Case No. 21-1043

In the United States Court of Appeals
For the Fourth Circuit

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.

On Appeal from the United States District Court
for the District of South Carolina at Columbia
Case No. 3:18-cv-02078-MGL

BRIEF OF 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, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

Martha Jane Perkins*
Catherine McKee
Sarah Jane Somers
Sarah Grusin
* Counsel of record
Counsel for Amici Curiae

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1043 Caption: Planned Parenthood South Atlantic v. Phillip

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Health Law Program
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Martha Jane Perkins Date: 06/04/2021

Counsel for: Amicus Curiae NHeLP

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 21-1043 Caption: Planned Parenthood South Atlantic v. Phillip

Pursuant to FRAP 26.1 and Local Rule 26.1,

SC Appleseed Legal Justice Center
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

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Signature: /s/ Martha Jane Perkins Date: 06/04/2021

Counsel for: Amicus Curiae SC Appleseed

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No. 21-1043 Caption: Planned Parenthood South Atlantic v. Phillip

Pursuant to FRAP 26.1 and Local Rule 26.1,

Virginia Poverty Law Center
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ Martha Jane Perkins Date: 06/04/2021

Counsel for: Amicus Curiae VA Poverty Law Ctr

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 21-1043 Caption: Planned Parenthood South Atlantic v. Phillip

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Justice Center
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ Martha Jane Perkins Date: 06/04/2021

Counsel for: Amicus Curiae NC Justice Center

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No. 21-1043 Caption: Planned Parenthood South Atlantic v. Phillip

Pursuant to FRAP 26.1 and Local Rule 26.1,

Charlotte Center for Legal Advocacy
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Martha Jane Perkins Date: 06/04/2021

Counsel for: Amicus Curiae Charlotte Center Leg

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Ipas
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
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Signature: /s/ Martha Jane Perkins Date: 06/04/2021

Counsel for: Amicus Curiae Ipas

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No. 21-1043 Caption: Planned Parenthood South Atlantic v. Phillip

Pursuant to FRAP 26.1 and Local Rule 26.1,

SIECUS: Sex Ed for Social Change
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Martha Jane Perkins Date: 06/04/2021

Counsel for: Amicus Curiae SIECUS

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INTEREST OF THE *AMICUS*[1]

The *amici curiae* file this brief pursuant to Fed. R. App. P. 29. *Amici* are 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. While each *amicus* has particular interests, they collectively bring to the Court a commitment to advocate on behalf of low-income people, women, older adults, people with disabilities, and children. *Amici* also research and provide education on a range of policy and legal issues affecting these populations, including health insurance coverage, access to comprehensive health care, including reproductive health care, and access to the courts. As such, *amici* have an interest in the outcome of this case. The National Health Law Program filed a similar *amicus curiae* brief when this issue was before this honorable Court in 2019. *See* Br. of the Nat'l Health L. Prog. et al. as *Amici Curiae* in Support of Plaintiffs-Appellees and Urging Affirmance, Planned Parenthood S. Atl. v. Baker, No. 18-2133 (Jan. 22, 2019)), ECF No. 40.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* made a monetary contribution to its preparation or submission. The parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

Medicaid is the largest public health insurance program for low-income people in the United States. Federal law requires all state Medicaid programs to cover family planning services and supplies. Low-income women who are enrolled in Medicaid—nationwide and in South Carolina—depend on Planned Parenthood clinics for these family planning services and supplies, as well as for other services covered by Medicaid.

Recognizing the importance of meaningful access to health services, including family planning services and supplies, Congress included a free choice of provider provision in the Medicaid Act. *See* 42 U.S.C. § 1396a(a)(23)(A).

Whether a federal statute, such as section 1396a(a)(23)(A), is privately enforceable is a threshold inquiry. That question, if raised, must be answered before inquiry into the precise scope or meaning of the right as applied to any particular set of facts. The Supreme Court has a well-established test for determining when a federal statute creates rights that are enforceable under 42 U.S.C. § 1983. Moreover, Congress has amended the Social Security Act expressly to recognize beneficiaries' ability to enforce provisions of the Medicaid Act under section 1983. *See* 42 U.S.C. §§ 1320a-2, 1320a-10.

