NO. 23-1275

IN THE

Supreme Court of the United States

EUNICE MEDINA, INTERIM DIRECTOR, SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, ET AL.,

Respondents.

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

BRIEF OF WORLD FAITH FOUNDATION AND NC VALUES INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully urge this Court to reverse the decision of the Fourth Circuit.

World Faith Foundation ("WFF") is a California religious non-profit, tax-exempt corporation formed on May 2, 2005 to preserve and defend the customs, beliefs, values, and practices of religious faith and speech, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF's founder is James L. Hirsen, who has served as professor of law at Trinity Law School and Biola University in Southern California and is the author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). WFF has made numerous appearances in this Court as *amicus curiae*.

NC Values Institute ("NCVI"), formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to life.

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

NCVI joined WFF in an amicus brief supporting Petitioners in *Dobbs v. Jackson Women's Health,* 597 U.S. 215 (2022). See https://ncvi.org.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has explicitly returned abortion regulation to the states. *Dobbs,* 597 U.S. 215. Allowing the private right of action sought by Respondents would undermine the states' ability to exercise their newly recognized regulatory authority. Laws vary from state to state. S.C. Code Ann. § 43-5-1185 prohibits the use of state funds to pay for abortions, and that prohibition undergirds the State's decision to disqualify Planned Parenthood as a Medicaid provider. Even before *Dobbs*, states had "no affirmative duty to commit any resources to funding abortion." *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (quoting *Webster v. Reprod. Health Servs*., 492 U.S. 490, 511 (1989)). Coerced qualification of abortion providers, using 1983 private enforcement as a vehicle, would sneak forbidden funding through the back door into South Carolina and other pro-life states. Although this case is not about abortion rights per se, the relevant circuit split has emerged among cases involving Planned Parenthood, thrusting the underlying legal issues to the forefront of the discussion.

Each participating state must allow a Medicaid beneficiary to choose "any qualified provider." 42 U.S.C. § 1396a(a)(23)(A). This "right to choose" hinges on the state's prior determination that the chosen provider is "qualified." Federal law does not define

"qualified provider." Each state retains the responsibility and authority to establish that definition and apply it. Thereafter, its obligation is to fund each beneficiary's choice among the providers it has qualified. A provider may be disqualified "for any reason for which the Secretary could exclude the individual or entity from participation in" the Medicare program, "[i]n addition to any other authority" that states themselves retain to exclude providers. 42 U.S.C. § 1396a(p)(1).

A Medicaid beneficiary has the right to choice among qualified providers, but not the choice to determine who *is* qualified. Qualification is a matter between the *provider* and the state, not between the *beneficiary* and the state. The state must provide for appeal rights if a provider is disqualified (as South Carolina does), but there is no analogous requirement to provide appeal rights for beneficiaries. The statute does not grant beneficiaries the right to challenge a state's disqualification of a preferred provider—only the right to select from among providers the state has approved as qualified. There is no express authorization for a private right of action against a state's determination that a particular provider is not qualified.

Spending clause issues emerge. The State of South Carolina has not "knowingly and willingly" accepted, as a condition of receiving federal funds, a specific definition of "qualified provider" that would obligate it to certify Planned Parenthood (or any other particular entity). Nor has South Carolina "knowingly and willingly" accepted an obligation to allow a beneficiary to challenge its disqualification of a

particular provider. Forcing states to allow beneficiary challenges would create additional costs and administrative burdens on state taxpayers, plus the risk of losing Medicaid funds.

ARGUMENT

I. THERE IS AN URGENT NEED FOR CLARITY AT EVERY LEVEL OF ANALYSIS IN THIS AND OTHER CASES ARISING UNDER THE SPENDING CLAUSE.

