No. 21-806

IN THE
Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *et al.*,
Petitioners,
v.
IVANKA TALEVSKI, Personal Representative of the Estate of GORGI TALEVSKI, Deceased,
Respondent.

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

BRIEF OF INDIANA AND 21 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in light of compelling historical evidence to the contrary, the Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.

2. Whether, assuming Spending Clause statutes ever give rise to private rights enforceable via Section 1983, FNHRA's transfer and medication rules do so.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Florida, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia respectfully submit this brief as *amici curiae* in support of petitioners. From healthcare and social services to education, elder care, transportation, public safety, and more, States participate in myriad federal spending programs administering federal grants.[1] In fiscal year 2021 alone, Indiana received $24.5 billion in federal grants, including $11.9 billion for Medicaid, $5.03 billion for education, and $1.32 billion for transportation. *See State Profile: Indiana*, USAspending.gov (last visited July 12, 2022), https://www.usaspending.gov/state/indiana/2021. Those federal programs benefit both States and private actors, many of whom are program grantees, vendors, or beneficiaries. *Amici* States thus have a critical interest in whether, and when, Spending Clause statutes implicitly confer rights that private businesses and individuals may enforce against state agencies via 42 U.S.C. § 1983.

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[1] *See, e.g.*, 42 U.S.C. § 1396 et seq. (Medicaid); *id.* § 602 et seq. (TANF); *id.* § 9858 et seq. (Child Care and Development Fund (CCDF)), 20 U.S.C. § 1232g (FERPA); *id.* § 1401 et seq. (IDEA); 23 U.S.C. § 133 (Surface Transportation Block Grant (STBG)); *id.* § 148 (Highway Safety Improvement Program); *id.* § 150 (National Highway Performance Program).

Spending Clause statutes are fundamentally contractual: Congress requires grant recipients, such as States, to comply with conditions in exchange for federal funding. States consider the terms of the grant and decide whether to subject themselves to those conditions in exchange. When Congress expressly provides for private enforcement of those conditions in the statutory text, States can consider the risk of private challenges—and the attendant litigation risks and burdens—in deciding to accept federal funds.

Inferring privately enforceable rights from Spending Clause statutes, however, interferes with administration and enforcement mechanisms created by Congress—and the participation calculus of States. States cannot reliably determine in advance whether courts will infer a privately enforceable right from broadly worded Spending Clause statutes. After several decades and multifactor tests, many circuit conflicts over private enforceability of various Spending Clause statutes persist. *Amici* States urge the Court to eschew adopting another vague standard for inferring privately enforceable rights and instead adopt a rule that Spending Clause statutes simply do not imply such rights. Either Congress expressly enacts privately enforceable rights, or they do not exist, period.

SUMMARY OF THE ARGUMENT

Congress exercises significant power to implement its policies and programs under the Spending Clause by creating what are essentially contracts between the federal government and the recipients of federal funding grants. A fundamental limitation on this

power is the requirement that counterparties—the recipients of federal funds—voluntarily and knowingly accept the grants' terms. For that reason, Congress must speak clearly as to the "conditions" and "consequences of . . . participation" in federal Spending Clause programs. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

Permitting private actions to enforce federal conditions based on implied rights erodes that foundational limitation on Congress's Spending Clause power. Yet that is exactly what the Court in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), allowed. In the three decades since, the Court has steadily retreated from *Wilder*'s premise that courts may imply privately enforceable rights into Spending Clause legislation—eventually "plainly repudiat[ing]" it. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 n.* (2015). Yet lower courts continue to allow Section 1983 actions to enforce implied rights in Spending Clause statutes. As long as the Court clings to *Wilder*—or to any other multipart, flexible standard of indeterminate meaning—such decisions requiring correction will recur. The Court can resolve that problem by adopting a clear, principled rule.

Such a rule stands at the ready. Just last Term, the Court reaffirmed that common-law principles inform which remedies are available in suits to enforce federal statutory rights. *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562, 1570 (2022). Applying common-law contract principles here, a rule for private

enforcement of Spending Clause statutes readily emerges: a private actor may not sue to enforce Spending Clause legislation based on an implied right. Remedies traditionally available for breach of contract make a Section 1983 action—a species of tort liability—brought by third parties a poor mechanism for remedying alleged breaches. The Court should stop looking to Section 1983 for a cause of action to enforce implied rights in Spending Clause legislation.

Stare decisis considerations readily justify overruling *Wilder*'s contrary rule. *Wilder* is unprincipled, inconsistent with the Court's later decisions, and presents an unworkable standard, and no reliance interest requires its retention. The Court should at long last overrule *Wilder* and set forth the principled rule that private actors may not use Section 1983 to enforce implied rights in Spending Clause statutes.

