. at 340-41, that its enforcement would strain judicial competence. The provision protects the right of a Medicaid recipient to seek care from his or her provider of choice, subject to two criteria: (1) the provider must be "qualified to perform the service or services required," and (2) the provider must "undertake[ ] to provide [the recipient] such services." 42 U.S.C. § 1396a(a)(23)(A). These criteria are objective. The second is "a simple factual question no different from those courts decide every day." *Betlach*, 727 F.3d at 967. And the first, which "may require more factual development or expert input," still falls squarely "within the range of judicial competence." *Id.*

In an attempt to create ambiguity, South Carolina focuses on the word "qualified" in isolation, Appellant's Reply Brief at 9-10, ignoring the reality that the term is "tethered to an objective benchmark: 'qualified *to perform the service or services required*.'" *Betlach*, 727 F.3d at 967-68 (quoting 42 U.S.C. § 1396a(a)(23)(A)). That omission makes all the difference. Courts can "readily determine" whether a provider is qualified to perform a service by "drawing on evidence such as descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and expert

testimony regarding the appropriate credentials for providing the service." *Id.* at 968. This factual determination "is no different from the sorts of qualification or expertise assessments that courts routinely make in various contexts." *Id.*[3]

Finally, the free-choice-of-provider provision "unambiguously impose[s] a binding obligation on the States." *Blessing*, 520 U.S. at 341. Under the provision, states "must provide" a Medicaid recipient with his or her choice of provider qualified to perform the service at issue. 42 U.S.C. § 1396a(a)(23)(A). Thus the provision is "couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341; *see also Kidd*, 501 F.3d at 356 (holding, as mandatory, a Medicaid provision requiring that state plans "must" provide for reasonably prompt medical assistance).

Since the three *Blessing* factors are satisfied, the individual plaintiff benefits from a rebuttable presumption that the free-choice-of-provider provision is enforceable under § 1983. *Blessing*, 520 U.S. at 341. That presumption has not been overcome. As an initial matter, nowhere in the Medicaid Act did Congress declare an express intent to "specifically foreclose[ ] a remedy under § 1983." *Id.* (internal quotations omitted).

Nor can such an intent be implied: the Medicaid

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[3] A distinct note of caution is in order. To say that the term "qualified" is susceptible to federal judicial measurement for purposes of the second prong of *Blessing* is not the same thing as saying that states lack discretion in defining professional qualifications under 42 U.S.C. § 1396a(p)(1), or that they are not due deference in their termination decisions. *See infra* Section VI.B. In this case, PPSAT's qualifications are simply not in dispute.

Act does not contain a "comprehensive enforcement scheme . . . incompatible with individual enforcement under § 1983." *Id.* Because South Carolina assumed that the free-choice-of-provider requirement did not confer an individual right, it did not expressly press a rebuttal argument before this court. Even if it had, we conclude that the Medicaid Act's enforcement scheme is not sufficiently "comprehensive" to foreclose a private right of action enforceable under § 1983. Three alternative remedies are provided for in the Act: (1) the Secretary of HHS's authority to review state Medicaid plans for noncompliance and curtail or cut off Medicaid funding as a matter of discretion, 42 U.S.C. §§ 1316(a), 1396c; 42 C.F.R. § 430.12; (2) a state administrative process for providers to challenge termination decisions, 42 U.S.C. § 1396a(a)(4); 42 C.F.R. § 1002.213; and (3) a state administrative process for Medicaid recipients to challenge a claim denial, 42 U.S.C. § 1396a(a)(3).

These remedies, taken together, are quite different from the "unusually elaborate enforcement provisions" that the Supreme Court has taken as evidence that Congress intended to preclude individual enforcement under § 1983. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13-14 (1981). The relevant pollution control statute at issue in *Middlesex County* is illustrative. That statute authorized governmental officials to respond to violations of the act with compliance orders and civil suits; permitted the imposition of penalties up to $10,000 per day; and made criminal penalties available. *Id.* at 13. Separately, the act also conferred on "any interested person" the right to seek judicial review of relevant acts by federal officials, such as the

issuance of an effluent permit. *Id.* at 13-14. By prescribing the particular remedies available to public and private actors, Congress demonstrated its intent to foreclose forms of relief otherwise available to plaintiffs bringing § 1983 claims. See *id.* at 14-15.

Nothing comparable to this detailed enforcement scheme exists in the Medicaid Act. To state the obvious, individuals are not ordinarily plaintiffs in provider suits, and an individual's administrative remedy to challenge, for example, a denial of Medicaid coverage for a particular "service" does not also provide a forum for contesting the disqualification of a preferred provider. This much is clear to South Carolina, so it seems to latch onto the Secretary's ability to cut Medicaid funds as itself indicative of a comprehensive administrative enforcement scheme. *See* Appellant's Opening Brief at 26-27. But a remedy is not comprehensive solely because it is drastic, and to view a wholesale cutoff of funding to the states as vindicating the interests of individual Medicaid beneficiaries in their choice of provider would be illogical.

The illogic of this argument aside, the Supreme Court has already held that the Medicaid Act's administrative scheme is not sufficiently comprehensive to foreclose a private right of action enforceable under § 1983. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521-22 (1990); *see also Kidd*, 501 F.3d at 356 (holding that the Medicaid Act neither explicitly nor implicitly "forbid[s] recourse to § 1983"). The Court's decision in *Gonzaga* cut back on *Wilder*'s treatment of implied rights of action in the § 1983 context; specifically, *Gonzaga* clarified that Congress must create an "unambiguously conferred right" rather

than merely confer a "benefit" on a plaintiff to establish a cause of action enforceable under § 1983. *Gonzaga*, 536 U.S. at 282. But *Wilder*'s reasoning as to the comprehensiveness of the Medicaid Act's enforcement scheme has not been overturned. *See Andersen*, 882 F.3d at 1229, 1229 n.16 (recognizing the same).

In sum, the Medicaid Act's enforcement scheme is not sufficiently "comprehensive" because, inter alia, it does not provide a private remedy—either judicial or administrative—for patients seeking to vindicate their rights under the free-choice-of-provider provision.[4] *See City of Rancho Palos Verdes*, 544 U.S. at 121 ("[I]n *all* of the cases in which we have held that § 1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue . . . *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated."). The reason Congress did not specify a method of private enforcement is plain: Section 1983 was to be the remedy for patients seeking to enforce their rights under the free-choice-of-provider provision. Permitting private enforcement of this type of suit,

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[4] South Carolina's contention that the individual plaintiff had a state administrative remedy she was required to exhaust before bringing a § 1983 suit is misguided. "[A]s a general rule, a plaintiff bringing a suit pursuant to 42 U.S.C. § 1983 does not have to exhaust state administrative remedies before filing suit in federal court." *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215, 218 (4th Cir. 1997) (citing *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 512 (1982)). At any rate, we agree with the district court that even if the individual plaintiff had a state administrative remedy available to her, it would, given the circumstances here, be futile. *Baker*, 326 F. Supp. 3d at 46-47.

Congress realized, "in no way interferes" with the Secretary of HHS's authority to audit and sanction noncompliant state Medicaid plans. *Planned Parenthood of Ind.*, 699 F.3d at 975.

Thus, the Medicaid Act provides no comprehensive enforcement scheme sufficient to overcome the presumption that the free-choice-of-provider provision is enforceable under § 1983. *Blessing*, 520 U.S. at 341. The plain, direct language of that provision unmistakably confers on a discrete class of individual Medicaid beneficiaries the right to seek medical assistance from any qualified medical provider who is willing to provide the required medical service. If that language does not suffice to confer a private right, enforceable under § 1983, upon the plaintiff here, it is difficult to see what language would be adequate. To hold in South Carolina's favor here would simply be to remove § 1983 as a vehicle for private rights enforcement and essentially to require Congress to set forth a cause of action enforceable purely on its own terms. We do not believe that the Court has channeled the expression of congressional intent in such a fashion, nor do we believe that we are free to do so. *See Blessing*, 520 U.S. at 340-41. Because South Carolina has not rebutted the presumption that a private right of action exists, we join the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits in finding that the free-choice-of-provider provision creates a private right enforceable under § 1983. *See Andersen*, 882 F.3d at 1224; *Gee*, 862 F.3d at 457; *Betlach*, 727 F.3d at 965-66; *Planned Parenthood of Ind.*, 699 F.3d at 968, 972-74; *Harris*, 442 F.3d at 461. *But see Gillespie*, 867 F.3d at 1041, 1046.

V.

We are mindful of two principal, and principled, objections to according the plaintiff her requested relief. First, we should not freely infer private rights of action that are enforceable under § 1983. Second, because Spending Clause legislation is in the nature of a contract, we should not construe it so as to ambush states with terms that the states did not foresee or bargain for. These are doctrines of importance and great force, but both presuppose some level of textual ambiguity. Because that ambiguity is absent here, we begin and end our search for Congress's intent with the plain text of the free-choice-of-provider provision.

First, courts are most definitely not at liberty to imply private rights of action willy-nilly. Congress's intent to make a private right enforceable under § 1983 must be "unmistakably clear." *Gonzaga*, 536 U.S. at 286 (internal citations omitted). This requirement ensures that courts enforce private rights under § 1983 only when Congress has so intended. Here, Congress unambiguously intended to create a private right—in favor of "any individual" receiving Medicaid assistance—in the free-choice-of-provider provision. Medicaid recipients, it is clear, are not merely within the provision's "general zone of interest." *See id.* at 283.