A. The definition of "*qualified* provider" is a critical aspect of this case.

The "dispositive issue" in this case "is whether 42 U.S.C. § 1396a(a)(23) gives Medicaid patients a right to challenge, under 42 U.S.C. § 1983, a State's determination that a health care provider is not 'qualified' within the meaning of § 1396a(a)(23)." *Planned Parenthood of Greater Texas Family Planning & Preventative Health Services, Inc. v. Kauffman*, 981 F.3d 347, 350 (5th Cir. 2020). That critical question can only be answered if key terms, such as "qualified provider," can be clearly defined. The Fourth Circuit acknowledged that "[t]he Medicaid Act limits the right of a beneficiary's choice to *qualified* medical providers." *Kerr v. Planned Parenthood*, 95 F.4th 152, 169 (4th Cir. 2024). But the court skips over by presupposing that "Planned Parenthood is professionally qualified to provide the care that the plaintiff seeks" and wrongly asserting that "[t]he State has not contested this." *Ibid.* On the contrary, South Carolina deemed Planned Parenthood "*unqualified* to provide family planning

services," and accordingly, terminated its enrollment in the State's Medicaid program. *Id.* at 157 (emphasis added). Federal law does not define "qualified" but leaves the determination of "whether a provider is 'qualified' within the meaning of § 1396a(a)(23)," as "a matter to be resolved between the State (or the federal government) and the provider." *Kauffman*, 981 F.3d at 350.

The definition of "qualified," critical to the outcome of this case, has been left to each *state* participating in Medicaid—not federal law, not federal (or state) courts, and not individual beneficiaries. After the State establishes criteria and approved providers it deems "qualified," the State's Medicaid plan "must permit an individual eligible for medical assistance to obtain that assistance from any 'qualified' provider who undertakes to provide such services." *Kauffman*, 981 F.3d at 354, citing subpart 23(A) of the statute. Nowhere in the text and structure of § 1396a(a)(23) is there any provision allowing a Medicaid patient to contest a State's determination that a particular provider is not "qualified." *Id.* at 350, 357; *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785-786 (1980).

B. State obligations must be set forth unambiguously.

This case arises in the context of spending legislation, characterized by this Court as "much in the nature of a contract." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). The contractual relationship is between the federal

government and each participating state, although the State's compliance with the terms may be relevant to its relationship with beneficiaries of the program.

If the State's obligations are ambiguous, that inevitably casts uncertainty on the scope of beneficiary rights. Congress did not confer on beneficiaries a "clear and unambiguous right" to challenge the State's qualification decisions but did grant States "wide latitude" to determine who is or is not "qualified" to provide services to Medicaid beneficiaries. The States are not restrained by a federal statutory definition. *Kauffman*, 981 F.3d at 378 (Elrod, J., concurring). A variety of statutory provisions "permit a State to exclude providers from Medicaid plans for a host of reasons," and such exclusion includes the refusal to enter a new agreement or renew a prior agreement. *Id*. at 360. "None of these statutes suggest that Medicaid patients have a right to challenge whether, as either a factual or legal matter, a State's exclusion or removal of a provider is permitted or mandated by these statutes." *Ibid*. Termination of a provider's agreement—by the *State*—is permissible on many grounds and does not require that the provider also be precluded from providing services to non-Medicaid patients. *Id*. at 368.

C. Beneficiary rights must be set forth unambiguously.

The right at stake in this case, "to choose among a range of *qualified* providers, without government interference" (*O'Bannon*, 447 U.S. at 785) arises in

the context of the Medicaid Act—spending legislation that provides federal funds to participating states. "States can opt out of spending programs, completely nullifying whatever force the spending conditions once had." *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166, 201 (2023) (Thomas, J., dissenting). The free-choice-of-provider right operates solely within the administration of Medicaid and is irrelevant outside that context, in contrast to rights that are independent of Medicaid administration and might be vindicated through other federal or state statutes. *See, e.g.*, *id.* at 166 (nursing home residents' right to be free of unnecessary-restraints, 42 U.S.C. § 1396r(c)(1)(A)(ii) and (2)(A)-(B)); *O'Bannon*, 447 U.S. 773 (nursing home facility); *Pennhurst*, 451 U.S. 1 (unsanitary, inhumane, and dangerous conditions in state hospital for developmentally disabled).

