No. 23-1275

IN THE
Supreme Court of the United States

ROBERT M. KERR, 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 all 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 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., Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The ACLJ is committed to the constitutional principles of federalism and state sovereignty, and especially state autonomy over abortion policy, which necessarily encompasses taxpayer subsidization of abortion clinics.

SUMMARY OF THE ARGUMENT

Review is warranted in this case to clarify that the *Gonzaga/Talevski* "demanding bar" is at its zenith when the implication of a private enforcement right in a federal spending power statute would coerce state policy on a difficult question of moral and economic importance.

Last term, in *Health & Hospital Corp. v. Talevski,* all nine Justices agreed that *Gonzaga University v. Doe* established the governing standard for

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*Counsel of record for the parties received notice of the intent to file this brief, pursuant to Supreme Court Rule 37.2(a). No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

determining whether spending power statutes give rise to individual rights enforceable under 42 U.S.C. § 1983. All nine Justices also agreed that the *Gonzaga* standard set a "demanding bar," although none of the opinions explained why, other than to note that the typical remedy for state noncompliance with spending statute conditions is termination of federal funds.

The bar is demanding because *Gonzaga* reemphasized the importance of preserving the constitutional balance between the states and the federal government. Congress cannot alter that balance unless it makes its intention to do so unmistakably clear in the statute. The states must be given clear notice that by accepting federal funds, they may be forfeiting autonomy over weighty state policy interests. The constitutional limits on congressional spending power serve anti-commandeering goals by ensuring that spending power statutes do not obliterate distinctions between national and local spheres of interest by imposing federal policy in the most sensitive areas of State decision-making autonomy.

Talevski involved certain rights of nursing home patients and implicated no clash between federal and state policy on weighty moral questions. By contrast, anti-commandeering concerns are at the forefront in this case because discovering a private right to enforce the Medicaid Act's any-qualified-provider provision would coerce state policy on a question of profound moral and social importance—taxpayer subsidization of abortion clinics. This Court's decision in *Dobbs v. Jackson Women's Health Organization* returned abortion policy to the states. State policy on taxpayer

subsidization of abortion clinics must necessarily be included within that preserve because allocating state taxpayer money to abortion clinics undermines state policy protecting the sanctity of human life.

ARGUMENT

This Court's decision in *Health & Hospital Corp. v. Talevski,* 143 S. Ct. 1444, 1455 (2023), left unresolved critical issues, including, as Petitioner fully explained,[1] whether *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and *Blessing v. Freestone*, 520 U.S. 329 (1997), are still good law. Review is warranted to answer those questions and eliminate the chaos prevailing among the lower courts on whether Congress unambiguously created a privately enforceable right in § 1396a(a)(23) of the Medicaid Act. *See Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from denial of certiorari) ("We created this confusion. We should clear it up."); *Planned Parenthood S. Atl. v. Kerr,* 95 F.4th 152, 170 (4th Cir. 2024) (Richardson, J., concurring) (pleading for "a third time" for clarification on the precedential status of *Wilder* and *Blessing*). *See also Federal Statute: 42 U.S.C. § 1983 Spending Clause Health & Hospital Corp. of Marion County v. Talevski*, 137 Harv. L. Rev. 380, 388 (2023) (*Talevski* "will likely perpetuate" "two decades" of confusion because the majority "never once

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[1] Pet. at 17-29.

referenced *Blessing's* three-part test"[2] even though the court below believed the test controlled.)

Talevski did make clear, however, that *Gonzaga University v. Doe,* 536 U.S. 273 (2002), establishes the standard for determining whether spending power statutes give rise to individual rights enforceable under 42 U.S.C. § 1983. Federal spending power statutes provide no basis for private enforcement under § 1983, unless Congress gives clear notice to the states by manifesting an unambiguous intent in the statutory language. *Talevski*, 143 S. Ct. at 1455 (citing *Gonzaga Univ.*, 536 U.S. at 280).