We do not reach this conclusion lightly, but only after closely examining Congress's intent underlying the "specific statutory provision" at issue. *Blessing*, 520 U.S. at 342-43. South Carolina reaches beyond the plain and narrow text of the free-choice-of-provider provision—to eighty-two other provisions in

the Medicaid Act—to conclude that the provision is no more than a "plan requirement," rather than an individual right. Appellant's Opening Brief at 23. However, Congress foreclosed any argument that an individual plan requirement in the Medicaid Act cannot be enforceable through an implied private right of action. 42 U.S.C. § 1320a–2 (A provision "is not to be deemed unenforceable because of its inclusion in a section of [the Act] . . . specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements . . . ."). Quite apart from that clause, however, ignoring Congress's clearly expressed intent to create a private right of action here is no less a usurpation of Congress's "policy-making authority," *see Cannon*, 441 U.S. at 743 (Powell, J., dissenting), than reading a cause of action into a statute where Congress did not create one, *see Borak*, 377 U.S. at 433.

Second, courts must be especially cautious in finding that a provision in Spending Clause legislation, such as the Medicaid Act, creates a private right enforceable under § 1983. Spending Clause legislation, as noted, has been likened to a contract: "[I]n return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus 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). Since a state cannot voluntarily and knowingly accept conditions unknown to it, "if Congress intends to impose a

condition on the grant of federal moneys, it must do so unambiguously." *Id.*

So much is true here. The terms of the Medicaid agreement are clear; in return for substantial federal funds, states are required to comply with the unambiguous terms of the free-choice-of-provider provision. And for the reasons described above, this obligation is enforceable by recipients, the intended beneficiaries of the provision. When, as here, the private cause of action is "unambiguously conferred" on a third party, *see Armstrong*, 135 S. Ct. at 1388 (plurality), courts cannot deprive the sovereign signatories to a "contract" such as the Medicaid Act of the benefit of their bargain.

Nor may courts relieve them of the agreement's consequences. Here, South Carolina would like to avoid the obligations imposed by this fair bargain. In essence, the state argues that some Supreme Court decisions might suggest a move away from inferring private rights of action in Spending Clause legislation. *See*, *e.g.*, Appellant's Opening Brief at 29-30 ("The [*Gonzaga*] Court noted that '[m]ore recent decisions have rejected attempts to infer enforceable rights from Spending Clause statutes.'") (quoting *Gonzaga*, 536 U.S. at 281). South Carolina may or may not be correct in its doctrinal forecast, but for now its argument remains speculative and conjectural. As the Seventh Circuit noted:

> [N]othing in *Armstrong*, *Gonzaga*, or any other case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending

> Clause powers. There would have been no need, had that been the Court's intent, to send lower courts off on a search for "unambiguously conferred rights." A simple "no" would have sufficed.

BT Bourbonnais Care, LLC v. Norwood, 866 F.3d 815, 820-21 (7th Cir. 2017). We agree. At bottom, the Court's cases require us to find an "unambiguously conferred" right, *Armstrong*, 135 S. Ct. at 1387-88 (plurality), which is exactly what we have done here. In the end, the concerns identified above are not controlling in this case, because the free-choice-of-provider provision unambiguously creates a private right in favor of the individual plaintiff.

VI.

Having decided that Congress unambiguously intended to create a private right of action in the free-choice-of-provider provision, we turn now to consider the scope of the right it confers on Medicaid recipients. A reasoned textual analysis in this case requires only two steps. First, "[a]s always, we start with the specific statutory language in dispute." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). In the free-choice-of-provider provision, "qualified to perform the service or services required" means what it says: professionally fit to perform the medical services the patient requires. Second, we look to § 1396a(p)(1), which describes a state's authority to exclude providers from its Medicaid plan. In the end, we find that the free-choice-of-provider provision in § 1396a(a)(23)(A) and the state's discretionary authority under § 1396a(p)(1) work in tandem to accomplish Congress's overall objectives in this

cooperative federalism scheme.

A.

First principles guide us in deciding what it means for a provider to be "qualified to perform the service or services required" under the free-choice-of-provider provision. "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). Because the Medicaid Act does not define the term "qualified," we consider its plain meaning—namely, "having an officially recognized qualification to practice as a member of a particular profession; fit, competent." Oxford English Dictionary (3d ed. 2007); *see also* Black's Law Dictionary 1360 (9th ed. 2009) (defining "qualified" as "[p]ossessing the necessary qualifications; capable or competent").

Every circuit to have considered this issue is in accord with that straightforward definition. *See, e.g.*, *Andersen*, 882 F.3d at 1230; *Gee*, 862 F.3d at 459-60; *Betlach*, 727 F.3d at 967-68; *Planned Parenthood of Ind.*, 699 F.3d at 978. *But see Gillespie*, 867 F.3d at 1046 (declining to reach this question after concluding that the free-choice-of-provider provision does not provide patients with a private right of action enforceable under § 1983).

South Carolina does not contest the fact that PPSAT is professionally qualified to deliver the services that the individual plaintiff seeks. Nowhere in its submissions to this court does the state seek to raise doubts that PPSAT satisfies the ordinary definition of "qualified" as being professionally capable or competent. Instead, the state seeks to

persuade us that "qualified" means something other than what it says or that the structure of the statute as a whole entrusts the word to the states to define its meaning.

The term, however, is in a federal statute and we are obliged to give it the meaning that Congress intended, so long as that meaning is clear to its state partners in this cooperative program. There is no question that the ordinary meaning of the term "qualified" is the one Congress intended. Were there any doubt as to its intent, Congress provided more specificity in the terms surrounding "qualified." The free-choice-of-provider provision guarantees Medicaid recipients the right to "obtain [medical] assistance from any institution, agency . . . or person[ ] qualified *to perform the service or services required*." 42 U.S.C. § 1396a(a)(23)(A) (emphasis added). The plain import of this language is to tie the word "qualified" to the performance of a service—and not just any service, but a medical service. Tellingly, the statute does not differentiate among different types of medical services, laying bare what can be the only reasonable interpretation of "qualified" in this context: capable of "carry[ing] out a particular *activity*—'perform[ing] the [medical] service' that a given Medicaid recipient requires.' " *Betlach*, 727 F.3d at 969. It follows that the types of "qualifications" that are intended relate to a provider's competency to perform a particular medical service, and not to any conceivable state interest as applied to the Medicaid program.

Reading "qualified to perform" in the free-choice-of-provider provision to mean professionally competent accords with the way Congress ordinarily uses the phrase. *See Mount Lemmon Fire Dist. v. Guido*,

139 S. Ct. 22, 26 (2018) (finding it "instructive" that a phrase "occurs dozens of times throughout the U.S. Code, typically carrying [its ordinary meaning]"). Consider, for example, 8 U.S.C. § 1188(c)(3), which directs the Secretary of Labor to find that "there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or service needed" before admitting temporary H-2A workers. This provision, like many others in the U.S. Code, specifies some service or function as the object of the phrase "qualified to perform." *See*, *e.g.*, 49 U.S.C. § 5329(e) (awarding states funding to carry out a federal public transportation safety program if, among other things, members of the state agency "responsible for rail fixed guideway public transportation safety oversight" are "qualified to perform such functions through appropriate training"); 37 U.S.C. § 301b(b)(3) (defining "covered officers" as including those "qualified to perform operational flying duty"). To read the phrase as denoting anything other than fitness to perform the activity identified would be highly unusual.

In short, Congress's handiwork here makes good sense. As a matter of ordinary English, one's preferred dry cleaner is not made unqualified to perform cleaning services because he disfavors bicycles or because he did not vote in the last state election, even though the state may prefer otherwise. Yet that is precisely the sort of result produced by South Carolina's reading of "qualified," which would allow the state to exclude providers based on any conceivable state interest. PPSAT, as South Carolina all but admits, is perfectly competent to perform the family-planning services required by plaintiff and is

licensed to do so. The state nevertheless suggests that it may disqualify a competent provider under state law so long as there is "good reason." *See* Appellant's Opening Brief at 24. Today that reason is PPSAT's provisioning of abortion services, but we cannot glean any principled limit to the state's exclusion authority under South Carolina's interpretation.

And there's the rub. If credited, South Carolina's submission that the term "qualified" means whatever the state says would strip the free-choice-of-provider provision of all meaning and shortchange the federal side of the bargain. South Carolina argues the provision would still have *some* meaning by ensuring that recipients could see any provider that meets the state's qualifications. But we do not believe that Congress could have intended to confer a right so empty in terms so strong. "If the states are free to set any qualifications they want—no matter how unrelated to the provider's fitness to treat Medicaid patients—then the free-choice-of-provider requirement could be easily undermined by simply labeling any exclusionary rule as a 'qualification.'" *Planned Parenthood of Ind.*, 699 F.3d at 978.

South Carolina nonetheless contends that the Medicaid Act's silence as to the meaning of "qualified" is grounds for interpreting it to allow states expansive exclusionary powers. *See* Appellant's Reply Brief at 10 ("Congress leaving the term 'qualified' undefined purposely creates a vague or amorphous provision with the idea being that doing so allows the states to tailor their State Plan."). That, however, is not how we ordinarily interpret undefined statutory terms, let alone a term pegged to a phrase as clear as "to perform the [medical] service or services required." 42

U.S.C. § 1396a(a)(23)(A).