The Medicaid Act entitles each beneficiary to choose his or her "preferred *qualified* provider without state interference." *Kerr*, 95 F.4th at 168 (emphasis added). But this begs the question: *Who* is a "qualified" provider? According to the Fourth Circuit, this provision "dictates that '*any individual*' eligible for Medicaid '*may obtain*' services from '*any*' provider 'who undertakes to provide *him* such services.' 42 U.S.C. § 1396a(a)(23) (emphasis added)." *Id*. at 170. But this right presupposes a *qualified* provider, not merely "any" provider or "a" provider. The right is to choose among *qualified* providers, per the State's prior qualification. The Medicaid Act does not grant a beneficiary a unilateral right to decide who *is* qualified or to overrule or challenge the State's decision that a specific provider is *not* qualified. If the State refuses to qualify a beneficiary's preferred

provider, such "decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility." *O'Bannon*, 447 at 785-786.

Courts have strayed far from the simple right to choose from among *qualified* providers, using § 1983 as an enforcement vehicle. In such actions, courts require "the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (the right "must be couched in mandatory . . . terms"); *Kerr*, 95 F.4th at 160. A plaintiff seeking private enforcement must show that Congress "unambiguously conferred a presumptively enforceable right. . . . upon a discrete class of beneficiaries." *Id*. at 163; *Gonzaga University v. Doe*, 536 U.S. 273, 282-283 (2002); *id*. at 290 ("clear and unambiguous terms" required to create new rights); *Talevski*, 599 U.S. at 186. This Court has allowed spending power legislation to confer federal individual rights presumptively enforceable through a § 1983 action. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (expanding § 1983 enforcement to encompass federal statutory rights as well as constitutional violations); *Pennhurst*, 451 U.S. at 17, 28, and n. 21 (Congress must "speak[] with a clear voice" that manifests an "unambiguous intent to confer individual rights"); *Gonzaga*, 536 U.S. at 290; *Talevski*, 599 U.S. at 172; *id*. at 193 (Barrett, J., concurring); *Kerr*, 95 F.4th at 160.

This case does not even present the violation of a federal *law*, let alone a federal *right*, because the State retains the right to qualify or disqualify providers. The right conferred – to choose among

qualified providers – is "couched in mandatory . . . terms" (*Blessing*, 520 U.S. at 341) but does not settle the question of *who* has the authority to determine whether a particular provider is "qualified." The Medicaid Aid has already settled the "who" question – the *State* identifies qualified providers – yet courts continue to analyze a mind-boggling array of details to sometimes create enforcement rights for beneficiaries.

Courts scrutinize many factors. The intent to benefit a discreet class is one of them. *Blessing*, 520 U.S. at 340-341 (mothers receiving child support services under the Social Security Act); *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) (hospital management). On the other hand, "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Gonzaga*, 536 U.S. at 287 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)); *id.* at 282 (a provision focused on "aggregate services" rather than "the needs of any particular person" does not confer enforceable rights). Courts also consider whether "Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987). The result of a string of cases and splits among the circuit courts, as described in the Petition, concerning whether "the Medicaid Act grants Medicaid beneficiaries a § 1983 enforceable right to a provider of their choice." *Federal Statute: 42 U.S.C. § 1983 Spending Clause* Health & Hospital Corp. of Marion County v. Talevski, 137 Harv. L. Rev. 380, 386 (November 2023). It is quite possible that

"*Gonzaga* muddled, rather than clarified, the doctrine" by leaving open the question of "whether a statute that include[s] 'rights-creating language' *and* a directive to funding recipients to comply with that language [is] focused on the benefited class or the funding recipient." 137 Harv. L. Rev. at 386.

II. EVEN ASSUMING BENEFICIARIES HAVE AN "UNAMBIGUOUS RIGHT" TO SELECT AMONG QUALIFIED PROVIDERS, THERE IS NO "UNAMBIGUOUS" COROLLARY RIGHT TO CHALLENGE THE STATE'S DETERMINATION THAT A PARTICULAR PROVIDER IS NOT QUALIFIED.

