No. 19-1186

IN THE

Supreme Court of the United States

JOSHUA BAKER, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Planned Parenthood affiliates provide essential medical care to low-income individuals through state Medicaid programs. South Carolina terminated the Medicaid provider agreement of a Planned Parenthood affiliate without cause. The affiliate and one of its patients sued under 42 U.S.C. § 1983. The patient invoked the Medicaid Act's free-choice-of-provider provision, which states that "any individual eligible for medical assistance" "may obtain such assistance from any institution" that is "qualified to perform the service or services required" and "undertakes to provide [the individual] such services." 42 U.S.C. § 1396a(a)(23)(A). The question presented is:

Whether the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23)(A), confers a right enforceable under 42 U.S.C. § 1983.

RULE 29.6 STATEMENT

Respondent Planned Parenthood South Atlantic is a North Carolina non-profit corporation. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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BRIEF IN OPPOSITION

Respondents Planned Parenthood South Atlantic (PPSAT) and Julie Edwards respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Joshua Baker, Director of the South Carolina Department of Health and Human Services.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 941 F.3d 687. The opinion of the district court (Pet. App. 46a-66a) is reported at 326 F. Supp. 3d 39.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2019. On January 8, 2020, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 27, 2020. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

PPSAT provides essential medical services to low-income South Carolina residents through the state's Medicaid program. South Carolina terminated PPSAT's participation in that program, even though it does not dispute that PPSAT "is a medically and professionally qualified provider." Pet. App. 50a.

PPSAT and one of its patients sued under 42 U.S.C. § 1983, contending that, among other things, the termination violates the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23)(A). Pet. App. 9a-10a. That provision gives Medicaid recipients the right to choose to receive

their medical care from any qualified and willing provider. *Id.* at 6a-7a.

The district court preliminarily enjoined the director of the state health department (petitioner) from terminating PPSAT's participation in the state Medicaid program. Pet. App. 47a, 65a-66a. The court of appeals affirmed. *Id.* at 4a, 39a. As relevant here, both courts held that a patient may sue under Section 1983 to enforce the Medicaid Act's free-choice-of-provider requirement. *Id.* at 12a-23a, 52a-55a. All three appellate judges found that the statutory text "unambiguously" confers that right. *Id.* at 17a; *see id.* at 40a (Richardson, J., concurring).

1. Medicaid is the national health insurance program for persons of limited financial means. Pet. App. 5a. It provides federal funding for medical care for children, needy families, the elderly, the blind, the disabled, and pregnant women. *See* 42 U.S.C. § 1396d(a).

Medicaid is a "joint federal-state effort." Pet. App. 5a. A state's participation in the program is conditioned on the state complying with various federal requirements. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323 (2015). Among those requirements is the requirement that the state's Medicaid plan "must" provide that "any individual eligible for medical assistance . . . may obtain such assistance" from any provider who is "qualified to perform the service or services required" and "who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23)(A). That is the free-choice-of-provider provision at issue in this case.

2. PPSAT has provided healthcare to low-income residents of South Carolina for four decades. Pet.

App. 7a. PPSAT operates two health centers in the state, one in Charleston and one in Columbia. *Id.* Both are in medically underserved communities. *See* Resp. C.A. Br. 8-9. Those centers serve hundreds of Medicaid patients each year. Pet. App. 7a.

PPSAT's health centers provide essential medical care through Medicaid. They offer a range of services, including physical exams; cancer screenings; contraception; pregnancy testing and counseling; and screening for conditions such as diabetes, depression, anemia, cholesterol, thyroid disorders, and high blood pressure. Pet. App. 7a; Resp. C.A. Br. 4-5. The health centers also provide abortion services, but Medicaid does not pay for abortion except in the very limited circumstances required by federal law. Pet. App. 8a n.1, 59a.

Patients insured through Medicaid choose PPSAT for many reasons. PPSAT provides nonjudgmental, high-quality medical care. Resp. C.A. Br. 4-5. PPSAT also has designed its services to help low-income patients overcome barriers to accessing healthcare. *Id.* at 5; C.A. App. A-47 ¶ 11. For example, PPSAT offers extended hours and flexible scheduling; same-day appointments and short wait times; comprehensive contraceptive care in a single appointment; and interpreting services for patients who do not speak English. Resp. C.A. Br. 5; C.A. App. A-47-48 ¶¶ 11-13. PPSAT has continued to offer high-quality medical care during the COVID-19 pandemic, including through telemedicine.[1] That has ensured continuity of care for

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[1] *See* Abigail Adams, *Planned Parenthood is Expanding Telehealth to All 50 States Amid the Coronavirus Pandemic*, Time (Apr. 14, 2020), https://time.com/5820326/planned-parenthood-telehealth-coronavirus/; Leah Keller & Ruth Dawson, *Family*

low-income patients and has lessened the burdens on other parts of the health care system.[2]