The state next seeks refuge in the canon against surplusage. If "qualified" means professionally competent, South Carolina argues, then its inclusion in the free-choice-of-provider provision is "pointless and redundant" because state licensing schemes already exclude incompetent providers from the Medicaid pool. *See* Appellant's Reply Brief at 13. But this view ignores the language of the free-choice-of-provider provision. We do not lightly impute to Congress an intent to use terms that "have no operation at all." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). And as noted above, South Carolina's reading works precisely this result by allowing states—at their discretion—to nullify the free-choice-of-provider provision entirely. Granted, South Carolina agrees that a state's policies cannot eliminate "all recipient choice," which the state interprets to require only that at least two "qualified" providers remain available. *See* Appellant's Opening Brief at 36-37. But that cannot be right. The free-choice-of-provider provision "does not simply bar the states from ending *all* choice of providers, it guarantees to every Medicaid beneficiary the right to choose *any* qualified provider." *Planned Parenthood of Ind.*, 699 F.3d at 979. In order to do that, a state must be restricted in its ability to terminate providers for reasons unrelated to professional competency.

The case law also does not support South Carolina's position. On this front, the state argues that the Court's decision in *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), interpreted the free-choice-of-provider provision to apply only to providers that "continue[ ] to be qualified" in the

Medicaid program as a matter of state law. Appellant's Opening Brief at 35 (quoting *O'Bannon*, 447 U.S. at 785). Not so. *O'Bannon* spoke to the narrow question whether residents of a nursing home had a right to a pre-termination hearing before the state could close a home that all parties agreed was professionally "unqualified" to render patient care. *See* 447 U.S. at 775-76; *see also id.* at 776 n.3 (cataloguing the home's noncompliance with statutes governing, among other topics, nursing services, physical environment, and medical records). In point of fact, the patients there did not bring a substantive claim seeking to vindicate their rights under the free-choice-of-provider provision, but rather sued for violation of their procedural due process rights. *Id.* at 775. Along with three of the four circuits to have addressed this issue, we cannot read *O'Bannon* to resolve the very different claim raised by plaintiff in the instant case. *See Andersen*, 882 F.3d at 1231-32; *Gee*, 862 F.3d at 460-61; *Planned Parenthood of Ind.*, 699 F.3d at 977. *But see Gillespie*, 867 F.3d at 1047 (Shepherd, J., concurring).

B.

Although the free-choice-of-provider provision imposes limits on a state's qualification authority, states retain discretionary authority with regards to healthcare providers. Section 1396a(p)(1) speaks to this balance, providing:

> In addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary [of Health and Human

> Services] could exclude the individual or entity from participation in a program under subchapter XVIII under section 1320a–7, 1320a–7a, or 1395cc(b)(2) of this title.

This provision confirms that states may and do set standards that relate to providers' ability to practice in a professionally competent manner. Take the cross-references to start. They identify various forms of misconduct including patient abuse, failure to furnish medically necessary services, fraud, license revocation, excessive charges, and failure to disclose necessary information to state regulators. 42 U.S.C. § 1320a–7. In short, federal regulations confirm the authority vested in states to "set[ ] reasonable standards relating to the qualifications of providers" on analogous state-law grounds. *See* 42 C.F.R. § 431.51(c)(2).

Putting all this together, § 1396a(p)(1) and the free-choice-of-provider provision operate in pleasant conjunction. The free-choice-of-provider provision confers an individual right on Medicaid recipients to select the willing and competent provider of their choice. Section 1396a(p)(1) clarifies that states retain discretionary authority to disqualify providers as professionally incompetent for nonmedical reasons such as fraud and for any number of unprofessional behaviors. But the emphasis in § 1396a(p)(1) upon professional malfeasance in no way deprives states of the latitude they possess, under the free-choice-of-provider provision itself, to judge a provider's medical qualifications. Indeed, the language that begins the free-choice-of-provider provision—"A State plan for medical assistance must—provide," 42 U.S.C. § 1396a(a)(23)(A)—presupposes the existence of

discretionary authority in the states as it relates to provider qualifications. Nevertheless, the fact that the statute's language and structure suggest the deference due states on the matter of professional and medical qualifications in no way confers a blank check. Here, it bears repeating, no one disputes PPSAT's medical qualifications to perform the family-planning services required, nor is any professional wrongdoing on the part of PPSAT even alleged. So it follows that South Carolina cannot arbitrarily disqualify PPSAT upon the generalized assertion of inapposite state interests without running afoul of the free-choice-of-provider provision.

South Carolina attempts to disrupt the congruence between these two provisions by reading the savings clause "for more than it's worth." *Planned Parenthood of Ind.*, 699 F.3d at 979. The state argues that the phrase "[i]n addition to any other authority" in § 1396a(p)(1) means it can exclude a provider on any state-law grounds—and for any reason. *See* Appellant's Opening Brief at 32 ("South Carolina's authority, under Section 1396a(p)(1), to determine whether a provider is qualified does not depend on the state interest the disqualification seeks to protect.").

The district court rejected this interpretation, concluding that reading the savings clause this way would render the right conferred by the free-choice-of-provider provision meaningless. *Baker*, 326 F. Supp. 3d at 47-48. We agree. If Congress had in fact harbored the sweeping intent that South Carolina gleans from § 1396a(p)(1), there would be no reason to bother with the free-choice-of-provider provision, as any state-law ground could serve as the basis to eliminate a patient's choice. To say that this would

warp the law enacted by Congress is an understatement.

Moreover, South Carolina's interpretation also finds no support in the four corners of § 1396a(p)(1). For one thing, the phrase "[i]n addition to any other authority" serves a specific purpose. It lists what "is a non-exclusive list of specific grounds upon which states may bar providers from participating in Medicaid." *Planned Parenthood of Ind.*, 699 F.3d at 979. The grounds identified—spanning everything from financial fraud to medical malpractice—relate generally to professional malfeasance. In contrast, the type of "qualification" the state argues for under § 1396a(p)(1) is different in kind. South Carolina's exclusion of PPSAT from its Medicaid network has nothing to do with professional misconduct or for that matter with PPSAT's ability to safely and professionally perform plaintiff's required family-planning services. PPSAT, after all, continues to deliver these services to thousands of South Carolinians each year—to which the state has no objection. *See* J.A. 91.

What we are left with, ironically, is the state's attempt to eliminate almost the entirety of § 1396a(p)(1). For if the phrase "[i]n addition to any other authority" authorizes any and all state interests to serve as a basis for termination, there would be no need to list the specific grounds identified in § 1396a(p)(1). Congress sometimes employs the broad version of the phrase. *See*, *e.g.*, 7 U.S.C. § 2279(c)(4)(B) ("The authority to carry out this section shall be *in addition to any other authority* provided in this or any other Act.") (emphasis added). But it did not do so here, and the foregoing discussion makes clear that this was not through inadvertence.

Consider also the cases cited by the state to support its broad reading of the savings clause. In *Guzman v. Shewry*, 552 F.3d 941 (9th Cir. 2009), the Ninth Circuit did not hold that § 1396a(p)(1) grants states plenary exclusion authority over healthcare providers. Rather, that court expressly recognized that states may exclude providers "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity." *Id.* at 949 (citing 42 U.S.C. § 1320a-7(b)(5)). In any event, the provider in *Guzman* was deemed "unqualified" based on a state law guarding against professional malfeasance—as were the providers in all cases interpreting § 1396a(p)(1) that South Carolina cites. *See id.* at 946-47 (fraud or abuse); *First Med. Health Plan v. Vega-Ramos*, 479 F.3d 46, 49-50 (1st Cir. 2007) (financial self-dealing); *Triant v. Perales*, 491 N.Y.S.2d 486, 488 (App. Div. 1985) (shoddy record-keeping).

In the end, to read § 1396a(p)(1) as imposing such severe limits on the scope of the right conferred by the free-choice-of-provider provision would eviscerate the Medicaid Act's cooperative scheme and turn the congressional judgment on its head. Congress, aware of the deep national divide on a topic so sensitive as abortion, sought to strike a balance in the Medicaid Act. Starting in 1976, Congress has prohibited federal funds from being used to finance abortions, excepting instances of rape, incest, or to save the life of the mother. *Harris v. McRae*, 448 U.S. 297, 302 (1980) (describing the Hyde Amendment). On the other hand, Congress provided extra protections for beneficiaries' freedom of choice among family-planning providers, something it accomplished while

amending the free-choice-of-provider provision to accommodate Medicaid managed care plans.[5] The Secretary, to wit, may waive the free-choice-of-provider provision when a state implements a Medicaid managed care plan. But with an important caveat: An individual's right to seek out non-abortion services from a qualified family-planning provider of her choice cannot be waived. 42 U.S.C. §§ 1396a(a)(23)(B), 1396d(a)(4)(C); *see also Betlach*, 727 F.3d at 972 ("Even if a state otherwise exercises its option to implement a managed-care system, § 1396a(a)(23)(B) makes clear that as to family planning services, state Medicaid plans must afford recipients the full range of free choice of provider."). This implicit bargain agreed to by the political branches is one that we are bound to respect.

VII.

Because the individual plaintiff has a private right of action to challenge South Carolina's denial of her right to the qualified and willing family-planning provider of her choice, we agree with the district court that she has demonstrated a substantial likelihood of success on her free-choice-of-provider claim. We also hold that the district court did not abuse its discretion in enjoining South Carolina from terminating PPSAT's provider agreement.