When Congress uses its spending power to enact legislation, the legitimacy of that exercise of power "rests on whether the State voluntarily and knowingly accepts the terms" of the "contract" established. *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 577 (2012) (quoting *Pennhurst*, 451 U.S. at 17). Clarity is imperative when Congress attaches conditions to the grant of federal funds, because it "enable[s] the States to exercise their choice . . . knowingly, cognizant of the consequences of their participation," i.e., to "knowingly decide whether or not to accept those funds." *Pennhurst*, 451 at 17, 24. This critical safeguard ensures that spending legislation does not "undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 567 U.S. at 577. Unlike legislation that "imposes congressional policy" on regulated parties involuntarily, spending legislation is based on informed consent. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219

(2022). Congress must not alter the "usual constitutional balance between the States and the Federal Government" without using "unmistakably clear" language. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

The Medicaid Act is devoid of any language—"unmistakably clear" or otherwise—requiring the States to waive their right to define "qualified provider" or requiring them to litigate beneficiary challenges to their qualification decisions. Indeed, the any-qualified-provider provision governs the relationship between the federal and state governments and is thus "two steps removed" from the individual Medicaid beneficiaries. *Kauffman*, 981 F.3d at 372 (Elrod, J., concurring).

A. South Carolina has not "knowingly and willingly," as a condition of receiving federal funds, waived its right to define "qualified provider" for the State's Medicaid program.

The right conferred, to choose among qualified providers, may be "couched in mandatory . . . terms" (*Blessing*, 520 U.S. at 341), but that does not settle the question as to *who* has the authority or responsibility to determine whether a particular provider is "qualified." The State retains broad discretion to set criteria for qualifying providers. (See Sect. I-A.) A *provider* who has been disqualified, excluded, or suspended has the right to an administrative appeal of the State's decision. No comparable appellate rights are provided for *beneficiaries*. Even if there were a right to private

enforcement, judicial review should evaluate claims using the arbitrary-and-capricious standard, so as not "to relegate states to the position of distrusted, second-class decisionmakers without an express indication in the statute saying as much." *Kauffman*, 981 F.3d at 378 (Elrod, J., concurring), citing *Abbeville General Hosp. v. Ramsey*, 3 F.3d 797, 804 (5th Cir. 1993).

B. South Carolina has not "knowing and willingly," as a condition of receiving federal funds, accepted an obligation to allow a beneficiary to challenge its decision that a particular provider is not qualified.

South Carolina has not assumed a legal duty to grant beneficiaries the right to appeal its disqualification of a provider. If the State were refusing to fund a provider it had qualified, this would be a different case. The State does have an obligation to comply with the free-choice-of-*qualified*-provider provision. But that provision does not encompass a right to demand that a specific provider be qualified. Such a "corollary right" does not follow logically, nor does it comport with spending clause principles. South Carolina is only obligated to fund a beneficiary's choice among *qualified* providers, not to fund a beneficiary's choice to seek care from a *disqualified* provider, such as Planned Parenthood.

"It is conceivable that recipients might be required as a condition of funding to agree to respond on the merits to claims of third parties," such as the Medicaid beneficiaries in this case. David E.

Engdahl, *The Spending Power*, 44 Duke L.J. 1, 98-99 (October 1994). Such a condition must be made "unmistakably clear," and would be "binding only by force of contract and not by virtue of the funding statute as law in itself." *Id.* at 99. No such condition is present here, either in the statutory text or implicitly. "Where is the language in § 1396a(a)(23) that grants a right to a Medicaid patient, either independent of the provider's right or exercised in tandem with the provider, to have a particular provider declared 'qualified'? It is not there, and that is why [this] Court held as it did in *O'Bannon*." *Kauffman*, 981 F.3d at 358. A Medicaid patient has "no right to insist that a particular provider is 'qualified' when the State has determined otherwise." *Ibid*. There is simply no "unambiguous right" for Plaintiffs in this case to force South Carolina to pay for the services of a disqualified provider, particularly contrary to the State's explicit statutory policy not to use government funds for abortion.

There is also no warrant for finding an implied right of private enforcement. "The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst*, 451 at 16-17. In addition to the cost of funding services, massive unnecessary costs would be imposed on the States forced to defend a multitude of beneficiary lawsuits for disqualifying, or refusing to qualify, specific providers. In the absence of an unambiguous statement within the Medicaid Act, "it is difficult to conclude from so thin a read of §

1396a(a)(23) that Congress envisioned States spending additional millions of dollars defending suits in courts across the country brought by Medicaid *patients*." *Kauffman*, 981 F.3d at 364. The consequences could be "drastic . . . opening the floodgates of litigation against states that make hundreds of routine Medicaid termination decisions every year" (*id.* at 373-374 (Elrod, J., concurring)), perhaps including challenges to the State's "*failure* to list particular providers." *Id.* (quoting *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari)).