ARGUMENT

I. A Principled Rule, Not an Indeterminate Standard, Is Necessary for Deciding When Private Actors May Enforce Spending Clause Conditions Under Section 1983

The Court has "long recognized" that, within limits, "Congress may fix the terms on which it shall disburse federal money to the States" using its spending power. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987). A fundamental limit on that power is knowing acceptance: Congress must speak

clearly as to the "conditions" and "consequences of . . . participation" in federal Spending Clause programs. *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17). The indeterminate standard for enforcing Spending Clause conditions adopted in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), subverts that limitation.[2]

In *Wilder*, the Court held that a statutory provision is privately enforceable through Section 1983 if "the provision in question was intended to benefit the putative plaintiff," does not "reflect[] merely a 'congressional preference' for a certain kind of conduct," and is otherwise not "too vague and amorphous." *Id.* at 509 (internal citations omitted). That open-ended standard, however, finds no support in traditional principles of statutory interpretation and provides no meaningful guidance to States. Indeed, the Court's "later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 330 n.* (2015). And although this Court has retreated from *Wilder* at every turn, later decisions have done little to resolve the vagaries inherent in *Wilder*'s permissive standard. Courts continue to struggle with

[2] An earlier case, *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), took a similar approach. In that case, the Court held that public-housing tenants could sue under Section 1983 to enforce the so-called Brooke Amendment, which precluded federally funded local housing authorities from charging rent that exceeded 30 percent of the tenant's income. It relied on a statutory "intent to benefit tenants." *Id.* at 430. *Wilder*, however, has become the standard-bearer for inferring private rights of action from federal spending statutes.

applying it to the myriad conditions in Spending Clause statutes, leaving States guessing as to which conditions will be deemed privately enforceable.

As the last thirty years have demonstrated, *Wilder* cannot be tamed through case-by-case corrections. "Continued adherence" to *Wilder* or some variation of it "would undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The Court should replace *Wilder*'s unruly standard with a clear, principled rule.

A. A rule—not an open-ended standard—should guide enforcement decisions for Spending Clause legislation

As Justice Scalia observed, in deciding cases, it is not merely the "*outcome* of th[e] decision, but the *mode of analysis*" that is important. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989). The principal modes of analysis "belong[] to one of two forms: rules or standards." Daphna Lwinsohn-Zamir et al, *Law & Identifiability*, 92 Ind. L. J. 505, 540 (2017). *Wilder* embodies a standard. It permits courts to infer who can enforce a statute—who are the statute's "intended" beneficiaries—from a variety of circumstances even in the absence of an express statutory command. 496 U.S. at 509. That mode of analysis is ill-suited to resolving enforcement questions for Spending Clause legislation.

In the Spending Clause context, the demand for consistency and predictability is at its zenith. A fundamental tenet is that spending conditions must be "'unamibiguous[].'" *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17). States must "clearly understand" in advance the obligations that they are undertaking in exchange for federal funds. *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562, 1570 (2022) (quoting *Arlington Central Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006)). That clarity is essential for ensuring that Spending Clause legislation does not undermine States' status as "independent sovereigns." *Nat'l Fed. of Indep. Business v. Sebelius*, 567 U.S. 519, 576–77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

Standards like the one in *Wilder* cannot provide the consistency and predictability that States require. Scalia, *supra*, at 1178–80. The discretion that inheres in standards, particularly vague ones, means decisionmakers may reach different outcomes in similar cases. Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 Okla. City. L. Rev. 559, 564 (2010). And where, as in our legal system, the highest court can review only a small fraction of decided cases, inconsistencies will persist. *See* Scalia, *supra*, at 1178–79. Standards also lack rules' predictability. *Id.* Understanding standards' content is "more costly" because "it generally is more difficult to predict the outcome of a future inquiry (by the adjudicator, into the law's content) than to examine the result of a past inquiry." Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 621 (1992).

Those characteristics of standards render them unsuited to providing advance notice of how Spending Clause conditions will be enforced.

Rules by contrast promote informed, consistent, and predictable decisionmaking. As this Court has recognized in other contexts, rules can provide "clear and unequivocal" guidance. *Arizona v. Roberson*, 486 U.S. 675, 681–82 (1988). And it has imposed "bright-line rules" for precisely that reason. *See id.*; *see also, e.g.*, *Dobbs*, 142 S. Ct. at 2274–75 (rejecting the undue-burden test as "unworkable" and "unpredictable"); *Janus v. Am. Federation of State, Cnty., & Mun. Employees*, 138 S. Ct. 2448, 2481 (2018) (rejecting an "impossible" standard for determining whether spending on public-employee benefits is a public concern); *U.S. Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 780 (1989) (adopting "categorical" standard for criminal-history disclosures under the Freedom of Information Act). A clear rule for enforcing Spending Clause legislation is needed too.

B. Despite decades of tinkering with *Wilder*, *Wilder*'s standard remains unprincipled, inconsistent, and unworkable, and no reliance interests compel retaining it

Wilder's standard for inferring judicially enforceable rights from Spending Clause legislation suffers from a lack of uniformity and predictability. Yet decisions since *Wilder* have stopped short of overruling it—and solved very little in the process. Continuing attempts to reign in *Wilder* by concluding that FNHRA's provisions do not, in substance, confer

"rights," will not fix anything. Conflicts will continue to arise, as "it is not [the Court] who will be 'closing in on the law' in the foreseeable future, but rather . . . thirteen different courts of appeals and fifty state supreme courts." Scalia, *supra*, at 1179. The Court cannot course correct in every Spending Clause case; it can at most review "only an insignificant proportion" of cases, making clear rules essential. *Id.* at 1178. The Court should clear the decks to make way for a principled rule by expressly overturning *Wilder*.