It is clear that the plaintiff would suffer

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[5] Medicaid managed care plans allow a state to contract with a limited selection of healthcare providers. Through this arrangement, states can lower their Medicaid expenses and streamline their delivery of health care. There is no contention that any waiver of the free-choice-of-provider provision took place here.

irreparable harm in the absence of a preliminary injunction. Denial of her statutory right to select a qualified provider visits a tangible harm: diminished access to high-quality health care suited to the individual plaintiff's needs. *See* Appellees' Brief at 39. That PPSAT may be one of many providers available to the individual plaintiff through South Carolina's Medicaid network is not dispositive; the free-choice-of-provider provision, as we have noted, guarantees a patient's access to her *preferred* provider, save on matters of professional integrity and competency. South Carolina has a legitimate interest in ensuring that state dollars do not subsidize abortion. But we are not prepared to disrupt the district court's finding that the state's reimbursement of PPSAT on a fee-for-service basis guards against the indirect subsidization of abortion. Finally, an injunction would serve the public interest by preserving the individual plaintiff's statutory right under the free-choice-of-provider provision and ensuring "affordable access to competent health care by some of South Carolina's neediest citizens," *Baker*, 326 F. Supp. 3d at 50, whose health challenges are every bit as real as those of citizens of greater means.

We do not doubt that South Carolina's termination of PPSAT's provider agreement was intended "to further [its] own legitimate interests in protecting prenatal life." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992). Reasonable people can disagree with how Congress chose to balance state flexibility on the one hand, and enforcement of federal entitlements on the other. But in all events federal courts are ill-suited to second-guess this act of political judgment in the Medicaid

Act. An injury so concrete and a right so clear is something that the courts must respect, else we forsake natural and straightforward readings of statutory text in favor of spinning ever-finer webs of circumvention that lead to our desired outcomes. To subscribe to this portentous course is to abandon the very source of our authority and the mandate that alone makes the Third Branch a distinctive organ of our government. The judgment of the district court is affirmed.

AFFIRMED

RICHARDSON, Circuit Judge, concurring:

I join in affirming the grant of the preliminary injunction. The Majority correctly recognizes that applying existing Supreme Court precedents requires that we find § 1396a(a)(23) to unambiguously create a right privately enforceable under § 1983 to challenge a State's determination of whether a Medicaid provider is "qualified." Six Circuits now recognize that § 1396a(a)(23) creates this enforceable right.[1] One Circuit does not.[2]

As lower court judges, we are bound to do our level best to apply the law as it is, not how it may become. We have done so here. But when binding precedents present us with a bit of "a mess of the issue," *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari), our job becomes particularly challenging.

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[1] *See Planned Parenthood S. Atlantic & Julie Edwards v. Baker*, No. 18-2133 (4th Cir. 2019); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 638 (2018); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 571 U.S. 1198 (2014); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

[2] *See Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017). And in the last two years, other judges have raised questions about recognizing the right of action. *See Planned Parenthood of Greater Tex. Family Planning and Preventative Health Servs., Inc. v. Smith*, 913 F.3d 551, 569–73 (5th Cir. 2019) (Jones, J., concurring); *Gee*, 862 F.3d at 473–86 (Owen, J., dissenting); *Andersen*, 882 F.3d at 1238–49 (Bacharach, J., concurring in part and dissenting in part).

The challenge here derives from a broader question lurking in the background. What is the proper framework for determining whether a given statute creates a right that is privately enforceable under § 1983? And specifically, has *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), a case relied on in other Circuits' decisions and in our own, been repudiated (or even effectively overruled)? There are indications that it has. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 n.* (2015). But we do not lightly conclude that the Supreme Court has overruled its prior cases—that job is for the Supreme Court alone. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

Like this case, *Wilder* involved a question of whether a subsection of § 1396a(a) of the Medicaid Act created a private right of action under § 1983. The particular provision at issue required a State's plan for medical assistance to "provide . . . for payment" of certain medical services "through the use of rates (determined in accordance with methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities*. . . ." 496 U.S. at 502–03 (quoting 42 U.S.C. § 1396a(a)(13)(A)) (alterations

and emphasis in original).[3]

The *Wilder* Court found that service providers had an enforceable right under § 1983 to reimbursement at "reasonable and adequate" rates. 496 U.S. at 512. It reached this conclusion after looking to three "factors." First, the Court had "little doubt that health care providers are the intended beneficiaries" of the provision. *Id.* at 510. Then the Court observed that the statutory language imposed a binding obligation on States that participate in the Medicaid program because the relevant statutory provision was "cast in mandatory rather than precatory terms," given its use of the word "*must*." *Id.* Finally, the Court found that the provision's obligation was not "too 'vague and amorphous' to be judicially enforceable," applying what would become the second of the three "factors" to find clarity in the statutory directive for payment of "rates . . . which the State finds . . . are reasonable and adequate." *Id.* at 503; *see id.* at 519.[4]

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[3] In 1997, Congress replaced the provision at issue in *Wilder*. *See Long Term Care Pharmacy All. v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004).

[4] In finding that this statutory right was "judicially enforceable," the Court rejected the argument that the language in the Medicaid Act giving States the authority to set rates "which the State finds . . . reasonable and adequate," granted "a State flexibility to adopt *any* rates it finds are reasonable and adequate." *Wilder*, 496 U.S. at 503, 519 (emphasis added). Though acknowledging that the Act provided States "substantial discretion in choosing among reasonable methods of calculating rates," the Court held that it was "well within the competence of the Judiciary" to identify which rates were "outside that range that no State could ever find to be reasonable and adequate." *Id.* at 519–20.

Seven years later in *Blessing*, the Supreme Court instructed courts to apply these "three principal factors" to determine whether a statutory provision creates an enforceable right under § 1983. *Blessing v. Freestone*, 520 U.S. 329, 338 (1997). The Court applied the multifactor test from *Wilder* to determine whether § 1983 established a private right of action under Title IV–D of the Social Security Act. *See Blessing*, 520 U.S. at 338, 340–41.

When the Supreme Court again revisited privately enforcing a statutory right under § 1983 in *Gonzaga*, it seemed to consider this multifactor test problematic, to say the least. "[C]onfusion" on how to apply the *Blessing* factors improperly "led some courts to interpret *Blessing* as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *see id.* (noting the "uncertainty"). *Gonzaga* also questioned "how relations between the branches are served by having courts apply a *multifactor balancing test* to pick and choose which federal requirements may be enforced by § 1983 and which may not." *Id.* at 286 (emphasis added).

The multifactor test is not the only aspect of *Wilder* that has been questioned. *Wilder* had noted that its analysis was "a different inquiry than that involved in determining whether a private right of

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In this way, *Wilder* seems to foreclose the argument that § 1396a(a)(23) grants South Carolina the flexibility to adopt qualifications based on its interests beyond professional integrity and competency. *See* Majority Op. at 17, 27–29. And on this record, South Carolina has not explained how its actions fall within its broad discretion to identify professional qualifications.

action can be implied from a particular statute." 496 U.S. at 508 n.9. On this point, the Court in *Gonzaga* would later "reject the notion" that "*Wilder* appears to support" that "our implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983." 536 U.S. at 283. To the contrary, "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." *Id.*

So are *Wilder*, specifically, and the *Blessing* factors, generally, still good law? On the one hand, we look to the three factors from *Blessing*. 520 U.S. at 338, 340–41. But on the other hand, we must find a bright-line: nothing "short of an unambiguously conferred right." *Gonzaga*, 536 U.S. at 283.

But *Gonzaga* did not explicitly overrule *Blessing*'s three-factor approach. Nor did it plainly discard *Wilder*'s application of the factors. *See Gonzaga*, 536 U.S. at 289–90 (distinguishing *Wilder* on its facts). More recently, the Court has more directly questioned *Wilder*'s reasoning and validity. *Armstrong*, 135 S. Ct. at 1386 n.* ("Respondents do not claim that *Wilder* establishes precedent for a private cause of action in this case. They do not assert a § 1983 action, since our later opinions *plainly repudiate* the ready implication of a § 1983 action that *Wilder* exemplified." (emphasis added)). Yet, at least in our Circuit, *Wilder* and *Blessing* remain controlling. *See*, *e.g.*, *Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (relying on *Wilder* and *Blessing* to find § 1396a(a)(8) confers an individual right).

Despite the "confusion" and "uncertainty," we

must apply the law as we find it. Today, our opinion is "guide[d]" by the three factors from *Blessing*. Majority Op. at 14. Following their guide requires that we find a private right of action under § 1983 to challenge a State's determination of whether a Medicaid provider is "qualified" under 42 U.S.C. § 1396a(a)(23). And so I do. But I do so with hope that clarity will be provided.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

PLANNED PARENTHOOD SOUTH ATLANTIC and JULIE EDWARDS, on her behalf and on behalf of all others similarly situated, Plaintiffs, vs. JOSHUA BAKER, in his official capacity as Director, South Carolina Department of Health and Human Services, Defendant.	§ § § § § § § § § § § § § § § § §	Civil Action No.: 3:18-2078-MGL

MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

I. INTRODUCTION

This is an action for violation of 42 U.S.C. § 1396a(a)(23)(A), a provision of the Medicaid Act, and related constitutional claims. The Court has jurisdiction over this matter under 28 U.S.C. § 1331.