Respondent Julie Edwards is a Medicaid patient who has received care at PPSAT. Pet. App. 8a. She suffers from diabetes. *Id.* Because doctors have advised her that complications from diabetes would make it dangerous for her to carry a pregnancy to term, she sought access to safe and effective birth control. *Id.* After having difficulty finding a doctor who would treat her, she obtained care at PPSAT. *Id.* PPSAT doctors provided her with birth control and also informed her that her blood pressure was elevated, so she could obtain follow-up care for that issue. *Id.* Ms. Edwards was impressed with PPSAT and intends to obtain future gynecological and reproductive health care there. *Id.*

3. In July 2018, South Carolina's Department of Health and Human Services (SCDHHS) terminated PPSAT's participation in the state Medicaid program. Pet. App. 8a. The termination was prompted by the Governor, who issued two executive orders designed to withdraw state funding from any organization that provides abortions, purportedly based on a twenty-five-year-old statute. *Id.* at 9a; *see* S.C. Code Ann. § 43-5-1185.

Planning Providers Show Creativity and Resilience in Response to the COVID-19 Pandemic, Guttmacher Institute (June 24, 2020), https://www.guttmacher.org/print/article/2020/06/family-planning-providers-show-creativity-and-resilience-response-covid-19-pandemic.

[2] *See* Gabriela Weigel et al., *Potential Impacts of Delaying 'Non-Essential' Reproductive Health Care*, Kaiser Family Found. (June 24, 2020), https://www.kff.org/womens-health-policy/issue-brief/potential-impacts-of-delaying-non-essential-reproductive-health-care/.

Relying on those orders, SCDHHS terminated PPSAT's state Medicaid agreement. Pet. App. 9a. SCDHHS did not find that PPSAT is medically unqualified. *Id.* Instead, it terminated PPSAT's participation in Medicaid "solely because [PPSAT] performed abortions outside of the Medicaid program." *Id.* at 8a. As a result of the termination, PPSAT's health centers immediately had to begin turning away Medicaid patients. *Id.* at 9a.

4. Respondents sued under 42 U.S.C. § 1983 to challenge the state's decision to terminate PPSAT's participation in Medicaid. Pet. App. 9a-10a. They allege that the termination violates the Medicaid Act's free-choice-of-provider provision and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* at 10a; Resp. C.A. Br. 9. They sought temporary injunctive relief, so that Ms. Edwards and other patients could continue to receive care from their chosen provider. Pet. App. 10a.

After briefing and a hearing, the district court entered a preliminary injunction. Pet. App. 46a-66a. The court first determined that respondents established a likelihood of success on the merits of the Medicaid Act claim. *Id.* at 50a-60a. As part of that analysis, the court considered whether the Medicaid Act's free-choice-of-provider requirement is privately enforceable under Section 1983. *Id.* at 52a-55a. Applying the factors identified by this Court in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the court concluded that this requirement is privately enforceable. Pet. App. 53a-55a. In so holding, the court agreed with the "well-reasoned" decisions of five federal courts of appeals (and many district courts). *Id.* at 52a-53a.

The district court explained that the free-choice-of-provider provision contains "clear language" that "unambiguously confers a right" on Medicaid patients to "obtain assistance from any qualified and willing provider." Pet. App. 53a-54a. The court noted that the statutory language describes the right "in mandatory terms" that are "neither vague nor amorphous," and it gives the right to "individual patients," "not simply patients in the aggregate." *Id.* at 54a. The court rejected the state's argument that the federal government's ability to withhold funds forecloses private enforcement. *Id.* at 54a-55a.

On the merits, the district court concluded that petitioner likely violated the Medicaid Act because he had no legitimate basis to terminate PPSAT's participation in the state's Medicaid program. Pet. App. 58a-60a. The court explained that the free-choice-of-provider provision prohibits states from terminating the Medicaid contract of a qualified and willing provider, and that it is "undisputed" that PPSAT is qualified within the meaning of the statute, because PPSAT is "professionally competent and is capable of performing family planning services for Medicaid patients." *Id.* at 58a-60a (citing 42 U.S.C. § 1396a(a)(23)(A)).

The state had argued that it could terminate PPSAT's Medicaid contract because it does not want to subsidize abortion. Pet. App. 59a. The district court rejected that argument, making the factual finding that because "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," "PPSAT's inclusion in South Carolina's Medicaid program results

in neither the direct nor indirect use of State funds to pay for abortions." *Id.*

The court also concluded that respondents demonstrated irreparable injury absent a preliminary injunction. Pet. App. 60a-62a. The court had "no trouble" finding that, absent an injunction, Ms. Edwards and other patients would be deprived of needed healthcare from their provider of choice. *Id.* at 61a-62a. And the court concluded that the balance of equities and the public interest favored the injunction, because there is a strong public interest in helping "South Carolina's neediest citizens" obtain "access to competent health care." *Id.* at 62a-64a.