1. *Wilder* lacks grounding in sound legal principles

Justices of this Court have long recognized that *Wilder* lacks sound legal grounding. The majority in *Wilder* "reason[ed] that the policy underlying the Boren Amendment would be thwarted if judicial review under § 1983 were unavailable," but as the dissent observed, "[t]his sort of reasoning . . . has not hitherto been thought an adequate basis for deciding that Congress conferred an enforceable right on a party." 496 U.S. at 525 (Rehnquist, C.J., dissenting).

Since then, several members of this Court have observed that allowing private litigants to enforce Spending Clause legislation against state officials goes against the grain of both historical *and* modern contract-law principles. In *Blessing v. Freestone*, for example, Justices Scalia and Kennedy observed that contract law at the time of Section 1983's passage did not allow a third-party beneficiary to enforce a contract's terms. 520 U.S. 329, 349–50 (1997) (Scalia, J., concurring). Thus, allowing a third-party beneficiary

to "compel a State to make good on its promise to the Federal Government [is] not a 'righ[t] . . . secured by the . . . laws' under § 1983." *Id.* at 350. To permit otherwise would be a "vast expansion" of contract-law principles. *Id.*

More recently, in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), a plurality of the Court observed that, even as it has permitted third-party beneficiaries to assert claims in some contexts, "modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government . . . much less to contracts between two governments." *Id.* at 332 (plurality op.). Justice Scalia (joined by the Chief Justice and Justices Thomas and Alito) offered a principled distinction between (1) suits based on a contractual relationship between two *private parties,* versus (2) suits predicated on a contractual relationship between (a) a *private* party and the *government*, or between (b) *two governments*: Although "intended beneficiaries" are allowed to "sue to enforce the obligations of private contracting parties," intended beneficiaries are plainly *not* permitted to sue the government—"much less to [enforce] contracts *between two governments*." *Id.* (emphasis added).

And in *Armstrong* a majority of the Court rejected a healthcare provider's suit to enforce a Medicaid Plan requirement under the Supremacy Clause because "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements . . . is the withholding of Medicaid funds by the Secretary of

Health and Human Services." *Id.* at 328 (majority op.). The Court observed that the plaintiffs did not assert a Section 1983 claim "since later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Id.* at 330 n.*. As that footnote attests, the Court has all but overruled *Wilder*.

The Court should do so now. Where Congress chose not to provide a private enforcement mechanism for Spending Clause conditions, it is incoherent for courts to apply a multifactor test to determine whether Congress nevertheless implied privately enforceable rights. As this Court observed in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), "we fail to see how relations between the branches are served by having courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not." *Id.* at 286. The only principled rule that protects the States' reliance interests is that Spending Clause statutes never give rise to implied rights enforceable through Section 1983.

2. *Wilder* is inconsistent with the Court's later decisions

Doctrinal developments show *Wilder* to be an "anomaly." *Janus*, 138 S. Ct. at 2483 (internal citation omitted). In the three decades since *Wilder*, the Court has "repeatedly declined to create private rights of action under statutes that set conditions on federal funding of state programs." *Nasello v. Eagleson*, 977 F.3d 599, 601 (7th Cir. 2020). Indeed, the Court began

to abandon the standard that *Wilder* announced almost as soon as the decision was published. Just two years after deciding *Wilder*, in *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court refused to permit private enforcement of the "reasonable efforts" state-plan requirement of the Adoption Assistance and Child Welfare Act of 1980 because the statute did not "unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 363.

Next, in *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court rejected the argument that *Wilder* permits a court to infer a private right to enforce "substantial compliance" with the requirements of Title IV-D of the Social Security Act. The Court reversed on the grounds that "the statute must unambiguously impose a binding obligation on the States" using "mandatory, rather than precatory, terms." *Id.* at 334–41. It remanded for lower courts to employ that new standard, *i.e.*, to "break[] down the complaint into specific allegations . . . to determine whether any specific claim asserts an individual federal right" under Title IV-D. *Id.* at 346. That is, the Court instructed lower courts to focus on *rights* rather than (as *Wilder* had) on *benefits*.

Using that "rights" standard, the Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001), found no "freestanding private right of action" to enforce regulations carrying out the non-discrimination directive of Title VI. *Id.* at 293. It emphasized that courts have no business "venturing beyond Congress's intent" in creating enforceable rights. *Id.* at 287. And in *Gonzaga*,

the Court further narrowed the rights-focused standard articulated in *Blessing*. It explained that a Section 1983 plaintiff must point to "clear and unambiguous terms" showing that Congress wished to create a "new right[] enforceable under § 1983." *Gonzaga*, 536 U.S. at 290. After examining the "the text and structure" of FERPA, the Court held that no such "unambiguous" language conferred an enforceable right. *Id.* at 286, 290.

More recently, in *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110 (2011), the Court held that entities covered by Section 340B of the Public Health Services Act, 42 U.S.C. § 256b—part of the Medicaid Drug Rebate Program—"have no right of action under § 340B itself." *Id.* at 117. It explained that "Congress vested authority to oversee compliance with the 340B Program in HHS and assigned no auxiliary enforcement role to covered entities." *Id.* In the absence of an express right to enforce the statute, the Court concluded, 340B entities could not sue to enforce the statute as intended beneficiaries. *Id.* at 119–21.