In 2019, the Fourth Circuit applied the enforcement test to section 1396a(a)(23)(A) in *Planned Parenthood South Atlantic v. Baker*, 941 F.3d 687 (4th

Cir. 2019). The Fourth Circuit found it "difficult to imagine a clearer or more affirmative directive" and held Section (23)(A) creates a federal right enforceable by Medicaid beneficiaries. *Id.* at 694. The Supreme Court precedent that produced this holding has not changed over the ensuing months. There is no reason to revise the previous decision.

ARGUMENT

I. CONGRESS AND THE SUPREME COURT RECOGNIZE THE RIGHT OF INDIVIDUALS TO ENFORCE PROVISIONS OF THE SOCIAL SECURITY ACT PURSUANT TO 42 U.S.C. § 1983.

Enacted in 1965, the Medicaid Act authorizes a cooperative state-federal medical assistance program for low-income people. *See* 42 U.S.C. §§ 1396-1396w-5. Part of the Social Security Act, the Medicaid Act was enacted pursuant to Congress's Spending Clause power.

Medicaid beneficiaries depend on states to adhere to the various Medicaid Act requirements. *See* 42 U.S.C. § 1396a (setting forth requirements for Medicaid programs). Given the importance of allowing Medicaid enrollees to choose their health care providers, Congress included a mandate in the Medicaid Act requiring states to

> 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 . . . who undertakes to provide him such

services[.]

42 U.S.C. § 1396a(a)(23)(A) ("Section (23)(A)" or "free choice of provider provision"). Section (23)(A) was added to the Medicaid Act in 1967 in light of evidence from Medicaid's first two years of existence that some states were restricting beneficiaries to health care settings of the states' choosing. *See* Lara Cartwright-Smith & Sara Rosenbaum, *Medicaid's Free-Choice-of-Provider Protections in a Family Planning Context*, 127 Pub. Health Rpts. 119 (Jan.-Feb. 2012) (citing President's Proposals for Revision in the Soc. Sec. Sys., Hearings on H.R. 5710 before the H. Comm. on Ways and Means, Pt. 4, at 2273 (Apr. 6 & Apr. 11, 1967).

A separate Medicaid Act provision, 42 U.S.C. § 1396c, allows the federal government to terminate or withhold federal funding to states that do not "comply substantially" with the federal law. That drastic provision has rarely—if ever—been enforced by the federal government. That is because, as a federal grant-in-aid program, "the posture of the federal agency toward its grantees is not generally that of a referee calling fouls, but that of a coach giving support in the form of cash and expertise." Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary* Involvement, 58 Va. L. Rev. 600, 620 (1972). For beneficiaries, application of this remedy would

make matters worse because it would deprive the state of the very funds it needs to cover the cost of medically necessary care and services.

Section 1396c is not the only remedy that Congress and the Supreme Court recognize. Entitlement to Medicaid triggers legal rights for program beneficiaries, including the right to petition courts to enforce some of the statutory requirements that are placed on the states. As explained below, Medicaid beneficiaries, like the plaintiffs in this case, can enforce certain provisions of the Medicaid Act, including the free choice of provider provision, in actions for prospective, injunctive relief pursuant to 42 U.S.C. § 1983.

A. Controlling Supreme Court Precedent Establishes the Right of Individuals to Enforce Provisions of the Social Security Act Pursuant to 42 U.S.C. § 1983.

Section 1983 litigation has long protected federal rights that Congress guaranteed in the Social Security Act. As Justice Harlan observed in a Social Security Act case filed by program beneficiaries pursuant to section 1983:

> It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.