III. FEDERAL AUTHORITY TO TAX AND SPEND DOES NOT CREATE REGULATORY AUTHORITY THAT EXCEEDS THE CONSTITUTIONALLY ENUMERATED POWERS OF CONGRESS.

For decades, it was "virtually undisputed that Congress' spending power" did not encompass any "regulatory authority" to "secure rights" to individuals or "impose duties" on the States, "even with their consent." *Talevski*, 599 U.S. at 219 (Thomas, J., dissenting). The so-called "Spending Clause" – more accurately known as the General Welfare Clause – allows Congress to tax and spend, but "confers no independent regulatory power." *Id.* at 209 (Thomas, J., dissenting).

Among the powers *not* granted to the federal government are health in general and abortion in particular. Congress may not coerce the States in these matters or use its spending authority to

circumvent the States' regulatory rights. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *NFIB,* 567 U.S. at 577 (quoting *New York v. United States*, 505 U.S. 144, 162 (1992). "Congress—and, a fortiori, federal courts – cannot displace state law in order to effectuate federal policy for matters extraneous to the enumerated powers." Engdahl, *The Spending Power*, 44 Duke L.J. at 97. South Carolina law prohibits state funding of abortion. The federal courts may not displace that state law to effectuate the pro-abortion policy preferred by Planned Parenthood and its clients who are Medicaid beneficiaries.

In *Talevski*, Justice Gorsuch noted the presence of other issues "lurking" for "another day." 599 U.S. at 192-193 (Gorsuch, J., concurring); *see NFIB,* 567 U.S. at 575-78; *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 469-476 (2018). That day has arrived, and now this Court must consider "whether legal rights provided for in spending power legislation," like the Medicaid Act, "are 'secured' as against States in particular and whether they may be so secured consistent with the Constitution's anti-commandeering principle." *Talevski*, 599 U.S. at 192 (Gorsuch, J., concurring).

A. There is no federal regulatory authority to commandeer the States.

Spending legislation has become "an extraordinarily potent instrument of federal control." *Talevski*, 599 U.S. at 199 (Thomas, J., dissenting).

Due to the "profound consequences of spending conditions" and the resulting "fundamental shift . . . in our federalist system, a sound understanding of their constitutional basis and permissible legal effects is essential." *Ibid*. Rights may be "secured" by laws that Congress enacts using its regulatory authority (*id*. at 201), but it would be "incompatible with this Court's anticommandeering doctrine" to equate a State's breach of spending conditions with a violation of rights secured by federal law (*id*. at 202).

Congress "may not conscript state governments as its agents," nor "compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 162, 188. States are free to "opt out of spending programs, completely nullifying whatever force the spending conditions once had." *Talevski*, 599 U.S. at 201 (Thomas, J., dissenting). Outside the context of conditions imposed by spending legislation, "Congress' legislative powers cannot be avoided by simply opting out." D. Engdahl, The Contract Thesis of the Federal Spending Power, 52 S. D. L. Rev. 496, 498 (2007) (emphasis deleted); *see also* *Townsend v. Swank*, 404 U.S. 282, 292 (1971) (Burger, C. J., concurring in result) ("Congress has used the 'power of the purse' to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV is in no way mandatory upon the States under the Supremacy Clause"). Obligations and third party are created only by voluntary agreement between federal and state governments, "not by force of law." Engdahl, *The Spending Power*, 44 Duke L. J. at 104. It is therefore important that this Court does not "simply ignore[] the crucial difference between restraints accepted as

conditions of funding, and restraints imposed by virtue of a legislative power." Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S. D. L. Rev. at 509.