Armstrong—decided 25 years after *Wilder*—leaves no doubt that *Wilder* is an orphan. It expressly acknowledged that this Court's intervening decisions "plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong*, 575 U.S. at 330 n* (citing *Gonzaga*, 536 U.S. at 283). *Wilder* cannot continue to stand after this steady and explicit erosion of its reasoning.

3. *Wilder*'s standard is unworkable—and begot yet another unworkable standard

"[A]nother important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272. As evidenced by the chaos in the courts of appeals, *Wilder*'s implied-rights standard—even as later modified by *Gonzaga*—fails the workability test.

Wilder itself invites courts to engage in an inquiry bound to produce unpredictable, conflicting outcomes. It "appears to support th[e] notion" that courts can infer the existence of a privately enforceable right even absent unambiguous textual support. *Gonzaga*, 536 U.S. at 283; *see Wilder*, 496 U.S. at 527 (Rehnquist, C.J., dissenting) (observing the *Wilder* majority "virtually ignore[d] the relevant text of the Medicaid statute"). And twelve years later in *Gonzaga*, the Court recognized that *Wilder* had indeed begot "confusion." *Gonzaga*, 536 U.S. at 283. The Court attempted to resolve that confusion by reiterating that rights must be "unambiguously conferred . . . to support a cause of action brought under § 1983." *Id.*

"[C]onfusion" nevertheless remains. *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 410 (2018) (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from the denial of certiorari). Since *Gonzaga*, courts have struggled to determine whether a statutory provision is "phrased with an *unmistakable focus* on the benefitted class," as opposed

to a "focus on the person regulated." *Gonzaga*, 536 U.S. at 284, 287. The courts of appeals, for example, have splintered over whether Section 1983 is a proper vehicle for challenging a Medicaid provider's disqualification.[3] They disagree whether 42 U.S.C. § 1396a(a)(13)(A) creates a procedural right for Medicaid providers to notice and comment.[4] And they disagree whether 42 U.S.C. § 1396a(a)(30), Medicaid's "equal access provision," is privately enforceable.[5]

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[3] *Compare Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019) (holding that Medicaid Act's free choice of provider provisions conferred a private right enforceable through Section 1983), *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018) (same), *Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013) (same), *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962 (7th Cir. 2012) (same), *and Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (same), *with Planned Parenthood of Greater Tex. Family Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc) (no Section 1983 cause of action), *and Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017) (same).

[4] *Compare BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 824 (7th Cir. 2017) (concluding that nursing home operators could use Section 1983), *with Developmental Servs. Network v. Douglas*, 666 F.3d 540, 546–48 (9th Cir. 2011) (finding no individual right of action under Section 1983).

[5] *Compare Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013–16 (8th Cir. 2006) (holding that recipients and providers can enforce Medicaid statutes through Section 1983), *with John B. v. Goetz*, 626 F.3d 356, 362–63 (6th Cir. 2010) (per curiam) (no Section 1983 right of action), *Long Term Pharmacy All. v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004)

Conflicts exist outside Medicaid as well. Four courts of appeals are admittedly divided over whether the Adoption Act's payments provision is privately enforceable. *See N.Y. State Citizens' Coalition for Child. v. Poole*, 922 F.3d 69, 74 (2d Cir. 2019) (collecting cases). And the courts of appeals are likewise divided over whether the Low-Income Home Energy Assistance Act gives rise to privately enforceable rights. *Compare Cabinet for Human Res. v. N. Ky. Welfare Rights Assoc.*, 954 F.2d 1179, 1179–80 (6th Cir. 1992) (no private right of action), *and Hunt v. Robeson Cnty. Dep't of Soc. Servs.*, 816 F.2d 150, 151 (4th Cir. 1987) (same), *with Crawford v. Janklow*, 710 F.2d 1321, 1325 (8th Cir. 1983) (finding a private right of action). As the Second Circuit observed, the task of deciding whether such legislation creates privately enforceable rights after *Gonzaga* still is "not an easy one." *Kapps v. Wing*, 404 F.3d 105, 127 (2d Cir. 2005).

And that puts it mildly. As members of this Court have observed, the "mess" surrounding *Wilder* and later right-of-action cases is so bad that "[c]ourts are not even able to identify which . . . decisions are 'binding.'" *Gee*, 139 S. Ct. at 410 (Thomas, J., dissenting from the denial of certiorari).

This case illustrates the point. Not two years ago, the Seventh Circuit determined that this Court's recent decisions "do not permit a court of appeals to enlarge the list of implied rights of action when the stat-

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(same), *and Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005) (same).

ute sets conditions on states' participation in a program, rather than creating direct private rights." *Nasello*, 977 F.3d at 601. Below, however, the Seventh Circuit invoked *Wilder* and held that FNHRA, 42 U.S.C. § 1396r, creates privately enforceable rights. Pet. App. 31a–35a. And just last month, over a partial dissent, it held that another statutory provision is privately enforceable because "th[is] Court has not overruled *Wilder*" yet. *Saint Anthony Hosp. v. Eagleson*, No. 21-2325, 2022 WL 2437844, at *5 (7th Cir. July 5, 2022).