Rosado v. Wyman, 397 U.S. 397, 422-23 (1970) (holding that suits in federal court under § 1983 are proper to secure compliance with provisions of the Social Security Act). Indeed, on multiple occasions, the Supreme Court has recognized that individuals may enforce various provisions of the Social Security Act through section 1983. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990) (allowing enforcement of a Medicaid Act provision concerning payment for institutional services); *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (holding "the phrase 'and laws,' as used in § 1983, means what it says" and allowing enforcement of a Social Security Act provision); *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) ("[S]uits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States."); *King v. Smith*, 392 U.S. 309, 333-34 (1968) (allowing enforcement of the "reasonable promptness" provision of a Social Security Act program); *see generally Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981) (citing *King v. Smith* with favor in case involving the Developmentally Disabled Assistance and Bill of Rights Act, which is not part of the Social Security Act, and stating "where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.").[2]

[2] *Pennhurst* noted that Spending Clause legislation operates "much in the nature of

In *Wilder*, a hospital association filed suit under section 1983 alleging that state officials were violating the hospitals' rights under a payment provision of the Medicaid Act. 496 U.S. at 501. After acknowledging that *Maine v. Thiboutot* authorized a section 1983 action for violations of federal statutes, the Court noted two exceptions to this general rule of enforcement: when the statute does not create individual federal rights within the meaning of section 1983 and when Congress has foreclosed enforcement through section 1983 in the underlying statute itself. *Id.* at 508-09. The Court then stated a test for determining whether a statutory provision creates a "federal right" under section 1983:

> Such an inquiry turns on whether the provision in question was intend[ed] to benefit the putative plaintiffs. . . . If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, . . . or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Id. at 509 (citations and internal quotations omitted). Applying this test, *Wilder* held that the Medicaid provision at issue created a right enforceable by hospitals under section 1983. *Id.* at 509-10.

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a contract," 451 U.S. at 17, meaning that in exchange for federal funding states agree to take actions that Congress could not require them to take directly. However, the Court has been clear that its use of this analogy "do[es] not imply . . . that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." *Barnes v Gorman*, 536 U.S. 181, 188 n.2 (2002).

Thereafter, in *Blessing v. Freestone*, the Supreme Court instructed courts to use this "traditional" enforcement test for determining whether Congress intended a federal statute to create rights under section 1983. 520 U.S. 329, 340 (1997) (citing *Wilder* and stating, "We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right."). So the test, first stated in *Wilder* and refined by *Blessing,* asks whether each statutory provision cited by the plaintiff: (1) creates a right intended to benefit the plaintiff; (2) is written with sufficient clarity for a court to enforce; and (3) is mandatory on the state. *Blessing* also cautioned plaintiffs to plead their claims in "manageable analytic bites" so that the court can ascertain whether "each separate claim" satisfies the three-part enforcement test. *Id*. at 342; *see also id.* at 346 (finding lower court failed to apply the enforcement test's "methodical inquiry" and remanding for determination of which rights plaintiffs were asserting).

Gonzaga University v. Doe further clarified the enforcement test. 536 U.S. 273 (2002). Reviewing *Wilder* and *Blessing*, the *Gonzaga* Court found some of the language used in these cases had confused lower courts, leading them to find a statute enforceable solely because the plaintiff came within the general zone of interests that the statute intended to protect. *Gonzaga* did not overrule these cases but clarified that the first prong of the test is met *only* if the federal provision contains an unambiguously conferred federal right using "rights-creating terms." 536 U.S. 273,

283-84 (2002) (analyzing a provision of the Family Educational Rights and Privacy Act, which is not part of the Social Security Act).

When the three-part test is met, "the right is presumptively enforceable by § 1983." *Id*. at 274. The presumption can be overcome only by demonstrating that Congress foreclosed private enforcement expressly or by creating a "'comprehensive enforcement scheme that is incompatible with'" private enforcement. *Id*. at 284 n.4 (quoting *Blessing*, 520 U.S. at 341); *see also Blessing*, 520 U.S. at 346 (stating this is a "difficult showing"). The *Wilder* Court held that Medicaid's administrative process "to curtail federal funds to States whose plans are not in compliance with the Act [42 U.S.C. § 1396c] . . . cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." 496 U.S. at 521-22; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (Scalia, J.) (including *Wilder* and Medicaid in listing of previous cases and statutes where § 1983 enforcement is not foreclosed); *Gonzaga Univ.,* 536 U.S. at 280-81 (noting *Wilder* held the Medicaid Act contains "no sufficient administrative means of enforcing the requirement against States that failed to comply"); *see also Planned Parenthood S. Atl.*, 941 F.3d at 699 ("[T]he 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.").[3]