Pending before the Court is Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. ECF No. 5. Having carefully considered Plaintiffs' Motion, the response, the reply, the record, and the applicable law, it is the judgment of the Court Plaintiffs' Motion will be granted, and Plaintiffs' requested preliminary injunction will be issued.

II. FACTUAL AND PROCEDURAL HISTORY

This action arises out of the South Carolina Department of Health and Human Services' (SCDHHS) termination of Plaintiff Planned Parenthood South Atlantic (PPSAT) from South Carolina's Medicaid program. SCDHHS is the state agency that administers South Carolina's Medicaid program, and Defendant is the director of SCDHHS. ECF No. 1 ¶ 16.

PSSAT operates two health centers in South Carolina—one in Charleston and one in Columbia. *Id.* ¶ 14. Prior to SCDHSS' termination of PPSAT from South Carolina's Medicaid program, PPSAT treated patients insured through Medicaid at both of its South Carolina locations. ECF No. 5-2 at 3. PPSAT offers its patients, including but not limited to those insured through Medicaid, a range of family planning, reproductive health, and preventive care services at its Charleston and Columbia health centers. ECF No.

1 ¶ 14. PPSAT performs abortions at its South Carolina health centers, but South Carolina Medicaid does not cover abortions except under limited circumstances required by federal law. ECF No. 5-2 at 3. Plaintiff Julie Edwards (Ms. Edwards) is a South Carolina resident insured through Medicaid who has been treated at the Columbia location of PPSAT. ECF No. 5-3 ¶¶ 1-2, 11-13.

On August 24, 2017, South Carolina Governor Henry McMaster issued Executive Order No. 2017-15 directing all State agencies to "take any and all necessary actions . . . to cease providing State or local funds . . . to any physician or professional medical practice affiliated with an abortion clinic and operating concurrently with and in the same physical, geographic location or footprint as an abortion clinic." ECF No. 5-2 at 14. On July 13, 2018, Governor McMaster issued Executive Order No. 2018-21 instructing SCDHHS to "deem abortion clinics . . . and any affiliated physicians or professional medical practices . . . enrolled in the Medicaid program as unqualified to provide family planning services and, therefore, to immediately terminate them upon due notice and deny any future such provider enrollment applications for the same." *Id.* at 28. That same day, SCDHHS notified PPSAT it was no longer qualified to provide services to Medicaid beneficiaries, and SCDHHS was therefore terminating PPSAT's Medicaid enrollment agreements effectively immediately. *Id.* at 30.

PPSAT and Ms. Edwards filed their complaint in this matter on July 27, 2018. ECF No. 1. Ms. Edwards has brought suit on her own behalf and as representative of a purported class of South Carolina Medicaid

beneficiaries who have obtained or seek to obtain covered healthcare services from PPSAT. *See id.* ¶¶ 15, 41-46. In their complaint, Plaintiffs allege Defendant's actions in terminating PPSAT from South Carolina's Medicaid program violate 42 U.S.C. § 1396a(a)(23), a provision of the Medicaid Act, as well as the Fourteenth Amendment of the United States Constitution. Plaintiffs seek declaratory and injunctive relief.

Plaintiffs filed their Motion for Temporary Restraining Order and Preliminary Injunction on July 30, 2018. ECF No. 5. Defendants filed a response in opposition on August 13, 2018, ECF No. 16, to which Plaintiffs replied on August 20, 2018, ECF No. 24. On August 23, 2018, the Court held a hearing on Plaintiffs' Motion at which counsel for Plaintiffs and Defendant were present. The Court, having been fully briefed on the relevant issues, is now prepared to discuss the merits of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

The Court notes there are two additional motions pending. ECF Nos. 6, 25. In the interest of expeditiously ruling on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, however, the Court will address the other pending motions at a later date.

III. STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council,*

Inc., 555 U.S. 7, 20 (2008) (citations omitted). "A preliminary injunction is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (citation omitted).

IV. DISCUSSION AND ANALYSIS

As an initial matter, the Court notes Plaintiffs are moving for injunctive relief on their Medicaid Act claim only. ECF No. 5-1 at 14. Therefore, the Court will confine its analysis to that claim. The Court will first consider whether Ms. Edwards has made the requisite showing for injunctive relief on her Medicaid Act claim.

A. Likelihood of Success on the Merits

1. Contentions of the Parties

Ms. Edwards argues she is likely to succeed on her Medicaid Act claim because Defendant's termination of PPSAT from South Carolina's Medicaid program violates 42 U.S.C. § 1396a(a)(23)(A), which provides "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services . . . ." Ms. Edwards asserts it is uncontested PPSAT is a medically and professionally qualified provider, and § 1396a(a)(23)(A) therefore guarantees her the right to choose PPSAT as her provider. She explains § 1396a(a)(23)(A) prohibits Defendant from excluding PPSAT from South Carolina's Medicaid program merely because PPSAT provides abortions outside the

Medicaid program. Ms. Edwards further maintains § 1396a(a)(23)(A) creates a private right of action for Medicaid beneficiaries enforceable through 42 U.S.C. § 1983.

In support of her contentions, Ms. Edwards notes the overwhelming majority of courts that have considered these issues, including the Fifth, Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeals, have held § 1396a(a)(23)(A) creates a private right of action and prohibits a State from terminating qualified providers from its Medicaid program for reasons unrelated to professional competency to perform the services at issue.

Defendant responds Ms. Edwards is unlikely to succeed on her Medicaid Act claim because § 1396a(a)(23)(A) fails to create a private right of action enforceable through § 1983. Defendant posits § 1396a(a)(23)(A), when read in context of § 1396a(a) as a whole, is meant to protect patients in the aggregate, not to confer an unambiguous right upon individuals such as Ms. Edwards. Accordingly, Defendant asserts the remedy for a violation of § 1396a(a)(23)(A) is the termination of federal funding to an offending State's Medicaid program as opposed to a private action. Defendant acknowledges the majority of courts to consider this issue have held § 1396a(a)(23)(A) does confer a private right of action upon patients, but Defendant relies upon *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), in support of his position. Defendant further avers Ms. Edwards' interpretation of § 1396a(a)(23)(A) is overly broad, and, under *O'Bannon v. Town Court Nursing Center*, 447 U.S. 774 (1980), the right outlined in § 1396a(a)(23)(A) is the right to choose among the pool

of providers determined to be qualified by a State, not the right to have a particular provider deemed qualified. Defendant also claims Ms. Edwards is unable to maintain her Medicaid Act cause of action because she has failed to exhaust state administrative remedies available to her.

Defendant insists that, even if Ms. Edwards were able to maintain her Medicaid Act claim, the claim lacks merit. Defendant posits § 1396a(a)(23)(A) does not define the term "qualified," and § 1396a(p)(1) permits a State to exclude providers from its Medicaid program for any reason established by State law. Defendant argues it may therefore terminate PPSAT from South Carolina's Medicaid program because PPSAT performs abortions, and S.C. Code Ann. § 43-5-1185 mandates "States funds appropriated for family planning must not be used to pay for an abortion."

2. Analysis

a) Private Right of Action

The Court must first determine the threshold issue of whether § 1396a(a)(23)(A) creates a private right of action enforceable through § 1983 such that Ms. Edwards may pursue her Medicaid Act claim. Although there is no controlling precedent on this issue, the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals have considered this question, and all of those courts except the Eighth Circuit have held § 1396a(a)(23)(A) does confer a private right of action. *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1224-29 (10th Cir. 2018) (holding § 1396a(a)(23) creates a private right of action); *Planned Parenthood of Gulf Coast, Inc. v. Gee*,

862 F.3d 445, 457-62 (5th Cir. 2017) (same); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 965-68 (9th Cir. 2013) (same); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972-77 (7th Cir. 2012) (same); *Harris v. Olszewski*, 442 F.3d 456, 460-65 (6th Cir. 2006) (same). *Contra Does v. Gillespie*, 867 F.3d 1034, 1039-45 (8th Cir. 2017) (holding § 1396a(a)(23)(A) does not create a private cause of action). The Court agrees with the well-reasoned analysis of the Fifth, Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeals and holds § 1396a(a)(23)(A) confers a private right of action on Medicaid beneficiaries such as Ms. Edwards.

To create a private cause of action enforceable through § 1983, a federal statute must unambiguously confer a federal right, not simply a benefit or interest. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). To determine whether this requirement has been met, a court must examine whether Congress intended the statute to benefit the plaintiff, whether the right is "so 'vague and amorphous' that its enforcement would strain judicial competence," and whether the obligation created by the statute is mandatory. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284.

Section 1396a(a)(23)(A) provides "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person qualified to perform the service or services required . . . who undertakes to provide

him such services." The Court holds this language unambiguously confers a right upon Medicaid-eligible patients, such as Ms. Edwards. *See*, *e.g.*, *Andersen*, 882 F.3d at 1225 ("[W]e have no trouble concluding that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients." (citation omitted)). Contrary to Defendant's argument, the clear language of this provision reveals it is meant to confer a right upon "any individual eligible for medical assistance," not simply patients in the aggregate. *See Comm'r of Ind.*, 699 F.3d at 974 ("This language does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled." (citation omitted)). Thus, individual patients like Ms. Edwards are indeed the intended beneficiaries of the right conferred.