As the "experience of the Courts of Appeals" demonstrates, it remains impossible to apply *Wilder*'s approach to achieve consistent, predictable, and principled outcomes even after 30 years of tinkering. *Dobbs*, 142 S. Ct. at 2274. It is high time to "repudiate" *Wilder*'s holding, theory, reasoning, and variations. *Armstrong*, 575 U.S. at 330 n.*.

4. No reliance interests require retaining *Wilder*

No reliance interest counsels otherwise. The statute at issue in *Wilder* no longer exists. Congress repealed the Boren Amendment as part of the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711(a), 111 Stat. 251, 507-08 (1997). In support of doing so, the House Committee on the Budget conveyed its aim to undo *Wilder*: "It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of Section 1902 will be interpreted as

establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive." H.R. Rep. No. 105-149, at 591 (1997).

Nor do cognizable reliance interests rest on the standard *Wilder* adopted. *Wilder* "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Janus*, 138 S. Ct. at 2485 (quoting *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2098 (2018)). The Court has steadily retreated from *Wilder* over the past 32 years. Private actors cannot claim a concrete reliance interest in preserving the vestiges of an approach that has since been "plainly repudiate[d]." *Armstrong*, 575 U.S. at 330 n.*.

"*[S]tare decisis*," moreover, "accommodates only 'legitimate reliance interest[s].'" *Wayfair*, 138 S. Ct. at 2098 (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). And private actors cannot claim a legitimate reliance interest in being able to enforce a federal-state contract to which they are strangers where Congress has not provided for private enforcement. "The legitimacy of Congress's exercise of the spending power . . . 'rests on whether [a] State voluntarily and knowingly accepts the terms of the "contract."'" *Sebelius*, 567 U.S. at 576–77 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)). That some providers might view private enforcement as expedient cannot "outweigh the countervailing interest[s]" of States—the parties to the federal-state agreement Spending Clause legislation creates—in having clear

notice and in having the contract enforced according to its terms. *Janus*, 138 S. Ct. at 2484 (quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009)).

Overruling *Wilder* once and for all is the only remedy for the lower-court confusion and the harm it creates. The Court's guidance on a single provision of FNHRA is insufficient. These conflicts will continue to arise, and the Court cannot course correct every provision of every Spending Clause program. A rule is required.

II. Both Principles of Political Accountability and Common-Law Contracts Foreclose Implied Rights of Action to Enforce Spending Clause Statutes

Principles of political accountability and contract law combine to preclude implied rights to enforce Spending Clause statutes. The Court confirmed the relevance of contract law last Term when it held that common law is relevant to discerning the scope of remedies available to enforce even express Spending Clause enactments. *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562 (2022). And, equally fundamental, the political-accountability limitation arises from the nature of the parties to the contract: co-equal, politically accountable sovereigns.

A. Principles of political accountability foreclose implied private-enforcement rights

Congress's spending power is premised on the knowing acceptance of the conditions of Spending

Clause statutes. Both state and federal governments, as politically accountable parties to a contract, must be able to make their own decisions over whether and how to enforce the terms of the deal—without unauthorized interference by private parties.

1. The legitimacy of spending conditions requires knowing acceptance of those conditions—including potential remedies for violations

"Unlike ordinary legislation, which 'imposes congressional policy' on regulated parties 'involuntarily,' Spending Clause legislation operates based on consent." *Cummings*, 142 S. Ct. at 1570 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16–17 (1981)). Thus, "the 'legitimacy of Congress' power' to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on 'whether the [recipient] voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Id.* (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)).

That limitation protects critical state interests. The "knowing acceptance" standard preserves the vertical balance of power between States and the federal government, "ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576–77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.). As a threshold requirement, therefore, Congress must speak to States with "a clear

voice" when communicating its conditions. *Pennhurst*, 451 U.S. at 17. "Recipients cannot 'knowingly accept' the deal with the Federal Government unless they 'would clearly understand . . . the obligations' that would come along with doing so." *Cummings*, 142 S. Ct. at 1570 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). Accordingly, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 451 U.S. at 17).

Informed acceptance requires the States to be informed not only of the conditions of accepting federal funds but of the possible "consequences" for noncompliance, including their risk of liability and the scope of possible remedies. *Cummings*, 142 S. Ct. at 1570. That makes sense: "[W]hen considering whether to accept federal funds, a prospective recipient would surely wonder not only what rules it must follow, but also what sort of penalties might be on the table." *Id.* Thus, in the Spending Clause context, a remedy is "appropriate relief . . . only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* (internal citation omitted) (emphasis in original).

Generally, funding recipients are "on notice" that they are subject to two sets of remedies: "remedies explicitly provided in the relevant legislation," and "those remedies traditionally available in suits for

breach of contract." *Barnes*, 536 U.S. at 187. Thus, for a Spending Clause condition to be privately enforceable under Section 1983, it must be clear—either from the express terms of the legislation or general contract principles—that the condition is so enforceable. Mere hints at enforceability are insufficient.