This enforcement doctrine is the law of the land. In 2018, the Supreme Court denied certiorari in two cases that had applied the *Blessing*/*Gonzaga* test to find Section (23)(A) enforceable pursuant to section 1983. *See Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 638 (2018); *Planned Parenthood Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018), *overruled by Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc., v. Kauffman,* 981 F.3d 347, 368 (5th Cir. 2020).[4] Three justices dissented, *see* 139 S. Ct. 408, but their opinion misrepresents the current state of the law. Writing for the dissent, Justice Thomas complains that the Court has "made a mess of the issue." *Id.* at 409. However, the enforcement track record in the lower courts does not reflect this. From

[3] Congress's reference to substantial compliance in section 1396c implies that this remedy has an "aggregate focus." *Gonzaga Univ.*, 536 U.S. at 288. That is, Congress intended this as a remedy for aggregate violations, rather than a remedy available to individual beneficiaries. *Cf. Wilder*, 496 U.S. at 522 ("[G]eneralized powers' . . . to audit and cut off federal funds [are] insufficient to foreclose reliance on § 1983 to vindicate federal rights.") (citation omitted); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1229 (10th Cir. 2018) (reaffirming *Wilder*'s holding in part "because the federal Secretary's withholding Medicaid funds would not redress [plaintiffs'] injuries at all.").

[4] *See also Planned Parenthood So. Atl.*, 941 F.3d 687 (4th Cir. 2019), *cert. denied*, 141 S. Ct. 550 (2020).

2002, when *Gonzaga* was decided, until 2017, when a split panel issued *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), the appellate courts' decisions on whether a particular Medicaid provision could be privately enforced were remarkably consistent. *See* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 St. Louis U. J. Health L. & Pol'y 207, tbl. 2 (2016). To the extent there is any confusion now, it stems not from the *Blessing/Gonzaga* test but from the failure of *Does* to apply the test and the aftermath of that error.

B. Congress Clearly Intends Private Enforcement of Social Security Act Provisions Under 42 U.S.C. § 1983.

Congress is well aware of the basic ground rules established by the Supreme Court: When a provision of a Spending Clause enactment is couched in terms that are "precatory," *Pennhurst*, 451 U.S. at 17, or that have an "'aggregate' focus," *Gonzaga Univ.*, 536 U.S. at 288, or is included in a statute that provides alternative, comprehensive private enforcement mechanisms, *see Smith v. Robinson*, 468 U.S. 992, 1012 (1984), it will not give rise to a section 1983 remedy. However, when the provision at hand binds states and confers entitlements on individuals, those will be regarded as "rights secured by the . . . laws of the United States" under section 1983. 42 U.S.C. § 1983.

Congress has evinced its understanding of this design. Following the Supreme Court decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), Congress amended the

Social Security Act to make clear that beneficiaries can enforce provisions of the Act that meet the traditional enforcement test. *Suter* held that plaintiffs could not use section 1983 to enforce a provision of the Adoption Assistance and Child Welfare title of the Social Security Act. *Id.* at 363. *Suter* further stated that a Social Security Act provision did not create enforceable rights if it was placed in a statute that listed mandatory elements of state plans submitted to receive federal funds. *Id.* at 358. This part of the decision had potentially far-reaching ramifications because most Social Security Act titles, including Medicaid, are written in terms of what a state plan must include for a state to receive federal funds to operate the plan.

Congress reacted decisively to correct the *Suter* error and reaffirm the law governing the private right of action as it existed previously in cases such as *Wilder*, *Thiboutot*, and *Rosado*. Specifically, Congress amended the Social Security Act to provide:

> In an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or 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 other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of [the Act] is not enforceable in a private right of action.

42 U.S.C. §§ 1320a-2, 1320a-10 (provision repeated). The Conferees explained:

> The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in federal courts to the extent they were able to prior to the decision in *Suter v. Artist M*.