5. The court of appeals affirmed. Pet. App. 1a-45a. Like the district court, the court of appeals applied this Court's framework from *Blessing* and *Gonzaga* and concluded that a Medicaid patient may sue under Section 1983 to enforce the free-choice-of-provider requirement. *Id.* at 15a-19a.

The court of appeals noted that a federal statute creates a right enforceable under Section 1983 "only when the underlying statute itself unambiguously 'confers an individual right' on the plaintiff." Pet. App. 15a (quoting *Gonzaga*, 536 U.S. at 284-85). The statute here, the court concluded, easily meets that test.

First, the court held that the statute "unambiguously gives Medicaid-eligible patients an individual right" to choose from any qualified and willing Medicaid provider. Pet. App. 17a (internal quotation marks omitted). As the court explained, "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," leaving "no doubt that [Congress] intended to guarantee each Medicaid recipient's free choice of provider." *Id*. at 17a-18a.

Second, the court determined that the statute "is not so vague and amorphous that its enforcement would strain judicial competence." Pet. App. 18a (quoting *Blessing*, 520 U.S. at 340-41). The statute "protects the right of a Medicaid recipient to seek care from his or her provider of choice" so long as two criteria are met: The provider is "qualified to perform the service or services required," and the provider "undertakes to provide" those services. *Id.* at 18a (quoting 42 U.S.C. § 1396a(a)(23)(A)).

Third, the court easily concluded that the free-choice-of-provider provision is mandatory, because the statute says that a state plan "must" provide that a Medicaid recipient can obtain care from the provider of his or her choice. Pet. App. 19a (quoting 42 U.S.C. § 1396a(a)(23)(A)).

The court then determined that the Medicaid Act does not provide a comprehensive enforcement scheme that would show Congress's intent to foreclose private enforcement. Pet. App. 19a-23a. The court explained that the federal government's ability to withhold funds "is not sufficiently 'comprehensive' to foreclose" a private remedy, and withholding funds would not "vindicate[] the interests of individual Medicaid beneficiaries in their choice of provider." *Id.* at 20a-21a.

The court recognized that it was "not at liberty to imply private rights of action willy-nilly," especially in legislation enacted under the Spending Clause. Pet. App. 24a-25a. But, the court explained, the statute here is exceptionally clear: "[I]f th[is] 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." *Id.* at 23a.

The court affirmed the preliminary injunction, concluding that petitioner likely violated the Medicaid Act by terminating PPSAT from the state's Medicaid program, and that the balance of the equities favors freezing the status quo. Pet. App. 27a-39a. The court explained that a state may not exclude a "qualified" and willing provider, and it noted that petitioner does not dispute that "PPSAT is professionally qualified to deliver the services that the individual plaintiff seeks." *Id.* at 28a; *see id.* at 19a n.3 ("PPSAT's qualifications are simply not in dispute" in this case.). The court also rejected the state's argument that it can terminate PPSAT's Medicaid contract because it does not want to subsidize abortion, upholding the district court's factual finding that PPSAT does not use any state money to pay for abortion. *Id.* at 39a.

Judge Richardson concurred, agreeing that the statute here "unambiguously create[s] a right privately enforceable under § 1983," but suggesting that this Court provide additional clarity on the relevant legal standard for future cases. Pet. App. 40a-45a.

ARGUMENT

Petitioner contends (Pet. 33-37) that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23)(A), is not privately enforceable under 42 U.S.C. § 1983. The court of appeals faithfully applied this Court's settled precedents and correctly rejected that argument. Nearly every court that has considered the issue has reached the same conclusion. The fact that one outlier circuit has disagreed does not

justify this Court's review. Review is especially unwarranted here because this case comes to the Court in an interlocutory posture, and other pending developments may shed further light on the legal issue. This Court has denied petitions presenting the same question many times,[3] and it should do the same here.

1. In a careful and thorough opinion authored by Judge Wilkinson, the court of appeals correctly held that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23)(A), is privately enforceable under 42 U.S.C. § 1983. Pet. App. 12a-27a.

Section 1983 authorizes "any citizen of the United States or other person within [its] jurisdiction" to sue any person who, "under color of" state law, "depriv[ed]" him or her "of any rights, privileges, or immunities secured by" federal law. 42 U.S.C. § 1983. A person deprived of a right created by a federal statute by a state actor may sue under Section 1983. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

The federal statute at issue gives a Medicaid patient the right to obtain care from the qualified and willing provider of his or her choice. It states:

> 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

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[3] *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408 (2018) (No. 17-1492); *Andersen v. Planned Parenthood of Kan. & Mid-Mo.*, 139 S. Ct. 638 (2018) (No. 17-1340); *Betlach v. Planned Parenthood Ariz., Inc.*, 134 S. Ct. 1283 (2014) (No. 13-621); *Sec'y of Ind. Family & Soc. Servs. Admin. v. Planned Parenthood of Ind., Inc.*, 569 U.S. 1004 (2013) (No. 12-1039).