2. Unauthorized private enforcement vitiates the political accountability of both federal and state actors

Permitting private enforcement only where Congress has unambiguously provided for it is essential for preserving legitimacy and political accountability. Under Spending Clause programs, state and federal officials are tasked with making a variety of policy choices about how to implement them. They may sometimes disagree about what those choices should be, but political accountability demands that officials be allowed to make them and resolve any differences through the mechanisms that Congress has provided. Unauthorized private enforcement improperly undermines accountability for value-laden choices.

Spending Clause statutes set out complex administrative management and enforcement mechanisms that often assign compliance responsibilities to the relevant state and federal agencies. *See* Eloise Pasachoff, *Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics*, 37 Yale J. on Reg. 573, 582–92 (2020) (providing a typology of grant-management rules). Federal grant programs typically condition State participation on submission of a "state

plan," which details how the State intends to implement and maintain program goals. *See e.g.,* 42 U.S.C. § 9858c (Child Care and Development Block Grant); *id.* § 602 (Temporary Assistance for Needy Families (TANF)); *id.* § 1437c (United States Housing Act); *id.* § 1758(4)(F) (National School Lunch Act); 20 U.S.C. § 1413 (Individuals with Disabilities Education Act (IDEA)). As States use federal dollars to execute their plans, the awarding federal agency not only monitors progress but also identifies instances of noncompliance. *See e.g.,* 42 U.S.C. § 9858c(c)(3)(B)(ii) (Child Care and Development Block Grant Act); *id.* § 1437c-1(1); *id.* § 1796c (National School Lunch Act).

If an agency discovers grantee noncompliance, it can respond in a variety of ways—for instance, by resolving the issue through technical assistance or informal negotiations, *see, e.g.*, 20 U.S.C. § 1416(e)(1)(A) (IDEA), by authoring a compliance agreement whereby the grantee must make specified changes within a particular time, *see e.g.*, 20 U.S.C. § 1234f(b) (General Education Provisions Act); 33 U.S.C. § 1414b(c) (Marine Protection, Research, and Sanctuaries Act of 1972); 31 U.S.C. § 6714 (General Assistance Administration), or by withholding funding, in whole or in part, *see, e.g.*, 20 U.S.C. § 1232g(b)(1) (FERPA); *id.* § 6311(g)(2) (No Child Left Behind Act). When an agency concludes further action is necessary, it may file a cease-and-desist order with the agency's administrative law office and obtain from an administrative law judge an order mandating the grantee to make changes. 20 U.S.C. § 1234(e).

The funding-termination and cease-and-desist remedies are available only through formal administrative procedures. Pasachoff, *supra*, at 582. After a grantee receives written notice of the agency's findings, it may respond with a written answer or a request for a hearing. *Id.* When a party is unhappy with the decision, it may appeal within the agency and, ordinarily, appeal a final decision to the appropriate district or appellate court. *See, e.g.*, 42 U.S.C. § 610(c) (TANF); 7 C.F.R. § 276.7 (2017) (SNAP); 20 U.S.C. § 1415(i)(2)(A) (IDEA).

Only occasionally does Congress authorize a private cause of action in the courts to enforce conditions on federal grants. *See, e.g.*, Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-2(a) ("A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."); Rehabilitation Act, 29 U.S.C. § 794a(a) (making available "[t]he remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)" to "employee[s]," "applicant[s] for employment" and "person[s] aggrieved" under the statute). States rely on the text of these statutes to inform them of the nature of the agreement and potential consequences of noncompliance.

But when private beneficiaries file enforcement actions under Section 1983 to enforce grant conditions, they upset both Congress's allocation of remedial power and the reliance of States on the federal

government's capacity to negotiate and resolve disputes within a politically accountable framework. Precisely that result occurred in *Kerr v. Edwards*, No. 21-1431 (U.S.), which involves a Section 1983 lawsuit against South Carolina's health department for disqualifying abortion clinics from being Medicaid providers of family planning services. Petition for Writ of Certiorari at 8a–11a, *Kerr v. Edwards*, No. 21-1431 (U.S. 2022). Before the plaintiffs brought a private enforcement action, the state health department began "negotiating with CMS regarding . . . a mandatory waiver." *Id.* at 120a. The lawsuit put an end to that negotiation after a federal court enjoined the South Carolina officials from applying the State's qualified-provider policy—without the federal government making any determination about the State's compliance with the Medicaid Act. *See id.* at 11a.

In 2011, Indiana faced a similar obstacle to implementing its own policy regarding provider qualifications and seeking administrative review of CMS's actions. Petition for Writ of Certiorari, *Secretary of the Ind. Family & Soc. Servs. Admin. v. Planned Parenthood of Ind., Inc.*, No. 12-1039 (U.S.) (*Planned Parenthood* Pet.). After CMS stated that it would not approve an amendment to Indiana's Medicaid plan (an amendment required by a state statute) because the amendment did not comport with the agency's view of 42 U.S.C. § 1396a, Indiana requested a hearing for reconsideration—as established procedures allow, 42 C.F.R. § 430.18(a) (2022). *Planned Parenthood* Pet. 5–8, 25–26. Before that hearing could take place, how-

ever, an individual provider sued Indiana under Section 1983, and the district court enjoined the State from enforcing its policy. *Id.* at 27. That judgment allowed CMS to avoid making a final decision.