Moreover, the right conferred—the right to obtain assistance from any qualified and willing provider—is neither vague nor amorphous. *See Comm'r of Ind.*, 699 F.3d at 974 ("[T]he right is administrable and falls comfortably within the judiciary's core interpretive competence."). Additionally, the right is plainly expressed in mandatory terms, as the statute states: "A State plan for medical assistance must . . . provide that (A) any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service . . . who undertakes to provide him such services . . . ." § 1396a(a)(23)(A); *see also Comm'r of Ind.*, 699 F.3d at 974 ("Finally, § 1396a(a)(23) is plainly couched in mandatory terms.").

The Court rejects Defendant's suggestion there is

no private right of action under § 1396a(a)(23)(A) because the appropriate remedy for violation of the provision, according to Defendant, is the termination of federal funding to an offending State's Medicaid program. The ability to withhold federal funding does not constitute a comprehensive enforcement scheme revealing an intent of Congress to foreclose private enforcement, and "private enforcement of § 1396a(a)(23) in suits under § 1983 in no way interferes with the Secretary's prerogative to enforce compliance using [his] administrative authority." *Comm'r of Ind.*, 699 F.3d at 975; *see also Olszewski*, 442 F.3d at 462-63.

The Court likewise rejects Defendant's contention that a beneficiary's ability to challenge the termination of a provider deemed unqualified by a State from the State's Medicaid program has been foreclosed by the Supreme Court's decision in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). In *O'Bannon*, the Supreme Court considered whether Medicaid beneficiaries had procedural due process rights prior to the termination of a nursing home's Medicaid provider agreement, and it was uncontested the nursing home was unqualified to provide the services at issue. *O'Bannon*, 447 U.S. at 775-90. In contrast, this case involves a claim Ms. Edwards' substantive rights have been violated, and, as discussed in more detail below, there is no suggestion PPSAT is professionally incompetent or unable to perform family planning services. Thus, *O'Bannon* is inapposite and has no bearing on this case. *See Andersen*, 882 F.3d at 1231-32; *Comm'r of Ind.*, 699 F.3d at 977.

Accordingly, the Court holds, in accordance with

the Fifth, Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeals, that § 1396a(a)(23)(A) confers a private right of action enforceable through § 1983 on Medicaid patients such as Ms. Edwards.

b) Exhaustion of Administrative Remedies

The Court must next consider Defendant's assertion Ms. Edwards is unable to maintain her Medicaid Act claim because she has failed to exhaust available state administrative remedies. Defendant argues Ms. Edwards' application for Medicaid, ECF No. 25-4, and the SCDHHS Medicaid Member Handbook, ECF No. 25-5, require her to pursue an administrative appeal. The provision Defendant relies upon in Ms. Edwards' Medicaid application states: "If I think SCDHHS . . . has made an error I can appeal its decision. To appeal means to tell someone at SCDHHS that I think the action is wrong, and ask for a fair hearing." ECF No. 25-4 at 16. The relevant portion of the SCDHHS Medicaid Member Handbook provides: "You can ask for an appeal if your Medicaid coverage has changed, ended, or been denied. You can also ask for an appeal if a medical service you need has been denied or delayed." ECF No. 25-5 at 21.

"[A]s a general rule, a plaintiff bringing a suit pursuant to 42 U.S.C. § 1983 does not have to exhaust state administrative remedies before filing suit in federal court." *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215, 218 (4th Cir. 1997) (citing *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496 (1983)). Exceptions to this general rule have been recognized for circumstances in which Congress has explicitly

provided state administrative remedies must be exhausted prior to bringing suit under § 1983 or implicitly indicated such in a statutory scheme. *Id.* at 219.

The Medicaid Act contains no provision explicitly requiring the exhaustion of state administrative remedies prior to bringing a § 1983 suit for violation of the Act. *Id.* Likewise, the Court does not interpret the Medicaid Act as implicitly requiring exhaustion of administrative remedies. Although there is a state administrative appeal process available to Ms. Edwards, the "mere provision of state administrative remedies . . . is not enough to demonstrate an implicit Congressional intent to impose an exhaustion requirement on a plaintiff seeking to bring a § 1983 action." *Id.* (citations omitted). Further, the relevant provisions of Ms. Edwards' Medicaid application and the SCDHHS Medicaid Member Handbook speak in optional rather than mandatory terms; they provide Ms. Edwards "can" appeal, not that she must.

Accordingly, the Court holds Ms. Edwards was not required to exhaust state administrative remedies prior to bringing this action. *See id.* at 220 (holding the "existence of state administrative review procedures does not suffice to evidence Congress' intent to implicitly create an exhaustion requirement" for claims under a different provision of the Medicaid Act given "the strong presumption against requiring the exhaustion of state administrative remedies in § 1983 suits.").

The Court further holds, even if there were a requirement for Ms. Edwards to exhaust state administrative remedies, her failure to do so would be

excused under the circumstances because the pursuit of an administrative appeal before SCDHHS would be futile given the clear directive in Governor McMaster's Executive Order No. 2018-21 for SCDHHS to deem abortion clinics unqualified to provide family planning services and to terminate them from South Carolina's Medicaid program. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (explaining there is a futility exception to the doctrine of exhaustion of administrative remedies).

c) Violation of 42 U.S.C. § 1396a(a)(23)(A)

The Court will now turn to the question of whether Defendant's termination of PPSAT from South Carolina's Medicaid program violates § 1396a(a)(23)(A). The Court notes the Fifth, Seventh, Ninth, and Tenth Circuit Courts of Appeals have held, in well-reasoned and persuasive opinions, that similar terminations of PPSAT affiliates from the Medicaid programs of other states violated § 1396a(a)(23)(A). *Andersen*, 882 F.3d at 1229-36; *Gee*, 862 F.3d at 462-68; *Betlach*, 727 F.3d at 968-74; *Comm'r of Ind.*, 699 F.3d at 977-80.

As set forth above, § 1396a(a)(23)(A) provides "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person qualified to perform the service or services required . . . who undertakes to provide him such services . . . ." The Medicaid Act does not define the term "qualified." In § 1396a(a)(23)(A), however, the term "qualified" is modified by the phrase "to perform the service or

services required." *See Betlach*, 727 F.3d at 969. Thus, the relevant qualification to which the provision refers is a provider's qualification to perform the medical services at issue. *See id.* The Court agrees with the Seventh Circuit that "[r]ead in context, the term 'qualified' as used in § 1396a(a)(23) unambiguously relates to a provider's fitness to perform the medical services the patient requires." *Comm'r of Ind.*, 699 F.3d at 978. Therefore, for purposes of § 1396a(a)(23)(A), "qualified" means "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *Id.*

It is undisputed PPSAT is professionally competent and is capable of performing family planning services for Medicaid patients. Defendant claims, however, it may exclude PPSAT from South Carolina's Medicaid program for any reason established by State law pursuant to § 1396a(p)(1). Defendant reasons it may therefore terminate PPSAT from the Medicaid program because PPSAT performs abortions, and S.C. Code Ann. § 43-5-1185 mandates "State funds appropriated for family planning must not be used to pay for an abortion." The Court disagrees.

First, S.C. Code Ann. § 43-5-1185 provides no basis for terminating PPSAT from South Carolina's Medicaid program because, except in narrow circumstances required by federal law, the State's Medicaid program does not cover abortions. ECF No. 5-2 at 3. PPSAT is reimbursed through the Medicaid program on a fee-for-service basis for covered services, and the Medicaid reimbursement rates in South Carolina do not even fully cover the cost of the

Medicaid services PPSAT provides. ECF No. 24-1 ¶¶ 2-3. Thus, PPSAT's inclusion in South Carolina's Medicaid program results in neither the direct nor indirect use of State funds to pay for abortions.

Moreover, the Court rejects Defendant's implication § 1396a(p)(1) permits a State to terminate a provider from its Medicaid program for any reason whatsoever as long as the reason is bolstered by State law. Section 1396a(p)(1) provides a State may exclude a provider from its Medicaid program for any reason the Secretary of the United States Department of Health and Human Services may exclude a provider, "[i]n addition to any other authority." Although § 1396a(p)(1) gives States broad authority to exclude providers from their Medicaid programs, *see*, *e.g.*, *Andersen*, 882 F.3d at 1230, it does not provide States with "unlimited authority to exclude providers for any reason whatsoever," *Comm'r of Ind.*, 699 F.3d at 979. Notably, a State's ability to exclude a provider is limited by § 1396a(a)(23)(A) and its requirement that Medicaid patients be afforded the freedom to choose any qualified and willing provider. *See Gee*, 862 F.3d at 465.

Thus, contrary to Defendant's suggestion, § 1396a(p)(1) does not permit a State to pass a law deeming a provider unqualified for reasons unrelated to professional competence to perform the services at issue and then to exclude the provider from its Medicaid program on the basis of that law. *See Comm'r of Ind.*, 699 F.3d at 979-80. To hold otherwise would render the right conferred in § 1396a(a)(23)(A) meaningless.

As explained above, Defendant's termination of

PPSAT from South Carolina's Medicaid program was not based on any alleged incompetence or inability of PPSAT to perform the medical services at issue. Rather, it was based on the fact that PPSAT performs abortions outside the Medicaid program. Because it is undisputed PPSAT is professionally competent to perform family planning services, Defendant's termination of PPSAT from South Carolina's Medicaid program violates § 1396a(a)(23)(A). Accordingly, the Court holds Ms. Edwards is likely to succeed on the merits of her Medicaid Act claim.

