No. 19-1186

In The
Supreme Court of the United States

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

v.

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

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, AND THE COMMITTEE TO ALLOW STATES TO DEFUND PLANNED PARENTHOOD, IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). The ACLJ and the Committee to Allow States to Defund Planned Parenthood, which consists of more than 111,000 of the ACLJ's members, are committed to the constitutional principles of federalism and state sovereignty. Both principles are threatened when the federal courts recognize private rights of action not expressly created by Congress.

SUMMARY OF THE ARGUMENT

For reasons grounded in both separation of powers and federalism, this Court has increasingly refused to recognize private rights of action not expressly authorized by Congress. Hauling sovereign states into federal court, without express statutory authorization, is as much a violation of federalism

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*Counsel of record for the parties received notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

principles as telling states what they can and cannot do.

The Fourth Circuit's reading into § 1396a(a)(23) of a § 1983 right of action constitutes a double assault on the states' power, as independent sovereigns, to adopt valid policies reflecting the values of their citizens. First, the court exposed the states within its jurisdiction to the specter of legal assault by potentially countless Medicaid recipients. Second, the court effectively granted nullification power to providers and aid recipients over state fiscal policy in a sensitive area of state concern – taxpayer subsidization of Planned Parenthood.

This amicus brief, like the petition for certiorari, focuses on the first error: creating a private cause of action where the relevant statutory provision mentions no such thing. The lower court failed to approach this statutory interpretation issue through the lens of federalism as this Court's decisions require. Ambiguities in federal statutes must be resolved in a way that least invades state sovereignty. This is especially important in Spending Clause cases when stealth conditions untethered to statutory text risk federal coercion of state policy.

This Court should grant review to bring coherency and due regard for federalism to the question whether to read private enforcement rights into Spending Clause statutes.

ARGUMENT

This Term alone, the Court has twice refused to recognize a private cause of action that was not

expressly created by Congress. *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, No. 18-1171, 2020 U.S. LEXIS 1908 (March 23, 2020); *Hernandez v. Mesa*, No. 17-1678, 2020 U.S. LEXIS 1362 (Feb. 25, 2020). The Court has "come to appreciate that, like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Comcast Corp,* 2020 U.S. LEXIS 1908, at *1015 (internal quotations omitted). The Court's evolution on this point is grounded in the recognition that finding private rights of action where Congress has not put them trenches upon the Constitution's separation of legislative and judicial power. *Hernandez*, 2020 U.S. LEXIS 1362, at *741.

The damage to separation of powers is compounded by damage to federalism in Spending Clause cases. Discovering, with no clear supporting text, a private right of action in a Spending Clause program condition is a direct assault on state sovereignty.

I. This Court Should Grant Review to Reaffirm the Centrality of Federalism in Determining Whether Spending Clause Statutes Authorize Private Enforcement Rights.

The Fourth Circuit's reading of the any-qualified-provider provision, 42 U.S.C. § 1396a(a)(23) (2010), encroached upon South Carolina's power to make policy decisions about allocation of taxpayer funds. The court failed to view § 1396a(a)(23) through the lens of federalism which should apply whenever the federal government tells a sovereign state how it must

allocate its taxpayer funds. Proper consideration of this Court's recent Tenth Amendment and Spending Clause cases supports the conclusion that Congress did not clearly authorize a private right of action in § 1396a(a)(23).

A. The Fourth Circuit's Decision Conflicts with this Court's Recent Precedents Reemphasizing Federalism Principles in Statutory Interpretation Cases.

This Court's recent case law reflects a heightened solicitude for federalism. "Federalism secures the freedom of the individual" as well as the prerogatives of state governments. *Bond v. United States*, 564 U.S. 211, 221 (2011); *see also Shelby Cty. v. Holder*, 570 U.S. 529, 543 (2013). The "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond*, 564 U.S. at 221. Protecting state government prerogatives fosters an environment where local policies which reflect the diverse needs of a heterogeneous society can flourish. *Id.* Federalism "permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Id.* at 221 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Federalism principles therefore play a central role in interpreting ambiguities in federal statutes that touch upon an area of traditional state authority, such as regulation of the health care field. Respect for state sovereignty requires federal courts "to be certain of

Congress' intent before finding that federal law overrides" the "usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory*, 501 U.S. at 460).