Talevski characterized the *Gonzaga* standard as "a demanding bar," 143 S. Ct. at 1455, and for good reason. The *Gonzaga* standard reflected the Court's renewed emphasis on the importance of federalism in cases decided after *Wilder* and *Blessing*. "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gonzaga Univ.*, 536 U.S. at 286 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). *See also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 n.1 (2015) (*Gonzaga* "plainly repudiate[s] the ready implication of a §1983 action that *Wilder*

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[2] The three *Blessing* factors are whether 1) "Congress . . . intended that the provision in question benefit the plaintiff"; 2) "[P]laintiff [can] demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and 3) "the statute . . . unambiguously imposes a binding obligation on the States." 520 U.S. at 340-41.

exemplified.").

To determine whether this "demanding bar" is cleared, *Talevski* instructed lower courts to "employ traditional tools of statutory construction." 143 S. Ct. at 1445. Under this Courts' precedents, however, those tools must be wielded under the lens of maximal regard for state autonomy when, as here, the implication of a private right of action would coerce state policy in a sensitive area of state concern. The Court's review is warranted to emphasize that the "demanding bar" is at its zenith when a federal spending power condition would coerce state policy on a question of profound moral and social importance—here, taxpayer subsidization of abortion providers.

I. This Court Should Grant Review to Clarify That *Talevski's* "Demanding Bar" Is Highest When, as in This Case, the Implication of a Private Right of Action Would Coerce State Policy in a Sensitive Area of Traditional State Concern.

In his *Talevski* concurrence, Justice Gorsuch remarked on the anti-commandeering issues that were "lurking" but undeveloped in that case. 143 S. Ct. at 1462-63 (Gorsuch, J., concurring). The issues that were lurking in *Talevski* are front and center in this case. Discovering a private right of action to enforce the Medicaid Act's any-qualified-provider provision would directly assault the States' status as independent sovereigns by coercing taxpayer subsidization of an

entity that engages in conduct deeply violative of at least some states' public policy.

A. Traditional Tools of Statutory Construction Must Be Employed Consistent with the Limitations on Congress's Spending Power That Protect State Autonomy Against Federal Coercion.

Outside the bounds of the Supremacy Clause, States enjoy broad autonomy under the Tenth Amendment to pursue legislative objectives reflecting the policy preferences of their citizens. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013). "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). The "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Id.* Protecting state government prerogatives fosters an environment where local policies can reflect the diverse needs of a heterogeneous society. *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.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Federalism principles therefore play a crucial role in interpreting federal statutes that intrude upon traditional areas of state sovereignty, such as regulation of the health care field. *See, e.g.*, *Pegram v.*

Herdrich, 530 U.S. 211, 237 (2000) (noting that health care regulation is within traditional state domain).

Respect for state authority 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*, 134 S. Ct. 2077, 2089 (2014) (cleaned up).

Such certainty cannot exist without a "'clear statement"' from Congress that it intended to intrude on traditional areas of state sovereignty. *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994) (Congress must be "explicit" when it "readjusts the balance of state and national authority.")(cleaned up). 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)).

Vigilance over the balance of power between the states and the federal government serves anti-commandeering goals. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (Respecting constitutional limitations "is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."). 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." *Id.* at 676

(Scalia, Alito, Kennedy, & Thomas, JJ., dissenting) (cleaned up).

If a state adopts a policy only because 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 preemption, the federal government "dictat[ing] what a state legislature may and may not do" is a "direct affront to state sovereignty." *Id.* (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 state action mandated by the federal government is unpopular with state citizens, such as allocating taxpayer funds to abortion providers, the citizens may blame state officials, while the federal officials who dictated the action escape responsibility. *Id.* at 473-74 (citing *New York v. United States*, 505 U.S. 144, 168-69 (1992)).

This Court's decision in *Dobbs*, 142 S. Ct. at 2259, restored abortion policy as a major area of state decision-making autonomy. Taxpayer subsidization of abortion clinics must necessarily be included in that domain because funneling taxpayer money to abortion clinics is wholly incompatible with state policy promoting the sanctity of human life.