> or services required . . . [that] undertakes to provide him such services.

42 U.S.C. § 1396a(a)(23)(A).

Congress enacted this provision to ensure that Medicaid recipients, like other individuals, could make deeply personal choices about where to obtain medical care free from state interference. *See, e.g.*, S. Rep. No. 90-744, at 183 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 3021. Congress reiterated the importance of this right in the family-planning context, providing that even when a state uses a managed-care system, the state cannot limit a patient's free choice of provider for family-planning services. *See* 42 U.S.C. § 1396a(a)(23)(B) (cross-reference to 42 U.S.C. § 1396d(a)(4)(C)).

a. The court of appeals carefully applied this Court's settled precedents for determining whether a federal statute may be enforced under Section 1983. Those precedents teach that, to be enforceable under Section 1983, a statute must provide "a federal right," not merely a federal rule. Pet. App. 16a (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)). Further, the statute at issue must "unambiguously" provide that right. *Id.* at 21a (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002)).

The court of appeals concluded that the statute at issue satisfies this Court's stringent test. All three judges agreed that the free-choice-of-provider provision "*unambiguously* creates a private right in favor of the individual plaintiff." Pet. App. 27a (emphasis added); *see id.* at 40a (Richardson, J., concurring) (statute "unambiguously create[s] a right privately enforceable under § 1983"). This was not a close call: The court found it "difficult to imagine a clearer or

more affirmative directive" than in the statute here. *Id.* at 12a.

This Court has identified several factors to help determine whether a federal statute creates a right enforceable under Section 1983. The Court asks (1) whether Congress clearly "intended that the provision in question benefit the plaintiff"; (2) whether the asserted right is "not so vague and amorphous that its enforcement would strain judicial competence"; and (3) whether the obligation created by the statute is "mandatory." *Blessing*, 520 U.S. at 340-41 (internal quotation marks omitted); *see Gonzaga*, 536 U.S. at 284-85. The Court also asks (4) whether Congress has otherwise expressly or impliedly evidenced an intention to foreclose private enforcement. *Gonzaga*, 536 U.S. at 284-85 & n.4.

The court of appeals correctly identified (Pet. App. 16a) and applied (*id.* at 16a-27a) those factors. First, the court concluded that the plain text of the statute "unambiguously gives Medicaid-eligible patients an individual right to their choice of provider." *Id.* at 17a (internal quotation marks omitted). The statute specifically defines the intended class of beneficiaries ("any individual eligible for medical assistance" under Medicaid) and gives them a particular right (the right to "obtain such assistance" from any qualified and willing provider). *Id.* at 17a-18a. There is no question *who* Congress intended to benefit in this statute, or *what* benefit Congress intended to give them. *Id.*

Second, the court of appeals determined that Congress defined the right using clear and administrable terms. Pet. App. 18a-19a. The statute provides that an individual has a right to use any willing provider that is "qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23)(A). As the court of

appeals explained, "qualified to perform the service or services required" has a clear ordinary meaning – "professionally fit to perform the medical services the patient requires." Pet. App. 27a; *see id.* at 18a. The court noted that courts decide similar questions of professional competence every day. *Id.* at 18a-19a, 27a-33a; *see id.* at 18a (court could look to "descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and expert testimony"). And the court noted that deciding the issue would be particularly easy in this case, because South Carolina "does not contest the fact that PPSAT is professionally qualified to deliver the services that the individual plaintiff seeks." *Id*. at 28a; *see id*. at 19a n.3 ("PPSAT's qualifications are simply not in dispute.").

Third, the court of appeals determined that the free-choice-of-provider provision "unambiguously impose[s] a binding obligation on the States" because it uses mandatory language. Pet. App. 19a (quoting *Blessing*, 520 U.S. at 341). The statute specifies that states "must" include the free-choice-of-provider right in their Medicaid plans. *Id.* (quoting 42 U.S.C. § 1396a(a)(23)(A)).

Finally, the court of appeals found no indication in the statutory text that Congress intended to foreclose a Section 1983 remedy. Pet. App. 19a-23a. No language expressly rejects that remedy. *Id*. at 19a. And the Medicaid Act lacks a comprehensive enforcement scheme that would indicate that Congress did not intend for individual enforcement under Section 1983. *Id*. at 19a, 21a (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521-22 (1990)).

The court of appeals' analysis was exceptionally thorough, and its application of settled law is straightforward. Indeed, nearly every court that has considered the issue has reached the same conclusion. *See* pp. 17-19 & notes 7-8, *infra*.

b. Petitioner offers only very limited criticisms of the court of appeals' decision. Pet. 33-37. None of them has merit.