Such certainty cannot exist without a "clear statement" from Congress that it intended to intrude on traditional areas of state sovereignty. *Bond*, 572 U.S. at 858; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (Congress must be "explicit" when it "adjusts the balance of state and national authority"). Thus, for example, a state's surrender of its sovereign immunity from suit "will be strictly construed, in terms of its scope, in favor of the sovereign." *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

Preserving the balance of power between the states and the federal government is essential to promoting political accountability. If a state adopts a policy only because a branch of the federal government dictates it, "responsibility is blurred." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (holding that a federal law banning states from authorizing sports gambling violated the anti-commandeering doctrine). In the absence of federal preemption, "dictat[ing] what a state legislature may and may not do . . . is a "direct affront to state sovereignty." *Murphy*, 138 S. Ct. at 1477–78 (noting that "[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals").

Thus, when states take actions at the federal government's say-so that are unpopular with their citizenry, such as allocating taxpayer funds to

abortion providers, the state's citizens may blame state officials, while the federal officials who mandated the action escape responsibility. *See id.* at 1477 (citing *New York v. United States*, 505 U.S. 144, 169 (1992)).

The foregoing principles govern this Court's Spending Clause cases as well. The "clear statement" rule, *Bond*, 572 U.S. at 858, is recast as the rule that states must have been "clearly told" about Spending Clause program conditions. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (holding that states were not clearly told that expert fees were recoverable as costs in lawsuits brought under the Individuals with Disabilities Education Act, notwithstanding contrary indications in the statute's legislative history).

The states cannot be deemed to "voluntarily and knowingly" accept the conditions upon which federal funds are conditioned, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), unless those conditions are set forth "*unambiguously*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasis added); *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 332 (2015). "Respecting this limitation is critical to 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, 577 (2012) ("*NFIB*"). Otherwise, the Spending Clause power would "obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which

otherwise would lie outside its reach." *NFIB*, 567 U.S. at 676 (Scalia, Alito, Kennedy, Thomas, JJ., dissenting) (quoting *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting)).

Springing "post-acceptance" or "retroactive" conditions on states is inherently coercive. *NFIB*, 567 U.S. at 584 (quoting *Pennhurst*, 452 U.S. at 25). In fact, state sovereignty concerns are at their zenith where post hoc conditions – such as a judicially discovered private right of action for Medicaid beneficiaries – are imposed in massive Spending Clause programs, like Medicaid, because the states' option to decline participation is more theoretical than real. Medicaid spending accounts for over a fifth of the average state's total budget, and federal funds supply anywhere from half to four-fifths of those costs. *NFIB*, 567 U.S. at 581–82 (holding that the threatened loss of over ten percent of a state's overall budget left the states with a Hobson's choice between accepting the post hoc condition and suffering a devastating blow to state fiscal solvency); *see also id.* at 683 (Scalia, Alito, Kennedy, Thomas, JJ., dissenting) (noting that "a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue.").

In purporting to find a § 1983 private enforcement right in § 1396a(a)(23), the Fourth Circuit created a post-acceptance condition with no support in the statute's text.

B. The Medicaid Act's Any-Qualified-Provider Provision Does Not Clearly Tell the States that Medicaid Beneficiaries Can Bring a Private Right of Action under § 1983 to Challenge State Decisions Disqualifying Providers.

The Fourth Circuit's reading of § 1396a(a)(23) of wrongly cabined South Carolina's broad authority over Medicaid provider disqualification decisions. Had the court correctly read *Gonzaga University,* 536 U.S. 273 and *Armstrong*, 575 U.S. 320 in the light of this Court's recent federalism cases, it could not have concluded that Congress unambiguously informed the states that their service provider disqualification decisions could be challenged in a private right of action under § 1983.

There is no question that states opting out of Medicaid by establishing their own healthcare programs can exclude categories of health care providers from participation. States enjoy wide latitude in choosing among competing demands for limited public funds. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

> The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the

> difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487.