B. Irreparable Harm

Ms. Edwards asserts she will suffer irreparable harm in the absence of preliminary relief because she is being deprived of her statutory right under § 1396a(a)(23)(A) to have the qualified and willing provider of her choice. She avers she is also suffering irreparable harm in the form of disruption of and reduced access to health care.

Defendant claims Ms. Edwards will suffer no harm without a preliminary injunction because she has no right to receive Medicaid services from a provider deemed unqualified by the State, such as PPSAT. Defendant reiterates its contention Ms. Edwards is unable to maintain a cause of action challenging Defendant's determination PPSAT is unqualified to provide Medicaid services. Defendant further suggests Ms. Edwards will suffer no harm because she can still obtain Medicaid services from PPSAT's physicians as long as they bill for such services outside of PPSAT.

The Court has no trouble concluding Ms. Edwards would suffer irreparable harm in the absence of a

preliminary injunction because she would be deprived of her statutory right to select the qualified and willing provider of her choice. Ms. Edwards is insured through Medicaid, ECF No. 5-3 ¶ 2, and she wants to continue receiving care from PPSAT, ECF No. 5-3 ¶ 17. Defendant's termination of PPSAT from South Carolina's Medicaid program is depriving Ms. Edwards of her statutory right to choose PPSAT as her provider, and deprivation of this right constitutes irreparable harm.

Defendant's arguments regarding Ms. Edwards' alleged lack of irreparable harm are without merit. As set forth above, the Court holds § 1396a(a)(23)(A) provides Medicaid patients such as Ms. Edwards a private right of action enforceable under § 1983, and Defendant's termination of PPSAT from South Carolina's Medicaid program violates § 1396a(a)(23)(A). Thus, the Court rejects Defendant's contention Ms. Edwards will suffer no irreparable harm because she has no right to receive Medicaid services from PPSAT and no ability to challenge Defendant's termination of PPSAT from the State's Medicaid program.

Defendant's claim Ms. Edwards may still obtain services from PPSAT's physicians as long as they bill for her services outside of PPSAT is likewise lacking in merit. Section 1396a(a)(23)(A) affords Ms. Edwards the right to obtain services from any qualified "institution, agency, community pharmacy, or person." Thus, Ms. Edwards has the right to choose PPSAT, not just its physicians, as her provider, and Defendant's termination of PPSAT from the State's Medicaid program deprives her of that right.

Accordingly, the Court holds Ms. Edwards has demonstrated she is likely to suffer irreparable harm in the absence of preliminary relief.

C. Balancing of the Equities

Ms. Edwards insists the balance of the equities tips in her favor because she will suffer irreparable harm in the absence of a preliminary injunction, and Defendant would suffer no injury if the Court were to issue a preliminary injunction. She explains Defendant would suffer no injury because the State would simply continue to reimburse PPSAT for Medicaid services as it has done for years.

Defendant disagrees the balance of the equities tips in Ms. Edwards' favor. Defendant claims Ms. Edwards and other PPSAT Medicaid patients can seek health care services elsewhere in the absence of injunctive relief. Furthermore, Defendant maintains he would in fact suffer an injury if injunctive relief were granted because, as revealed by Governor McMaster's Executive Order No. 2017-15 and S.C. Code Ann. § 43-5-1185, the State has a compelling interest in ensuring no State funds are used to pay for abortions or are provided to physicians or medical practices affiliated with abortion clinics. Defendant claims States funds would be used to subsidize abortions at PPSAT if Plaintiffs' requested injunction were issued, and, as evidence of this, Defendant cites to the testimony of PPSAT's CEO that PPSAT might have to reduce services and hours at its health centers without Medicaid reimbursements.

The Court holds the balance of the equities tips in Ms. Edwards' favor. As stated above, Ms. Edwards, as well as other PPSAT patients insured through

Medicaid, will suffer irreparable harm in the absence of an injunction because they will be deprived of their statutory right to the qualified provider of their choice. This harm is significant and can have substantial negative effects, including a potential lack of access to health care. Contrary to Defendant's suggestion, it is immaterial whether Ms. Edwards can seek health care from another provider because she is entitled to the qualified provider of her choice under § 1396a(a)(23)(A).

The Court agrees with Ms. Edwards the State would suffer no harm if injunctive relief were granted. As Ms. Edwards points out, the State would simply have to continue to reimburse PPSAT for Medicaid services as it has done previously. Defendant's argument injunctive relief would force it to subsidize abortions is without merit. As explained above, South Carolina's Medicaid program does not cover abortions except in narrow circumstances required by law, and PPSAT is reimbursed for Medicaid services on a fee-for-service basis. ECF No. 24-1 ¶¶ 2-3. Thus, PPSAT's inclusion in South Carolina's Medicaid program does not cause the State to subsidize abortions, and the fact PPSAT might have to reduce services and hours if it loses Medicaid patients fails to prove otherwise. Moreover, Defendant can have no legitimate interest in perpetuating circumstances contrary to law, and Defendant's termination of PPSAT from the Medicaid program violates § 1396a(a)(23)(A).

D. The Public Interest

Ms. Edwards argues a preliminary injunction would serve the public interest of ensuring continued access to crucial health services for Medicaid patients.

Defendant claims injunctive relief would be adverse to the public interest because it would require the State to subsidize abortions in violation of S.C. Code Ann. § 43-5-1185.

The Court has already rejected Defendant's claim a preliminary injunction would require the State to subsidize abortions, and the Court therefore rejects Defendant's argument injunctive relief is adverse to the public interest. The Court holds Plaintiffs' requested preliminary injunction would serve the public interest by preserving the statutory right of Ms. Edwards and other PPSAT patients insured through Medicaid to have the qualified provider of their choice. Injunctive relief further serves the public interest by helping to ensure affordable access to competent health care by some of South Carolina's neediest citizens.

In accordance with the above discussion, the Court holds Ms. Edwards has demonstrated she is likely to succeed on the merits of her Medicaid Act claim, she is likely to suffer irreparable harm in the absence of preliminary injunctive relief, the balance of equities tips in her favor, and her requested injunction is in the public interest. The Court will therefore issue a preliminary injunction enjoining Defendant from terminating the Medicaid enrollment agreement of PPSAT during the pendency of this litigation.

Because the Court holds preliminary injunctive relief is appropriate and warranted for Ms. Edwards' Medicaid Act claim, the Court declines to analyze whether preliminary injunctive relief is appropriate for PPSAT's claim. The Court likewise declines to

address the remaining arguments of the parties, as the Court's holdings articulated above are dispositive of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. *See Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 36 F.3d 8, 11 (4th Cir. 1994) ("If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest *dicta*.").

V. CONCLUSION

Wherefore, based on the foregoing discussion and analysis, it is the judgment of the Court Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is **GRANTED**. Defendant and his employees, agents, successors in office, and all others acting in concert with him in his official capacity as Director of the South Carolina Department of Health and Human Services are hereby enjoined from terminating the Medicaid enrollment agreement of Planned Parenthood South Atlantic during the pendency of this action. Plaintiffs are directed to post security in the amount of $1,000 with the Clerk of Court for the District of South Carolina by Tuesday, September 4, 2018.

IT IS SO ORDERED.

Signed this 28th day of August 2018 in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

42 U.S.C. 1396a(a)(23); 1396a(b)
State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

* * * * *

(23) provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services . . . .

* * * * *

(b) Approval by Secretary

The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) . . . .

* * * * *

42 U.S.C. 1396c
Operation of State plans

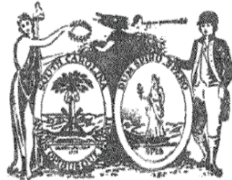
If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—

(1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

State of South Carolina
Executive Department



FILED
AUG 24 2017
Mark Hammond
SECRETARY OF STATE

Office of the Governor

EXECUTIVE ORDER NO. **2017-15**

WHEREAS, the State of South Carolina has a strong culture and longstanding tradition of protecting and defending the life and liberty of the unborn; and

WHEREAS, the General Assembly has expressed, in section 43-5-1185 of the South Carolina Code of Laws, as amended, that "State funds appropriated for family planning must not be used to pay for an abortion"; and

WHEREAS, on June 5, 2017, the undersigned requested that the South Carolina Board of Health and Environmental Control ("DHEC Board") "publicly reaffirm" the South Carolina Department of Health and Environmental Control's ("DHEC") "policy prohibiting the distribution of Title X grant funding to any local health care provider that performs abortion services"; and

WHEREAS, on July 12, 2017, in response to the undersigned's June 5, 2017 letter, the chairman of the DHEC Board confirmed that "no abortion services or

activities are provided or paid for by the Department" and that "the Department will continue its practice of not providing Title X grant funding to abortion clinics"; and

WHEREAS, abortion providers often focus primarily on abortion-related services and procedures; however, abortion providers may be subsidized by State or local funds intended for other women's health or family planning services, whether such non-abortion services are rendered directly by abortion providers or by affiliated physicians or professional medical practices; and

WHEREAS, a variety of governmental agencies and non-governmental entities offer important women's health and family planning services without resulting in the State directly or indirectly subsidizing abortion providers; and

WHEREAS, for the foregoing reasons, the State of South Carolina need not contract with abortion clinics, as defined by section 44-41-75 of the South Carolina Code of Laws, as amended, or any of coincident or affiliated physicians or professional medical practices, via the Medicaid program or provider network, in order to ensure the health and well-being of the people of South Carolina or to secure appropriate access to women's health and non-abortion family planning services.