Political accountability, however, demands that the federal government be the one to decide in the first instance both whether a material breach has occurred and what the proper remedy is—in short, to put its money where its mouth is. Medicaid illustrates the point well. Congress specified that the Secretary—not a federal court or a private beneficiary—determines in the first instance whether a State's Medicaid program is worthy of federal funds. *See Pharm. Researchers & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 675 (2003) (Scalia, J., concurring). And the administrative process of approving or disapproving a state plan—subject to judicial review—demonstrates the federal and state cooperation involved in, and the political choices and tensions attendant to, such cooperation. *See Harris v. McRae*, 448 U.S. 297, 309 (1980) (describing Medicaid as a "cooperative program of shared financial responsibility").

The process begins when a State proposes a plan or plan amendment. 42 C.F.R. § 430.12(c)(1). CMS either approves or disapproves the submission. In the event of disapproval, the State may file a request for reconsideration. 42 C.F.R. § 430.18(a). A final determination by CMS is then reviewable by the circuit court of appeals. 42 C.F.R. §§ 430.38(c), 430.102(c). Affected individuals and groups may participate in the administrative appeal process "if the issues to be

considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute." 42 C.F.R. § 430.76(b).

Critically, CMS's disapproval notwithstanding, a State may nonetheless carry out a *noncompliant* Medicaid plan. CMS may in response decide not to pay the State some or all federal matching funds, 42 U.S.C. § 1396c—a decision that is subject to judicial review, 42 C.F.R. § 430.38. In no event, however, is the State's decision to administer a healthcare finance plan that diverges from Medicaid *unlawful*. Only decisions that the Secretary makes about whether to reimburse States can be unlawful. *See* 42 U.S.C. § 1396c. Permitting a private provider to circumvent the negotiation process and seek an injunction against state policies improperly vitiates the political accountability that Congress built into the Medicaid Act. It relieves the Secretary of accountability for enforcement decisions and denies the States the opportunity to decide whether to carry out a state program without some (or all) of the federal financial assistance that might otherwise be available.[6]

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[6] *Wilder*'s multifactor standard has also disrupted Congress's own political accountability regarding Medicaid. In the wake of the Court's decision rejecting private enforcement of the Child Welfare Act in *Suter v. Artist M.*, 503 U.S. 347 (1992), Congress passed a statute providing:

Again, Indiana's provider-disqualification case illustrates the point. There, the district court felt justified enjoining Indiana's amendments precisely *because* doing so would disrupt the political process. The court concluded that "denying the injunction could pit the federal government against the State of Indiana in a high-stakes political impasse. And if dogma trumps pragmatism and neither side budges, Indiana's most vulnerable citizens could end up paying the price as the collateral damage of a partisan battle." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 913 (S.D. Ind. 2011). But such a political dynamic—with State participation entirely voluntary—is exactly

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> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. 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 this title is not enforceable in a private right of action.

42 U.S.C. § 1320a-2. In other words, Congress expressed disapproval of one aspect of *Suter*'s reasoning under a judicially created multifactor test without saying precisely which statutory provisions are privately enforceable. The so-called "*Suter* fix" wags the dog in such a perplexing way that courts routinely despair of applying it. *See, e.g.*, Pet. App. 21a–26a. *But see Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017) (discussing the *Suter* fix).

what Congress created with Medicaid and many other spending programs. Enjoining noncompliant state action at the behest of private parties undermines the voluntariness of the program itself. The appropriate, politically accountable remedy for state noncompliance is for a federal agency to reduce funding, and, if that reduction is lawful, for a State to decide whether that price is worth it. With its provider-disqualification law, Indiana never got that chance.

B. Common-law contract principles foreclose implied private rights under Spending Clause legislation

In *Cummings*, it was "beyond dispute that private individuals may sue to enforce" the statutes at issue, and the question was the range of remedies available. *Cummings*, 142 S. Ct. at 1569–70 (quoting *Barnes*, 536 U.S. at 185). Here, the right to sue is itself in dispute, but *Cummings* provides a critical analytical tool nonetheless: common law. Common-law contract principles—namely, the remedies available for breach of contract and the bar on third-party suits to enforce government contracts—foreclose enforcement of Spending Clause legislation through Section 1983.

1. Common-law principles bar third-party beneficiaries from suing to enforce government contracts

The Court has long held that, in enacting Section 1983, "members of the 42d Congress were familiar with common-law principles" and "likely intended

these common-law principles to obtain, absent specific provisions to the contrary." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). Here, that principle requires looking to contract law. *Cummings*, 142 S. Ct. at 1568.

Common-law contract principles in turn foreclose enforcement of Spending Clause legislation through Section 1983 by private parties absent an express authorization. When Section 1983 was enacted in 1871, "no stranger to the consideration" could "take advantage of a contract, though made for his benefit." W. W. Story, *A Treatise on the Law of Contracts* 509 (5th ed. 1874). "[U]nless the promise is made to the plaintiff, or the consideration moves from him, he cannot generally sue on it." *Id.* at 526.

Applied to Spending Clause legislation, that means only the parties to the agreement—the federal government and States—have a right to sue. Private actors, who are at most third-party beneficiaries, have no right to "compel a State to make good on its promise to the Federal Government." *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring); *see also* David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 104 (1994) ("[T]hird-party rights . . . are 'secured' (if at all) not by any 'law,' but only by the contract between the recipient and the United States, and section 1983 does not even remotely contemplate causes of action for contract violations."). States are not on notice of such third-party-enforcement suits

when they agree to accept federal funding subject to conditions imposed under Congress's spending power.