H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257. According to the House Ways and Means Committee:

> Prior to this decision, the Supreme Court has recognized, in a substantial number of decisions, that beneficiaries of Federal-State programs could seek to enjoin State violations of Federal statutes by suing under 42 U.S.C. § 1983. *See Rosado v. Wyman*, 397 U.S. 397 (1970); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

Report of the Comm. on Ways & Means, House of Representatives, No. 102-631, 102 Cong., 2d Sess., at 364 (1992). The Committee also noted that:

> Social Security beneficiaries, parents, and advocacy groups have brought hundreds of successful lawsuits alleging failure of the State and/or locality to comply with State plan requirements of the Social Security Act. . . . Much of this litigation has resulted in comprehensive reforms of Federal-State programs operated under the Social Security Act, and increased compliance with the mandates of the Federal statutes[.]

Id. at 364-65. Congress provided yet further evidence of its intent when it stated:

> [When] Congress places requirements in a statute, we intend for the States to follow them. If they fail in this, the Federal courts can order them to comply with the congressional mandate. For 25 years, this was the reading that the Supreme Court had given to our actions in Social Security Act State plan programs. The *Suter* decision represented a departure from this line of reasoning.

139 Cong. Rec. S173, S3, 189 (1993). As is evident from the face of the statute itself, the purpose of the law is to "restore[ ] the right of individuals to turn to Federal courts when States fail to implement Federal standards under the Social Security Act." 138 Cong. Rec. S17689-01 (1992) (statement of Sen. Riegle).[5]

Although a split Eighth Circuit panel discounted section 1320a-2 as "hardly a model of clarity." *Does v. Gillespie*, 867 F.3d 1034, 1044 (8th Cir. 2017) (quoting *Sanchez v. Johnson*, 416 F.3d 1051, 1057, n.5 (9th Cir. 2005)), other circuit courts have had no trouble relying on the statute. This Circuit, for example, has described the provision as "Congress's clearly expressed intent to create a private right of action." *Planned Parenthood S. Atl.*, 941 F.3d at 700; *see also*, *e.g.*, *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1200 (8th Cir. 2013) (quoting section 1320a-2 and stating, "A statutory provision located in [the Social Security Act] cannot be deemed individually unenforceable solely because of its situs in a larger regime 'requiring a State plan or specifying the required contents of a state plan'"); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*,

[5] In 1981, 1985, 1987, and 1996, Congress rejected bills that would have limited private enforcement under section 1983. *See* S. 584, 97th Cong., 1st Sess. § 1 (1981); S. 436, 99th Cong., 1st Sess. § 1 (1985); S. 325, 100th Cong., 1st Sess., § 1 (1987); H.R. 4314, 104th Cong., 1st Sess., § 309(a) (1996). In *Thiboutot*, the Court invited Congress to change the law if it thought the Court's interpretation of congressional intent was in error. 448 U.S. at 8. That Congress has not done so further evidences enforcement rights under section 1983.

699 F.3d 962, 977 n.9 (7th Cir. 2012); *Ball v. Rodgers*, 492 F.3d 1094, 1112 n.26 (9th Cir. 2007) (noting courts "around the country have relied on it [§ 1320a-2] in holding some Medicaid Act rights enforceable under § 1983 even where the statute's "rights-creating" language is embedded within a requirement that a state file a plan or that that plan contain specific features"); *Watson v. Weeks*, 436 F.3d 1152, 1160-61 (9th Cir. 2006); *Rabin v. Wilson-Coker,* 362 F.3d 190 (2d Cir. 2004); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004); *Harris v. James,* 127 F.3d 993, 1003 (11th Cir. 1997).

The Eighth Circuit also discounted section 1320a-2 because it was enacted before *Gonzaga*. *Does*, 867 F.3d at 1044; *see also Kauffman*, 981 F.3d at 375-76 (concurring opin.). But *Gonzaga* had no occasion to address section 1320a-2 because it concerned a provision of the Family Educational Rights and Privacy Act, not the Social Security Act. Moreover, as cases cited above demonstrate, courts have had no difficulty applying section 1320a-2 post-*Gonzaga*, as the provision gives them specific directions on how to interpret Social Security Act statutes that Congress enacts.