This Court has repeatedly characterized spending legislation as "much in the nature of a contract." *Barnes*, 536 U.S. at 186 (quoting *Pennhurst*, 451 U.S. at 17). The Fourth Circuit acknowledged that "Medicaid was enacted through Congress's Spending Clause authority," offering funds to the States on stated conditions. *Kerr*, 95 F.4th at 156. Respondents ask this Court to find a private right under §1983, enforceable against the State. Their request "run[s] headlong into the anticommandeering doctrine and long-recognized limitations on the federal spending power." *Talevski*, 599 U.S. at 229 (Thomas, J., dissenting). Transforming a spending condition into a state obligation would "unravel[] the very rationale" this Court has used to uphold "far-reaching spending programs." *Id*. at 228-229. The State's obligation is to fund a beneficiary's choice among providers it has deemed *qualified*, and the beneficiary's right is to choose among such *qualified* providers.

This Court rejected an attempt to impose a broad expansion of Medicaid on the States, threatening the loss of all Medicaid funds for States that declined new coverage requirements imposed by the Patient Protection and Affordable Care Act. The Court emphatically reaffirmed its anti-commandeering doctrine, citing its precedent "strik[ing] down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes." *NFIB*, 567 U.S. at 577; *see, e.g., Printz v. United*

States, 521 U.S. 898, 933 (1997) (mandated background checks on handgun purchasers). The Court has also "scrutinize[d] Spending Clause legislation "to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *NFIB*, 567 U.S. at 577 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). Congress may encourage and incentivize, offering funds to the States that "induce [them] to adopt policies that the Federal Government itself could not impose." *NFIB*, 567 U.S. at 537 (citing *South Dakota v. Dole*, 483 U.S. 203, 205-206 (1987) (conditioning federal highway funds on States raising their drinking age to 21)). "But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism." *Id.* at 577-578. This is particularly troubling where Congress "surprise[es] participating States with post-acceptance or retroactive conditions," as it attempted in *NFIB*. *Id.* at 584 (quoting *Pennhurst*, 451 U.S. at 25).

B. The typical remedy, where a State violates the conditions of spending legislation, is the withdrawal of federal funds rather than private enforcement against the State.

This Court escaped the "constitutional quandary" created by its ruling in *Maine v. Thiboutot* "only by recognizing spending conditions, not as rights-securing laws, but as the terms of possible contracts that secure rights only by virtue of an offeree's acceptance." *Talevski*, 599 U.S. at 196-197 (Thomas, J., dissenting). That "quandary" is the dilemma sparked by treating spending conditions that benefit

third parties as equivalent to rights secured by federal legislative power. *Ibid*. Such equivalence "would contradict the bedrock constitutional prohibition against federal commandeering of the States." *Id*. at 196.

Private enforcement against the State is a questionable remedy in the context of spending legislation, veering perilously close to breaching the anti-commandeering doctrine. The "typical remedy" for the State's failure to comply with federally imposed conditions is "action by the Federal Government to terminate funds to the State," not a private cause of action against the State. *Talevski*, 599 U.S. at 183; (quoting *Gonzaga*, 536 U.S. at 280, quoting *Pennhurst*, 451 U.S. at 28); *Kerr*, 95 F.4th at 160. Any exceptions require Congress to "speak[] with a clear voice" spelling out its "unambiguous" intent to create enforceable rights for individuals. *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst,* 51 U.S. at 17, 28, and n. 21).

In *Gonzaga*, the terminology in Titles VI and IX focused on individuals—"no person shall be subjected to discrimination." 53 U.S. at 287. The statutory provisions contained directions that "no funds shall be made available" to any "educational agency or institution" which has a prohibited "policy or practice." *Ibid.* This language "clearly does not confer the sort of '*individual* entitlement' that is enforceable under § 1983." *Ibid*. (quoting *Blessing*, 520 U.S. at 343 (emphasis in original)).

The Fourth Circuit admitted that a private right against the State is "the atypical case" subject to "a

demanding bar." *Kerr,* 95 F.4th at 164 (quoting *Talevski*, 599 U.S. at 180, 183). That high bar requires courts to "rigorously examine" whether there is "an unmistakable congressional intent to confer individually enforceable rights." *Id.* at 180. It is tough to hump the high hurdle. In a case arising under the Adoption Act, this Court rejected efforts to find that child beneficiaries had individual rights to enforce a requirement imposed on the States to make "reasonable efforts" to prevent a child's removal from his home or reunify him with his family if removed. *Suter v. Artist M.*, 503 U.S. 347, 364 (1992). It is questionable whether there is *ever* an enforceable individual right for the third party beneficiaries of spending legislation, but at the very least, there is a demanding test that must be met.