First, petitioner claims that the court of appeals "mostly ignored *Gonzaga*." Pet. 34-35. That is not true; the court discussed *Gonzaga* extensively. *See* Pet. App. 15a, 17a, 21a, 24a, 26a. The court repeatedly noted *Gonzaga*'s principal teaching – that a statute must "unambiguously confer" a private right for that right to be enforceable under Section 1983, 536 U.S. at 283-85. Pet. App. 15a, 17a, 24a. The court recognized that it "should not freely infer private rights of action," and it only did so here based on the "plain and narrow text of the free-choice-of-provider provision." *Id.* at 24a. Petitioner's claim that the court of appeals did not apply *Gonzaga* simply ignores the court's actual opinion.[4]

Second, petitioner asserts (Pet. 35) that the court of appeals "relied too heavily on" *Wilder*. Not so. The court cited *Wilder* for only one point – that "the Medicaid Act's administrative scheme is not sufficiently

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[4] Petitioner suggests (Pet. 34-35) that this Court abandoned *Blessing* in *Gonzaga*. Far from it. The *Gonzaga* Court repeatedly cited *Blessing* with approval, and concentrated its analysis on the two *Blessing* factors relevant in that case – the statute's lack of "rights creating" language and its congressionally created enforcement mechanism. *Gonzaga*, 536 U.S. at 287-89. Those same factors distinguish *Gonzaga* from this case.

comprehensive to foreclose a private right of action enforceable under § 1983." Pet. App. 21a (citing *Wilder*, 496 U.S. at 521-22). That point has not been called into question by this Court, *id.* at 21a-22a; in fact, the Court cited *Wilder* for that point in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005). To the extent the Court has questioned other parts of *Wilder*, the Fourth Circuit accounted for that when it noted that "*Gonzaga* cut back on *Wilder*'s treatment of implied rights of action in the § 1983 context," and then cited *Wilder* only for the narrow point about "the comprehensiveness of the Medicaid Act's enforcement scheme." Pet. App. 21a-22a.[5]

Third, petitioner reads *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), to foreclose private enforcement of any part of the Medicaid Act. Pet. 35. That is wrong for several reasons. As an initial matter, *Armstrong* did not address whether the plaintiffs there could sue under Section 1983; the issue was whether they could imply a right of action under the Supremacy Clause or general principles of equity. *Id.* at 324-29.[6] And to the extent *Armstrong* ad-

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[5] Petitioner asserts in passing (Pet. 7) that PPSAT was required to exhaust state administrative remedies. But patients such as Ms. Edwards – the people with the free-choice-of-provider right – cannot participate in this administrative review process. And even if Ms. Edwards could use that process, both the district court and court of appeals found that it would be "futile" to do so here. Pet. App. 22a n.4. Besides, it is well-established that a person is not required to exhaust administrative remedies before filing suit under Section 1983. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982); *see* Pet. App. 22a.

[6] The provision in *Armstrong*, 42 U.S.C. § 1396a(a)(30)(A), also was materially different from the provision here. That provision required states to adopt rate-setting plans in accordance with

dressed the issue, it said the *opposite* of what petitioner claims. *Id.* at 328 ("The provision for the Secretary's enforcement by withholding funds" did not "*by itself* . . . preclude the availability of equitable relief" through individual enforcement actions.).

In this case, the Fourth Circuit explained from first principles why the federal government's ability to withhold funds does not show that Congress intended to preclude private enforcement of the free-choice-of-provider provision. Pet. App. 19a-21a. That analysis was thorough and correct. Petitioner's criticisms are inapt, because the court of appeals was "especially cautious" before "finding that a provision in Spending Clause legislation, such as the Medicaid Act, creates a private right enforceable under § 1983." *Id.* at 25a.

Finally, petitioner argues (Pet. 36) about the scope of the right conferred in the free-choice-of-provider provision, arguing that a patient can only choose a provider the state deems qualified. That is just petitioner's merits argument repackaged, and it is wrong. As the Fourth Circuit explained, Congress gave patients the right to obtain care from any willing provider that is "qualified to perform the service or services required"; "qualified," in that context, means professionally competent; and petitioner has never disputed that PPSAT is professionally competent. Pet. App. 27a-31a. Petitioner's argument boils down to an assertion that "qualified" "means whatever the

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certain "broad and nonspecific" standards. *Armstrong*, 575 U.S. at 333 (Breyer, J., concurring). Unlike the provision here, it did not identify specific individuals to benefit or describe an individual right in specific and administrable terms. *Id*. at 328-29, 333.

state says" it means, but as the court of appeals explained, that would "strip the free-choice-of-provider provision of all meaning" and would allow states to avoid the obligation Congress imposed as a condition for federal funding. *Id.* at 25a-26a, 31a.