In sum, "the touchstone of the [private enforcement] determination is congressional intent, as manifest in the language and legislative history of the statute," *Va. Hosp. Ass'n v. Bailes*, 868 F.2d 653, 657 (4th Cir. 1989), *aff'd sub nom. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990). The language of 42 U.S.C. § 1320a-

2 and its legislative history establish that Congress clearly intends Medicaid beneficiaries to be able to enforce certain Social Security Act provisions under section 1983.

C. Over the Years, Courts of Appeals Have Consistently Applied the Enforcement Test to Decide Whether a Provision Creates a Federal Right Under 42 U.S.C. § 1983.

In *Gonzaga*, the Supreme Court addressed confusion surrounding application of the first (intent-to-benefit) prong of the enforcement test by clarifying that a general intent to benefit individuals will not do; rather, the federal law at issue must contain unambiguous rights-creating language. 536 U.S. at 282-84. Since 2002 when *Gonzaga* was decided, the federal courts of appeals have reviewed the enforceability of twenty-nine Medicaid Act provisions, with courts finding just over half of these provisions privately enforceable.[6]

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[6] *See* Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 St. Louis U. J. Health L. & Pol'y 207, tbl. 2 (2016), as updated by *Thurman v. Med. Transp. Mgmt., Inc*., 982 F.3d 953 (5th Cir. 2020) (holding § 1396a(a)(70) unenforceable); *Kauffman*, 981 F.3d 347 (5th Cir. 2020 (holding § 1396a(a)(23) does not create enforceable right to challenge state's determination that a provider in unqualified); *Planned Parenthood S. Atl.*, 941 F.3d 687 (4th Cir. 2019), *cert. denied*, 141 S. Ct. 550 (2020) (holding § 1396a(a)(23) enforceable); *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 436 (6th Cir. 2020) (holding §§ 1396a(a)(8) and (a)(10)(B) enforceable); *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358 (5th Cir. 2018) (holding § 1396a(bb) enforceable); *Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 638 (2018) (holding § 1396a(a)(23)(A) enforceable); *BT Bourbonnais Care v. Norwood*, 866 F.3d 815 (7th Cir. 2017) (holding § 1396a(a)(13)(A) enforceable); *Does*, 867

The cases in which a court has found a Medicaid Act provision enforceable refer to protections or benefits that run to individual Medicaid beneficiaries. The Second Circuit has explained that the crux of the *Gonzaga* holding was that provisions containing traditional, individual rights-granting language support a private action while those focusing on state "policy or practice" in the aggregate do not. *Rabin*, 362 F.3d at 201. The Second Circuit found enforceable a Medicaid provision regarding transitional Medicaid coverage, 42 U.S.C. § 1396r-6, which "contains no qualifying language akin to [*Gonzaga's*] 'policy or practice.'" *Id*. *See also*, *e.g.*, *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) (noting that "as required by *Gonzaga* [the Medicaid provision, § 1396a(bb)] contains rights-creating language because it specifically designates the beneficiaries—the [health clinics]—and . . . has an individual focus rather than an aggregate focus on institutional policy or practice"); *Sabree ex rel. v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004) (finding Medicaid provision's reference to "individual" recipients was indistinguishable from Title VI's reference to "no person" as discussed with favor in *Gonzaga*). The free choice of provider provision at issue in the instant dispute

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F.3d 1034 (8th Cir. 2017) (holding § 1396a(a)(23) unenforceable); *Planned Parenthood of Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir 2017), *cert. denied*, 139 S. Ct. 408 (2018), *overruled by Kauffman*, 981 F.3d at 368; *Health Sci. Funding, LLC v. N.J. Dep't of Health & Human Servs*., 658 F. App'x 139 (3d Cir. 2016) (holding § 1396a(a)(54) unenforceable).

does not contain the phrase "policy or practice" or any other comparable qualifying language.

Similarly, the Fifth Circuit has observed that provisions concerning "systemwide administration" have an aggregate focus, but that a Medicaid provision directed to services for "individuals" passes muster under *Gonzaga*. *S.D. ex rel. Dickson v. Hood*, 391 F.3d 591, 603-04 (5th Cir. 2004). Because the free choice of provider provision does not address "systemwide standards and measures employed by the state Medicaid agency in its administration of the [Medicaid] program," *see id*. at 604 n.29, the provision does not have an aggregate focus.