Both the state and federal governments are free to discourage abortion, including through allocation of taxpayer dollars. *Rust v. Sullivan*, 500 U.S. 173, 200–01 (1991) (upholding 1988 federal regulations prohibiting the use of Title X money to perform, promote, refer for, or support abortion as a method of family planning); *Maher v. Roe*, 432 U.S. 464, 465–66 (1977) (upholding state regulation denying payments for non-therapeutic abortions to Medicaid recipients); *California v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (en banc) (upholding 2018 federal regulations prohibiting the use of Title X money to perform, promote, refer for, or support abortion as a method of family planning); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908 (6th Cir. 2019) (en banc) (upholding Ohio law that prohibited abortion organizations from participating in six state health education programs).

"When an issue involves policy choices . . . the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" *Maher,* 432 U.S. at 479–80 (quoting *Mo., K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904)).

South Carolina's sovereign authority to ensure that taxpayer funds do not subsidize Planned Parenthood South Atlantic can only be deemed abrogated under the Medicaid Act if Congress

unambiguously intended to restrict the states' authority over Medicaid service providers. *See Gonzaga Univ.*, 536 U.S. at 283. Reading the any-qualified-provider provision in § 1396a(a)(23) to confer a private right of action on Medicaid recipients unquestionably limits the states' authority over Medicaid providers, and thus over allocation of taxpayer funds – both areas of traditional state sovereignty. *See, e.g.*, *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000) (noting that health care regulation is within traditional state domain).

Section 1396a(a)(23)(A) provides: "[A]ny individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23)(A). The provision requires states to offer Medicaid beneficiaries a choice of service providers, but § 1396a(p)(1) empowers states to determine the service providers among whom beneficiaries can choose. 42 U.S.C. § 1396a(p)(1). Medicaid regulations further mandate state authority over appeals from service provider disqualification decisions. 42 C.F.R. § 1002.213 (2017). Neither § 1396a(a)(23)(A) nor § 1396a(p)(1) can be read to confer an enforceable right on Medicaid patients to force the states to continue to do business with specific providers.

Section 1396a(a)(23) is a directive to the Secretary of Health and Human Services, not a conferral of a cause of action on Medicaid beneficiaries. A statute addressing federal officials who monitor the state recipient of federal funding "does not confer the sort of

'*individual* entitlement' that is enforceable under § 1983." *Gonzaga Univ.*, 536 U.S. at 287; *Doe v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017).

Moreover, § 1396a(a)(23) confers enforcement power on the Secretary of Health and Human Services, granting authority to withhold federal funds. *See* 42 U.S.C. § 1396c (2010). Congress clearly intended the withholding of federal funds to be the sole remedy for noncompliance with the any-qualified-provider provision. *See Armstrong*, 135 S. Ct. at 1385; *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others"); *Gillespie*, 867 F.3d at 1041.

Congress did not clearly authorize a private right of action to enforce the any-qualified-provider provision. But even if the text was ambiguous, the Fourth Circuit ignored the cardinal rule that ambiguities in federal statutes must be resolved in a manner that least treads upon state sovereignty. *Bond*, 572 U.S. at 860. There can hardly be a "more direct affront to state sovereignty," *Murphy*, 138 S. Ct. at 1477, than reading § 1396a(a)(23) as Congressional authorization for states to 1) be hauled into federal court, 2) have potentially hundreds of their Medicaid service provider disqualification decisions second-guessed and 3) have their limited Medicaid budgets drained of the substantial funds inevitably associated with hundreds of federal lawsuits. *See Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of cert) (locating a private right of action under § 1983 subjects states to the "threat of a federal lawsuit—and

its attendant costs and fees—whenever it changes providers of medical products or services for its Medicaid recipients").

Congress may, as a condition of receipt of federal Medicaid funds, restrict the states' power to disqualify abortion providers as Medicaid contractors, but only if it clearly and unambiguously does so. *Gonzaga Univ.*, 536 U.S. at 283. The any-qualified-provider provision does not do so, nor does it clearly inform the states that decisions disqualifying service providers are subject to § 1983 challenges by Medicaid recipients. The Fourth Circuit's contrary conclusion effectively coerces states to allocate taxpayer monies to Planned Parenthood irrespective of the citizenry's opposition to such allocation.

This Court should grant review to bring Spending Clause cases into alignment with this Court's other precedents refusing to recognize a private right of action where Congress has not clearly authorized one.

CONCLUSION

Amici respectfully request this Court to grant review.

Respectfully submitted,

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