2. a. Every court of appeals that has considered the issue but one has held that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23)(A), is privately enforceable under Section 1983.[7] And nearly every district court that has considered the issue has agreed with that conclusion.[8]

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[7] *See* Pet. App. 12a-23a; *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 913 F.3d 551, 561-62 (5th Cir.), *reh'g en banc granted*, 914 F.3d 994 (5th Cir. 2019); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1229 (10th Cir.), *cert. denied*, 139 S. Ct. 638 (2018); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457-63 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018); *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 966-68 (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, 974-75 (7th Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013); *Harris v. Olszewski*, 442 F.3d 456, 461-62 (6th Cir. 2006); *see also Silver v. Baggiano*, 804 F.2d 1211, 1216-18 (11th Cir. 1986) (noting in passing that "Medicaid recipients do have enforceable rights under § 1396a(a)(23)"), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002). *But see Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017).

[8] *See* Pet. App. 52a-55a, *aff'd*, Pet. App. 1a-39a; *Miracles House Inc. v. Senior*, No. 17-cv-23582, 2017 WL 5291139, at *3 (S.D. Fla. Nov. 9, 2017); *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 236 F. Supp. 3d 974, 978 (W.D. Tex. 2017), *aff'd in relevant part*, 913 F.3d 551 (5th Cir.), *reh'g en banc granted*, 914 F.3d 994 (5th Cir. 2019); *Planned Parenthood Se., Inc. v. Dzielak*, No. 3:16-cv-454,

The Eighth Circuit's decision in *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), is an outlier in both outcome and approach. That court failed to use the analysis set out by this Court in *Blessing*, *Gonzaga*, and similar cases, which focuses on whether the specific language at issue includes the necessary "rights-creating language." *Gonzaga*, 536 U.S. at 290. Further, rather than analyze the specific text of 42 U.S.C. § 1396a(a)(23)(A), the Eighth Circuit instead focused

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2016 WL 6127980, at *1 (S.D. Miss. Oct. 20, 2016), *appeal docketed*, No. 16-60773 (5th Cir. Nov. 21, 2016); *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 2:16-cv-2284, 2016 WL 3597457, at *15 (D. Kan. July 5, 2016), *aff'd in part, vacated in part sub nom. Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Bader v. Wernert*, 178 F. Supp. 3d 703, 718-20 (N.D. Ind. 2016); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 637-42 (M.D. La. 2015), *aff'd sub nom. Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), *cert denied*, 139 S. Ct. 408 (2018); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1217 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-566, 2015 WL 13710046, at *6 (E.D. Ark. Oct. 5, 2015), *vacated sub nom. Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017); *Planned Parenthood Ariz., Inc. v. Betlach*, 922 F. Supp. 2d 858, 864 (D. Ariz.), *aff'd*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 902 (S.D. Ind. 2011), *aff'd in part, rev'd in part*, 699 F.3d 962 (7th Cir. 2012); *G. ex rel. K. v. Hawai'i Dep't of Human Servs.*, No. 08-cv-551, 2009 WL 1322354, at *12 (D. Haw. May 11, 2009); *Women's Hosp. Found. v. Townsend*, No. 07-cv-711, 2008 WL 2743284, at *8 (M.D. La. July 10, 2008); *Kapable Kids Learning Ctr., Inc. v. Ark. Dep't of Human Servs.*, 420 F. Supp. 2d 956, 962 (E.D. Ark. 2005); *L.F. v. Olszewski*, No. 04-cv-73248, 2004 WL 5570462, at *7 (E.D. Mich. Nov. 1, 2004), *rev'd on other grounds and remanded sub nom. Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Martin v. Taft*, 222 F. Supp. 2d 940, 979 (S.D. Ohio 2002). *But see M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1307 (D. Utah 2003).

on the fact that the provision exists within a set of requirements for state Medicaid plans. *Gillespie*, 867 F.3d at 1041. But the Medicaid Act itself refutes that reasoning, because it instructs that a provision of the Act "is not to be deemed unenforceable because of its inclusion in a section of [the Act] . . . specifying the required contents of a State plan." 42 U.S.C. § 1320a-2.

The Eighth Circuit also treated the mere possibility of federal enforcement as precluding private enforcement, even though permitting private enforcement "in no way interferes with the Secretary of HHS's authority to audit and sanction noncompliant state Medicaid plans," Pet. App. 22a-23a (internal quotation marks omitted), and Congress expressly recognized as much, *see* 42 U.S.C. § 1320a-2.