C. There is no federal regulatory authority for health in general or abortion in particular.

The State's authority over provider qualification is consistent with the States' primary responsibility for health. This case does not seek affirmative recognition of abortion rights, but allowing the private right of action sought by Respondents would undermine the States' regulatory authority. If this Court recognizes a Medicaid beneficiary's right to demand that South Carolina certify Planned Parenthood, that would fling open the back door for abortion funding, contrary to the State's law (S.C. Code Ann. § 43-5-1185). Such a mandate would defy this Court's anti-commandeering doctrine, its explicit ruling in *Dobbs,* 597 U.S. 215 returning abortion to

the States, and even pre-*Dobbs* precedent protecting the States from such coercion.

"Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring), quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). These matters "do not ordinarily concern the National Government." *Id*. The "police power of a State" embraces "reasonable regulations established directly by legislative enactment" to "protect the public health and the public safety." *Id*. at 25. There is nothing extraordinary about abortion that warrants any sort of federal intervention, particularly after *Dobbs*.

As the Fourth Circuit admits, Medicaid is a "partnership with the states," offering "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Kerr*, 95 F.4th at 156 (quoting *Harris v. McRae*, 448 U.S. 297, 301 (1980)). "[T]he Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan," let alone "any services [abortion] for which a subsequent Congress has withheld federal funding" (per the Hyde Amendment), and certainly not a procedure (abortion) this Court has now unequivocally held to be a matter of *state* governance. *Harris*, 448 U.S. at 309 (Title XIX did not require a participating state to pay for medically necessary abortions for which federal reimbursement was unavailable). "The Federal

Government cannot buy (or rent) the *States' power to implement a federal program* [Medicaid] and then regard the conditions that the *States* are implementing themselves as having the force of *federal* law." *Talevski*, 599 U.S. at 204 (Thomas, J., dissenting).

"[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power" between federal and state governments. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *see also New York*, 505 U.S. at 181 (federal-state division of authority is "for the protection of individuals . . . . [S]tate sovereignty is not just an end in itself."). "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Moyle v. United States*, 144 S. Ct. 2015, 2035 (2024) (Alito, J., dissenting), quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C. J., in chambers).

With *Roe v. Wade,* 410 U.S. 113 (1973) now overruled, *states* may freely regulate abortion. "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). As then Chief Justice Marshall observed two centuries ago, the power to enact "health laws of every description" is reserved to the states. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824). That understanding has stood the test of time. *See, e.g., Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 149 (1855) (states legislate to protect "the lives, limbs, health, comfort, and quiet of all persons"); *Medtronic,*

Inc. v. Lohr, 518 U.S. 470, 475 (1996) ("states have exercised their police powers to protect the health and safety of their citizens"). It is "beyond question" that Congress recognized, "from an early day," the power of states to enforce health and safety regulations for their own residents. *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Board of Health*, 186 U.S. 380, 387 (1902). Congress must use "*exceedingly clear* language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted) (emphasis added); *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 667 (2022).

"It's worth remembering that the power of a federal agency to regulate is the power to preempt—to nullify the sovereign power of the States in the area" which explains why 27 States opposed the emergency OSHA vaccine rule several years ago. *MCP No. 165 v. United States DOL*, 20 F.4th 264, 273 (6th Cir. 2021) (Sutton, J., dissenting from denial of initial hearing en banc). The State of South Carolina "ha[s] an interest in seeing [its] constitutionally reserved police power over public health policy defended from federal overreach." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

CONCLUSION

The "right" in this case operates solely within a *state*'s administration of Medicaid, unlike the independent rights in other cases, e.g., nursing home residents' right to be free of chemical/physical

restraints (*Talevski*), or patient rights to humane conditions in a state hospital (*Pennhurst*).

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