NOW, THEREFORE, by virtue of the authority vested in me as Governor of the State of South Carolina and pursuant to the Constitution and Laws of this State and the powers conferred upon me therein, I hereby direct all State agencies to take any and all necessary actions, as detailed herein and to

the extent permitted by law, to cease providing State or local funds, whether via grant, contract, state-administered federal funds, or any other form, to any physician or professional medical practice affiliated with an abortion clinic and operating concurrently with and in the same physical, geographic location or footprint as an abortion clinic.

FURTHER, I hereby Order that the Executive Budget Office ("EBO") shall: (1) prepare, maintain, and make available on its website a comprehensive list of physicians or professional medical practices affiliated with an abortion clinic and operating concurrently with and in the same physical, geographic location or footprint as an abortion clinic; (2) conduct and make available on its website an annual audit or survey, the form of which shall be determined by EBO, of State agencies identifying or listing by agency and provider, any and all State or local funds, whether via grant, contract, state-administered federal funds, or any other form, provided to any physician or professional medical practice affiliated with an abortion clinic and operating concurrently with and in the same physical, geographic location or footprint as an abortion clinic.

FURTHER, I hereby direct the South Carolina Department of Health and Human Services ("DHHS") to take all necessary actions, to the extent permitted by law, to seek from the Centers for Medicare and Medicaid Services any and all appropriate waivers that may be required to comply with the provisions of this Order, including but not limited to all necessary actions, to the extent permitted by law, to exclude abortion clinics from the State of South Carolina's Medicaid provider network.

FURTHER, to ensure that the people of South Carolina are informed of and have appropriate access to women's health and family planning services, I hereby direct DHHS to coordinate with DHEC to prepare, produce, and make publicly available a user-friendly list of all qualified women's health and family planning providers operating within a twenty-five (25) mile radius of any abortion clinic identified as set forth herein and excluded from the State of South Carolina's Medicaid provider network.

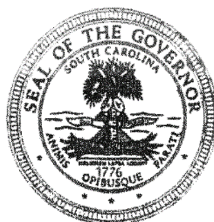
This Order applies to all Cabinet agencies and all boards and commissions that are part of, comprised within, or under the jurisdiction of a Cabinet agency, including but not limited to DHHS and EBO. It is further advised that executive agencies not in the undersigned's Cabinet or otherwise subject to the undersigned's direct authority shall likewise act in accordance with this Order and the foregoing directives. This Order is effective immediately.

GIVEN UNDER MY HAND AND THE GREAT SEAL OF THE STATE OF SOUTH CAROLINA, THIS 24 DAY OF AUGUST, 2017.

HENRY MCMASTER
Governor

ATTEST:

MARK HAMMOND
Secretary of State



HENRY MCMASTER
GOVERNOR

July 5, 2018

Dear Mr. Speaker and Members of the General Assembly,

I am vetoing and returning without my approval certain line items in R293, H. 4950, the FY 20l8-19 General Appropriations Act.

South Carolina is winning. Since January 2017, we have announced nearly 21,000 jobs and over $6 billion in new capital investment. Our unemployment rate is at its lowest since 2000. And, with more and more companies moving here every month, starting and expanding, we continue to see record numbers of citizens who are gainfully employed and enjoying the new prosperity of the Palmetto State.

* * * * *

As stewards of the public trust, we must always be tireless advocates of government accountability and transparency. The vetoes below reflect these twin responsibilities and specify instances in which the legislature has acted unwisely and hastily with

taxpayer dollars by directing public money to private interests or earmarking funds for parochial projects which serve little or no public interest and should be considered locally.

I urge the General Assembly to thoughtfully consider each of these vetoes and promptly sustain them on behalf of the people of this state.

* * * * *

Preventing Taxpayers from Subsidizing Planned Parenthood

Veto 42 **Part 1A, Page 76, Section 33, Department of Health & Human Services, II. Program and Services, A. Health Services, 3. Medical Assistance Payments, Family Planning, Total Funds $15,779,259, General Funds $2,208,596**

Taxpayer dollars must not directly or indirectly subsidize abortion providers like Planned Parenthood. There are a variety of agencies, clinics, and medical entities in South Carolina that receive taxpayer funding to offer important women's health and family planning services without performing abortions.

That's why last year I directed state agencies to stop providing slate or local funds to abortion clinics. I also directed the Department of Health and Human Services to submit a waiver request to the federal government, making South Carolina one of only two states in the nation (along with Texas) to take this action. Until the waiver is acted upon by the federal

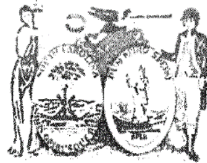
government, I will veto this section of the SCDHHS budget to prevent taxpayer dollars from directly or indirectly subsidizing abortion providers like Planned Parenthood.

For the foregoing reasons, I am vetoing and returning without my approval the above provisions in R293, H.4950, the FY 2018-19 General Appropriations Act.

Yours very truly,

Henry McMaster

Mark Hammond
SECRETARY OF STATE



Office of the Governor

EXECUTIVE ORDER NO. 2018-21

WHEREAS, the preservation of life is the ultimate right to be protected and necessarily includes the life of unborn children; and

WHEREAS, the State of South Carolina has a strong culture and longstanding tradition of protecting and defending the life and liberty of unborn children; and

WHEREAS, the State also recognizes that the availability of women's health and family planning services is important in providing for healthy families and children; and

WHEREAS, the South Carolina Department of Health and Human Services ("DHHS") expends taxpayer dollars to pay for health care services, including family planning services; and

WHEREAS, the General Assembly has expressed, in section 43-5-1185 of the South Carolina Code of Laws, as amended, that "State funds appropriated for family planning must not be used to pay for an abortion"; and

WHEREAS, 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; and

WHEREAS, abortion clinics' primary focus on denying the right to life is contrary to and conflicts with the State's obligation to protect and preserve that right; and

WHEREAS, on August 24, 2017, the undersigned issued Executive Order 2017-15 directing DHHS to pursue all available methods and to take all necessary actions to exclude abortion clinics from receiving taxpayer funds for any purpose, including but not limited to seeking any and all requisite waivers from the Centers for Medicare and Medicaid Services ("CMS"); and

WHEREAS, DHHS subsequently submitted and is negotiating with CMS regarding such a mandatory waiver: and

WHEREAS, on July 5, 2018, because CMS had not yet approved the requisite mandatory waiver, the undersigned issued Veto No. 42, which nullified the Family Planning appropriation in DHHS's budget; and

WHEREAS, although the State should not contract with abortion clinics for family planning services, the State also should not deny South Carolinians access to necessary medical care and important women's health and family planning services, which are provided by a variety of other non-governmental entities and governmental agencies; and

WHEREAS, Proviso 33.16 of the Fiscal Year 2018–19 General Appropriations Act grants DHHS broad authority to carry forward and expend funds for the purpose of operating the Medicaid program, to include family planning services.

NOW, THEREFORE, by virtue of the authority vested in me as Governor of the State of South Carolina and pursuant to the Constitution and Laws of this State and the powers conferred upon me therein, I hereby direct DHHS to exercise the authority granted in Proviso 33.16 of the Fiscal Year 2018–19 General Appropriations Act to expend such appropriated and carry-forward funds as necessary to continue the Family Planning program.

FURTHER, I hereby direct DHHS to deem abortion clinics, as defined by section 44-41-75 of the South Carolina Code of Laws, as amended, and any affiliated physicians or professional medical practices, as identified and defined by Executive Order 2017-15, that are enrolled in the Medicaid program as unqualified to provide family planning services and, therefore, to immediately terminate them upon due notice and deny any future such provider enrollment applications for the same.

This Order is effective immediately.

GIVEN UNDER MY HAND AND THE GREAT SEAL OF THE STATE OF SOUTH CAROLINA, THIS 13th DAY OF JULY, 2018.

HENRY MCMASTER
Governor

ATTEST:

MARK HAMMOND
Secretary of State

Henry McMaster GOVERNOR
Joshua D. Baker DIRECTOR
P.O. Box 8206 : Columbia, SC 29202
www.scdhhs.gov

July 13, 2018

Planned Parenthood South Atlantic
2712 Middleburg Drive, Suite 107
Columbia, SC 29204-2478

Re: Pharmacy MEDICAID ID#: 715572
NPI# 1497049555
Physician Group MEDICAID ID#: 143724
NPI# 1851438147

Dear Planned Parenthood South Atlantic:

On Friday, July 13, 2018, Governor Henry McMaster Issued Executive Order 2018-21 directing the South Carolina Department of Health and Human Services to deem abortion clinics unqualified to provide family planning services to beneficiaries in the South Carolina Medicaid Program. On July 5, 2018, Governor McMaster issued his vetoes to the FY 2018-2019 General Appropriations Act, among which was Veto 42, which prevents taxpayers from sub-sidizing abortion providers, including Planned

Parenthood. Previously, Executive Order 2017-15 requires the South Carolina Department of Health and Human Services to take all necessary actions to cease payment of funds to any physician or professional medical practice affiliated with an abortion clinic.

The Governor's actions result in Planned Parenthood no longer being qualified to provide services to Medicaid beneficiaries; therefore, Planned Parenthood's enrollment agreements with the South Carolina Medicaid Program is terminated effective July 13, 2018.

Sincerely,

Amanda Q. Williams
Office of Health Programs