And the Eighth Circuit's decision in *Gillespie* is out of step with its own precedent, because in other private-right-of-action cases, that court has faithfully applied the factors set out in *Blessing* and *Gonzaga*, *see, e.g.*, *Spectra Comm'cns Grp. v. City of Cameron, Mo.*, 806 F.3d 1113, 1120 (8th Cir. 2015); *Lankford v. Sherman*, 451 F.3d 496, 508-09 (8th Cir. 2006), and has recognized that provisions in the Medicaid Act can be privately enforceable, *see Ctr. for Special Needs Tr. Admin. v. Olson*, 676 F.3d 688, 699 (8th Cir. 2012). Put simply, the Eighth Circuit's decision is wrong and does not follow this Court's teachings.

b. The lopsided disagreement in the circuits does not warrant this Court's review. Petitioner suggests that the decision below will lead to additional litigation based on the free-choice-of-provider provision. Pet. 34. But that assertion has been disproven by the experience in the many circuits that have permitted individuals to bring those claims. Since the first appellate decision permitting enforcement of the free-

choice-of-provider provision under Section 1983 (the Sixth Circuit's decision in *Harris* in March 2006), respondents are aware of only eleven district court decisions involving lawsuits challenging the termination of Medicaid providers through the free-choice-of-provider provision and Section 1983, *see* note 8, *supra* (first eleven cases), plus a handful of cases challenging other state policies using those statutes, *see, e.g.*, *id.* (next five cases).

Further, all but two of the eleven cases are efforts by states to target Planned Parenthood in ways courts have recognized are unwarranted and politically motivated. *See, e.g.*, *Bader v. Wernert*, 178 F. Supp. 3d 703, 724 (N.D. Ind. 2016). They involve pretextual termination attempts lacking any legal basis or evidentiary support. A typical decision to terminate a provider, by contrast, is based on valid standards and supporting evidence and would not lead to litigation. *See, e.g.*, U.S. Br. at 15-16, *Planned Parenthood Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017) (No. 15-30987), *cert. denied*, 139 S. Ct. 408 (2018).

Finally, it would be wrong to assume that Medicaid recipients – some of the poorest members of our society – are enthusiastic about the prospect of bringing lawsuits against states under Section 1983. They would much prefer that states just follow the rules and allow them to obtain health care from qualified and willing providers.

3. Petitioner also contends that the Court should grant review to address "the appropriate framework for determining when a cause of action is available under § 1983." Pet. 11 (internal quotation marks omitted). But that is not a separate question that the Court should consider in the abstract, since *Blessing* and *Gonzaga* instruct courts to examine particular

statutory language to determine whether it creates a privately enforceable right.

Nor has petitioner established that any differences exist in the courts of appeals' approaches that might warrant this Court's review. When the courts of appeals address whether a federal statute confers a right enforceable under Section 1983, they consistently apply the factors set out by this Court in *Blessing* and *Gonzaga*, and they recognize that a statute must unambiguously confer the private right.[9] Petitioner has not identified any ways in which the courts of appeals are applying different legal tests (for example, by disagreeing about the relevant factors, or by instructing that the statutory text need not be unambiguous).

Petitioner asserts that the circuits have disagreed about application of the Court's settled framework to statutes *other* than the one at issue here. Pet. 29-31. But disagreement about whether other statutes with materially different language confer private rights enforceable under Section 1983 does not provide a reason that the Court should review *this* statute. After

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[9] *See, e.g.*, Pet. App. 14a-15a; *Carey v. Throwe*, 957 F.3d 468, 479 (4th Cir. 2020); *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097-98 (D.C. Cir. 2017); *DeCambre v. Brookline Hous. Auth.*, 826 F.3d 1, 10 (1st Cir. 2016); *Briggs v. Bremby*, 792 F.3d 239, 242 (2d Cir. 2015); *Crowley v. Nevada*, 678 F.3d 730, 734-35 (9th Cir. 2012); *Delancey v. City of Austin*, 570 F.3d 590, 593 (5th Cir. 2009); *Doe v. Penn. Bd. of Prob. & Parole*, 513 F.3d 95, 103-04 (3d Cir. 2008); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1146-47 (10th Cir. 2006), *cert. denied*, 549 U.S. 1305 (2007); *31 Foster Children v. Bush*, 329 F.3d 1255, 1270 (11th Cir.), *cert. denied sub nom. Reggie B. v. Bush*, 540 U.S. 984 (2003).

all, whether a statute confers a right enforceable under Section 1983 depends on the precise language of the statute at issue.[10]

If this Court's guidance were needed with respect to one of those other statutes, the Court could grant certiorari in one of those cases. Notably, the Court has declined to do so. Specifically, the Court has denied petitions for writs of certiorari with respect to two of the three statutes for which petitioner alleges circuit splits.[11]

The important point is that no such guidance is needed for the statute here. The court of appeals found the statutory language here to be exceptionally clear. Pet. App. 12a, 17a, 23a; *id.* at 40a (Richardson, J., concurring). The court of appeals "beg[a]n and end[ed] [its] search for Congress's intent with the

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[10] *See, e.g.*, Pet. App. 13a; *Burban v. City of Neptune Beach, Fla.*, 920 F.3d 1274, 1278 (11th Cir. 2019); *Estate of Cornell v. Bayview Loan Servicing, LLC,* 908 F.3d 1008, 1012 (6th Cir. 2018); *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 62-63 (1st Cir. 2016); *DuBerry v. District of Columbia*, 824 F.3d 1046 1052 (D.C. Cir. 2016); *Spectra Commc'ns Grp.*, 806 F.3d at 1119; *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 137 (2d Cir. 2010); *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 526 (3d Cir. 2009), *cert. denied*, 559 U.S. 939 (2010); *Cuvillier v. Taylor*, 503 F.3d 397, 406 (5th Cir. 2007); *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1058 (9th Cir. 2005); *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1265 (10th Cir. 2004).