Finally, with one exception, the circuit courts that have reviewed the free choice of provider requirement—including this one multiple times—have concluded that it creates a federal right for Medicaid beneficiaries. In his opinion for the Sixth Circuit, Judge Sutton assessed the provision against the traditional enforcement test and concluded that it contains the requisite rights-creating language. *See Harris v. Olszewski,* 442 F.3d 456, 460-65 (6th Cir. 2006). He noted that the provision is directed to "*any individual* eligible for medical assistance" and that these words comprise individually focused, rights-creating language. *Id.* at 462 (quoting § 1396a(a)(23)(A)) (emphasis in original). And, "by saying that '[a] State plan . . . must . . . provide' this free choice, the statute uses the kind of 'rights-creating,'

'mandatory language,' that the Supreme Court and our court have held establishes a private right of action." *Id.* at 461-62 (citation omitted).

Thereafter, the Fourth Circuit stated that "§ 1396a(a)(23) of the Medicaid Act 'is clearly drawn to give Medicaid recipients the right to receive care from the Medicaid provider of their choice, rather than the government's choice.'" *Doe v. Kidd*, 419 F. App'x 411, 416 (4th Cir. 2011) (quoting *Silver v. Baggiano*, 804 F.2d 1211, 1217 (11th Cir. 1986) (holding recipients can enforce § 1396a(a)(23) under § 1983), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002)). Other circuit courts have agreed. *See Andersen*, 882 F.3d at 1224 ("We are comfortable joining four out of the five circuits that have addressed this issue, and we too hold that § 1396a(a)(23) affords the [Patient's] a private right of action under § 1983.") (citation omitted); *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012) ("Medicaid patients are the obvious intended beneficiaries" of Section (23)(A), which "does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled."). Finally, in 2019, the Fourth Circuit again found section 23(A) privately enforceable under section 1983. *Planned Parenthood S. Atl.*, 941 F.3d at 697 (4th Cir. 2019) ("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.").

In all of these appellate cases, the statutory text has decided the question, and whether a federal statute creates a right that is enforceable under section 1983 is a threshold inquiry that is separate and distinct from any inquiry into the precise scope or meaning of the right as applied to any particular set of facts. *See*, *e.g.*, *Harris*, 442 F.3d at 462; *see also BT Bourbonnais Care, 8*66 F.3d at 820 (noting that the question of whether a statute creates an enforceable right under § 1983 is a "narrow question" distinct from whether "this particular complaint states a claim upon which relief can be granted.").

As noted above, until recently, *Does* was the private enforcement exception. However, in 2019, the Fifth Circuit, while acknowledging that "the statute unambiguously provides that a Medicaid beneficiary has the right to obtain services from the qualified provider of her choice," held that Section (23)(A) did not establish an enforceable right under section 1983 to "challenge a determination that the provider of her choice is unqualified." *Kauffman*, 981 F.3d at 359. Significantly, the *Kauffman* opinion is the only change to the legal landscape since the Fourth Circuit decided *Planned Parenthood South Atlantic* in 2019. And *Kauffman* is inapposite here. South Carolina did not terminate Planned Parenthood of South Atlantic because it is unqualified to provide Medicaid services, but rather solely to prevent

the State from providing any funding to organizations that offer abortion services outside of the Medicaid program. *See Planned Parenthood S. Atl.*, 941 F.3d at 692-93; *see also* 487 F. Supp. 3d 443, 447 (D.S.C. 2020) (finding "there is no dispute as to whether Baker asserts PPSAT afforded less than adequate care to its patients. He does not.").