B. *Abortion Policy and Taxpayer Subsidization of Abortion Clinics Are Quintessential Areas of Sensitive State Concern.*

Like other homicide, abortion is a "question of profound moral and social importance that the Constitution unequivocally leaves for the people." *Dobbs*, 142 S. Ct. at 2265; *see also id.* at 2304-05 (Kavanaugh, J., concurring) (recognizing abortion as an "extraordinarily weighty" issue that must be resolved "through the processes of democratic self-government established by the Constitution"). "For the first 185 years after the adoption of the Constitution," abortion policy was within the sole province of the states. *Id.* at 2240. When the Fourteenth Amendment was adopted, three quarters of the States criminalized abortion at all stages of pregnancy. *Id.* at 2253-54. The principal reason was "a sincere belief that abortion kills a human being." *Id.* at 2256. The same moral calculus underlies current state efforts to ban or limit abortion today. *Id.* at 2257; *see id.* at 2304, 2308 (Kavanaugh, J., concurring) (Current state efforts to limit abortion "represent the sincere and deeply held views of tens of millions of Americans.").

While the statutory issue in this case does not involve abortion *per se*, South Carolina sought to disqualify Planned Parenthood as a Medicaid health care provider because of the state's opposition to Planned Parenthood's abortion activities. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 692-93 (4th Cir. 2019). All but one of the cases in the 5-2 circuit

split [3] involved a state's opposition to taxpayer subsidization of either Planned Parenthood specifically or other abortion clinics generally.[4] Even before *Dobbs*, moral opposition to taxpayer subsidization of abortion clinics was a legitimate state police power concern under this Court's precedents.

Both 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

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[3] Pet. at 24-29.

[4] *See Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 351 (5th Cir. 2020) (en banc) (Texas disqualified Planned Parenthood as a Medicaid provider because of substantial evidence that Planned Parenthood engaged in unethical conduct involving the sale of fetal tissue.); *Does v. Gillespie*, 867 F.3d 1034, 1038 (8th Cir. 2017) (Arkansas Governor announced that because Planned Parenthood "does not represent the values of the people of our state and Arkansas is better served by terminating any and all existing contracts with them."); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1213-14 (10th Cir. 2018) (Medicaid contracts with Planned Parenthood terminated for several reasons, including "unethical or unprofessional conduct."); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013) (Arizona law prohibiting state contracts of any kind with abortion providers); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 967 (7th Cir. 2012) (Indiana law prohibiting state agencies from providing state or federal funds to abortion clinics served the state's interest in "eliminat[ing] the indirect subsidization of abortion."); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

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).

Because abortion is an extraordinarily weighty issue that *Dobbs* returned to the states, 142 S. Ct. at 2259, state taxpayer subsidization of abortion clinics should also be deemed a matter over which states presumptively enjoy autonomy. States whose citizenry views abortion as the taking of a human life should not be commandeered by a spending statute condition into funneling taxpayer funds to the very entities that terminate human life, unless those states have "voluntarily and *knowingly* accepted the condition." *Cummings v. Premier Rehab Keller, P.L.L.C.,* 142 S. Ct. 1562, 1566 (2022) (cleaned up) (emphasis added).

Congress did not give clear notice in the any-qualified-provider provision of the Medicaid Act that states would be subject to private rights of action under § 1983. There is no "more direct affront to state sovereignty," *Murphy*, 138 S. Ct. at 1478, than reading § 1396a(a)(23) as Congressional authorization for states to be 1) hauled into federal court to have potentially hundreds of their Medicaid service provider disqualification decisions second-guessed; and 2) coerced to funnel taxpayer money to entities

that violate the state's sincere and deeply held views on the sanctity of human life.

Talevski's "demanding bar" must at least mean that when extraordinarily weighty state interests are at stake, any doubts about whether Congress gave clear notice in a spending power statute must be resolved in a manner that least treads upon state sovereignty. *Bond*, 134 S. Ct. at 2090. This Court should grant review to make that point clear.

CONCLUSION

Amicus respectfully requests this Court to grant review.

Respectfully submitted,

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