[11] *See Poole v. N.Y. State Citizens' Coal. for Children*, 140 S. Ct. 956, 956 (2020) (No. 19-574) (concerning whether 42 U.S.C. § 672(a), a child welfare statute, confers a private right enforceable under Section 1983); *De Los Santos Mora v. New York*, 555 U.S. 943, 943 (2008) (No. 08-106) (concerning whether Article 36 of the Vienna Convention on Consular Relations confers a private right enforceable under Section 1983).

plain text of the free-choice-of-provider provision." *Id.* at 24a. And the court remarked that if the free-choice-of-provider provision "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." *Id.* at 23a. Other courts of appeals have taken the same view.[12]

Accordingly, this would not be a good statute for the Court to use to provide further guidance about which statutes confer private rights enforceable under Section 1983, if such guidance were needed. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (Where the "present litigation plainly does not present a borderline question," this Court ordinarily "express[es] no views about where it would be appropriate to draw the line." (internal quotation marks omitted)).

4. In any event, this case would be an unsuitable vehicle for reviewing the question presented for several reasons.

a. This case comes to the Court on grant of a preliminary injunction. This Court reviews a preliminary injunction for "abuse of discretion" and "uphold[s] the injunction" if "the underlying . . . question is close." *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004) (internal quotation marks omitted). Here, the district court froze the status quo so that low-income

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[12] *See Planned Parenthood of Kan. & Mid-Mo.*, 882 F.3d at 1225-26 (court had "no trouble concluding that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients"); *Planned Parenthood of Ind.*, 699 F.3d at 974-75 (explaining that Medicaid patients are the "obvious" and "unmistakabl[e]" intended beneficiaries of a mandatory right that "falls comfortably" within the judiciary's competence to administer).

individuals would not immediately lose their healthcare while the courts determined whether the state's termination decision was lawful. *See* Pet. App. 63a-65a. The parties have now fully briefed a motion for summary judgment on the free-choice-of-provider claim in the district court. *See* Pls.' Mot. for Summ. J. (D.S.C. Jan. 31, 2020), ECF No. 52. If the district court concluded that the claim fails on its merits, there would be no need to resolve the question presented here.

The Court normally does not review interlocutory orders, and for good reason. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 791 (2020) (Gorsuch, J., concurring in denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., concurring in denial of certiorari); *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari). There is no reason to depart from that practice here. Petitioner could, of course, seek this Court's review of the question presented once the courts below have definitively resolved the merits. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

b. Two additional factors counsel against reviewing the question presented at this time.

First, petitioner's argument rests in significant part on the availability of federal enforcement of the Medicaid Act. *See* Pet. 36. But the federal government's views on what states must do to comply with the free-choice-of-provider provision may be evolving.

In April 2016, the Department of Health and Human Services issued "guidance to state Medicaid

agencies on protecting the right of Medicaid beneficiaries to receive covered services from any qualified provider willing to furnish such services." U.S. Dep't of Health & Human Servs., State Medicaid Director Letter No. 16-005, Clarifying "Free Choice of Provider" Requirement in Conjunction with State Authority to Take Action against Medicaid Providers (Apr. 19, 2016), https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/SMD16005.pdf. The guidance did not address whether the free-choice-of-provider right is enforceable under Section 1983, but it did set out the federal government's view of the scope of that right. *E.g., id.* at 2 (under that provision, a state may not "target a provider or set of providers for reasons unrelated to their fitness to perform covered services or the adequacy of their billing practices," and failure to apply otherwise reasonable standards evenhandedly suggests improper targeting).

In January 2018, the Department issued a new letter to state Medicaid directors rescinding its prior guidance and stating that the federal government "may provide further guidance in the future." U.S. Dep't of Health & Human Servs., State Medicaid Director Letter No. 18-003, Rescinding SMD #16-005 Clarifying "Free Choice of Provider" Requirement (Jan. 19, 2018), https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/smd18003.pdf. To date, the agency has not provided any further guidance. That has created uncertainty about whether and how the federal government will enforce the free-choice-of-provider provision.

Moreover, there may be further developments in the courts of appeals that bear on the issue in this case. Another case is pending in the Fifth Circuit that

raises the same issue as in this case. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Phillips*, No. 17-50282 (5th Cir. argued May 14, 2019) (en banc).

In light of the interlocutory posture of this case, the uncertainty about federal enforcement, and the pending case in the Fifth Circuit, the Court should deny the certiorari petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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