2. Remedies principles render Section 1983 a poor fit for private enforcement of federal spending conditions

Outside the Section 1983 context, the Court has made clear that plaintiffs suing under Spending Clause legislation are generally limited to "those remedies traditionally available in suits for breach of contract." *Cummings*, 142 S. Ct. at 1571. Under Section 1983, however, plaintiffs generally can seek tort remedies that are not traditionally available in suits for breach of contract. That mismatch renders Section 1983 an awkward vehicle for enforcing Spending Clause legislation, confirming that the task of creating enforceable rights should be left to Congress.

Section 1983 "creates a species of tort liability." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Accordingly, to determine the rights and remedies available under Section 1983, this Court has repeatedly looked to principles of "tort liability." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (quoting *Monroe v. Pape*, 365 U.S. 167 (1961)); *see, e.g.*, *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022) (looking to elements of "most analogous tort as of 1871" to determine the elements of a malicious-prosecution claim); *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (looking to "common-law tort principles" to determine running of statute of limitations); *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 307–08

(1986) (looking to principles of "tort damages" to determine scope of monetary remedies).

The result is that Section 1983 plaintiffs may seek a variety of monetary remedies. Just as common-law tort claims seek to provide a claimant with "redress for interference with protected personal or property interests," *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 709, the "basic purpose of a § 1983 damages award" is to compensate a claimant for injuries caused by a deprivation of federally protected rights, *Carey v. Piphus*, 435 U.S. 247, 254 (1978). Section 1983 claimants, like other tort plaintiffs, thus generally can recover the full amount of damages needed to make themselves whole again. *See id.* at 258–59. That includes damages not only for monetary losses but also damages for loss of reputation and "mental anguish and suffering." *Stachura*, 477 U.S. at 307–08. And it includes punitive damages in appropriate cases. *See Smith v. Wade*, 461 U.S. 30, 56 (1983); *Stachura*, 477 U.S. at 308 n.11.

By contrast, damages to compensate for pain and suffering or to punish are not available in contract. Under traditional contract principles, contract damages are intended "to place the plaintiff-promisee in as good a position as he or she would have occupied had the defendant-promisor not breached the contract." 24 Richard A. Lord, *Williston on Contracts* § 64:1 (4th ed. 2022); *see* 3 C.G. Addison et al., *Addison on Contracts: Being a Treatise on the Law of Contracts* 669–70 (8th ed. 1888). That principle limits the available remedies. For example, whereas tort law

permits damages for pain, suffering, and emotional distress, "[i]t is hornbook law that 'emotional distress is generally not compensable in contract.'" *Cummings*, 142 S. Ct. at 1571; *see* Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution*, 825 (3d ed. 2018). Punitive damages—another tort standby—likewise "are generally not available for breach of contract." *Barnes*, 536 U.S. at 187; *see* 2 William W. Story, *Treatise on the Law of Contracts* § 1020 (7th ed. 1856). Awarding punitive damages would conflict with "the purposes of awarding contract damages," which is principally to "compensate the injured party." *Restatement (Second) of Contracts* § 355(a) (1979).

Consistent with those general contract principles, the Court has refused to permit emotional-distress and punitive damages for breaches of Spending Clause conditions in cases where Congress has provided an express right of action. *See Cummings*, 142 S. Ct. at 1571–72; *Barnes*, 536 U.S. at 189. It has explained that general contract principles "limit[] 'the scope of available remedies' in actions brought to enforce Spending Clause statutes." *Cummings*, 142 S. Ct. at 1570 (quoting *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 287 (1998)). Those same contract principles render Section 1983—which creates a species of tort, not contract, liability—a poor vessel for enforcement of federal spending conditions.

This case illustrates the problems that arise. The complaint here requests compensatory damages for "physical and mental pain and suffering, emotional

distress, humiliation, and embarrassment" and "punitive damages for [Petitioner's] willful, reckless, and malicious actions." Pet. App. 85a. Traditional contract principles would foreclose any award of such relief. Yet that relief is sought nonetheless apparently because the action was filed under Section 1983. *Cf. Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28–29 (1st Cir. 2006) (describing other instances in which plaintiffs have sought to use Section 1983 to circumvent limits on remedies for Spending Clause legislation). Rather than continue the experiment of permitting third parties to enforce federal-state agreements through a statute designed for tort liability, the Court should end it now. Congress is far better positioned to determine which conditions are privately enforceable and to design appropriate enforcement mechanisms.

* * *

The Court cannot continue to hedge the implied-rights standard in the Spending Clause context and expect to clear up the confusion that persists. A principled rule is necessary: Rights and conditions in Spending Clause legislation are not privately enforceable through Section 1983 unless Congress expressly provides by statute for private enforcement. Such a rule is critical to protecting the legitimacy of Spending Clause legislation, preserving political accountability, and promoting principled judicial decisionmaking. Courts should get out of the business of attempting to infer which Spending Clause conditions are (and are not) privately enforceable.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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