In any event, the reasoning in *Does* and *Kauffman* is deeply flawed. To begin with, the *Does* majority fails to focus it analysis on the statutory provision that the complaint sought to enforce, as *Blessing* requires. In addition, *Does* explicitly states, and *Kauffman* suggests, that *Wilder* has been overruled. *Does,* 867 F.3d. at 1040; *Kauffman*, 981 F.3d at 359. But, as the Fourth Circuit has pointed out, that is not so. *See Planned Parenthood S. Atl.*, 941 F.3d at 699. *See also*, *e.g., Legacy Cmty. Health Servs.*, 881 F.3d at 372 (finding a Medicaid provision enforceable and rejecting counterarguments because they "would likely overrule cases such as *Wilder* . . . thus Texas's contention goes too far"); *Andersen*, 882 F.3d at 1229 n.16 ("The Eighth Circuit contends that *Armstrong* effectively overruled *Wilder*. Even if the Supreme Court had done so—and we do not think it did—it would not impact our analysis.") (internal cite omitted); *see also* § I.A., *supra*. In addition, the majority in *Kauffman,* applying the first prong of the *Blessing/Gonzaga* test, improperly conflates the question of whether section 1396a(a)(23) grants an individual right with the question of the precise nature and scope of that right.

In addition, *Does* and to some extent *Kauffman* make essentially the same mistake *Suter* made: they conclude Section (23)(A) is not enforceable under section 1983 because it is part of a "directive to the Secretary," and section 1396c authorizes the Secretary to withhold federal funds to a state that is not substantially complying with the law. *Does*, 867 F.3d at 1043; *Kauffman*, 981 F.3d at 361-62, 364; *see also id*. at 402-403 (Dennis, J., dissenting) (distinguishing the provision at issue in *Suter* and noting that the majority ignores section 1320-a2). That reasoning is not correct because it would mean that no Medicaid provision could be privately enforced. As this brief has discussed, Congress and the Supreme Court have clearly said that is not the case.

II. THE SUPREME COURT'S *ARMSTRONG* DECISION DOES NOT IMPLICATE ENFORCEMENT ACTIONS BY MEDICAID BENEFICIARIES UNDER 42 U.S.C. § 1983.

Armstrong v. Exceptional Child Care Center, 135 S. Ct. 1378 (2015), does not alter the analysis for determining whether Medicaid beneficiaries can enforce a provision of the Medicaid Act pursuant to section 1983. *Armstrong* concerned claims brought by providers under the Supremacy Clause and in equity. 135 S. Ct. at 1382-83. "*Armstrong* isn't a § 1983 case." *Andersen*, 862 F.3d at 1229. Further, *Armstrong* addressed an entirely different provision of the Medicaid Act: 42 U.S.C. § 1396a(a)(30)(A), a provision that does not meet the three-prong test of *Blessing* and *Gonzaga*. The Supreme Court pointed to the provision's broad language to

conclude there was no cause of action in equity to enforce section (30)(A). 135 S. Ct. at 1385 ("It is difficult to imagine a requirement broader and less specific than §30(A)'s mandate"); *compare Planned Parenthood S. Atl.*, 941 F.3d at 694 (4th Cir. 2019) (finding Section (23)(A) enforceable, noting "[i]t is difficult to imagine a clearer or more affirmative directive"); *see also*, *e.g.*, *Andersen*, 882 F.3d at 1226 ("*Armstrong* does nothing to undermine the Patients' claim that Congress intended to confer on them an enforceable right of action with the free-choice-of-provider provision."); *see generally Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 n. 3 (2011) ("The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds—which are the chief statutory features respondents point to—does not demonstrate that Congress has 'displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young.*'") (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)).

Armstrong did not concern and certainly did not overrule the section 1983 test, and it did not address 42 U.S.C. § 1320a-2. While the Supreme Court has clarified and tightened the section 1983 enforcement test over the years, it has not removed Medicaid beneficiaries' ability to obtain relief from federal courts when states violate unambiguously conferred rights within the Medicaid Act. As the Fourth Circuit Court of Appeals has 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.

Planned Parenthood S. Atl., 941 F.3d at 701 (quoting *BT Bourbonnais Care,* 866 F.3d at 820-21).

CONCLUSION

For the foregoing reasons, *amici curiae* ask that this Court affirm the District Court's decision.

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Respectfully submitted,

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I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I certify that the foregoing brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5), and that the total number of words in this brief is 5971 according to the count of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on this day, June 4, 2021, I electronically filed the forgoing brief with the Clerk of the Court by using the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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