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 all others similarly situated, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* 86 CURRENT AND 2 FORMER SOUTH CAROLINA LEGISLATORS SUPPORTING PETITIONER

TIMOTHY J. NEWTON
Counsel of Record
Murphy & Grantland, P.A.
4406-B Forest Drive
P.O. Box 6648
Columbia, SC 29260
(803)782-4100
tnewton@murphygrantland.com

Counsel for Amici Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

Amici are 86 current and 2 former South Carolina state legislators.

Amici have interests in supporting the State of South Carolina's longstanding tradition of promoting a culture that values human life, in upholding South Carolina state law prohibiting state family planning funds from being used to pay for abortions, and in ensuring that agencies that do *not* perform abortions receive sufficient funding to be able to provide medical care and important women's health and family planning services to women in South Carolina. *Amici* also have an interest in ascertaining that when the State of South Carolina enters into agreements with the federal government, this State knows the terms of those agreements—including whether private third parties will be allowed to sue to enforce them. Furthermore, *Amici* have an interest in maintaining their ability to determine whether providers are qualified to provide certain medical services under the State of South Carolina's Medicaid program.

A list of the *amici* legislators and former legislators is included in the appendix of this brief.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certify that Petitioners and Respondents received timely notice of the intent to file and have given consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Medicaid represents more than 15% of every healthcare dollar spent in the United States and is the primary financing vehicle for states to provide health coverage to low-income residents. Because of the Medicaid program's size, the federal government vests states with considerable authority over how to run their Medicaid programs, leaving many program aspects to a state's discretion. If a state Medicaid plan deviates from those broad federal guidelines, there is a simple remedy: the federal government can withhold the federal funding stream. But unless there is express language to the contrary, the Medicaid statutory regime generally does not confer Medicaid providers or beneficiaries with private rights that can be invoked in a federal lawsuit such as a § 1983 civil rights action. Provider and beneficiary complaints must be made, if at all, through the state's administrative appeal process.

The Fourth Circuit's decision here upsets this straightforward framework. The State of South Carolina has public policy interests in promoting life, in ensuring that taxpayer dollars do not fund abortions, and in ensuring that providers of family planning services that receive state funding do not contravene those interests. In furtherance of this policy, South Carolina deemed abortion clinics and associated medical practices as unqualified under the Medicaid program to provide family planning services.

Rather than pursue available state administrative remedies, Respondents Julie Edwards, a Medicaid beneficiary, and Planned Parenthood South Atlantic

(hereinafter "Planned Parenthood"), a Medicaid provider, sued in federal court. But Medicaid gives neither Respondent a private right in these circumstances, and the Fourth Circuit was wrong to enjoin South Carolina's decision by implying such a right absent a Congressional clear statement.

The Circuits are split over whether Medicaid's any-qualified-provider requirement, 42 U.S.C. § 1396a(a)(23)(A), creates a private right of action in favor of Medicaid recipients seeking medical services, and this case provides this Court an ideal opportunity to resolve the conflict. What's more, this Court should reverse the decision below. This Court has held that government action directed at a third party and affecting a plaintiff only indirectly or incidentally does not give rise to a right enforceable by that plaintiff. This Court has also held that a plaintiff must establish a private right of action under the specific statute at issue. And Edwards cannot show a private right to dictate to the State of South Carolina which providers are qualified under the Medicaid Act. At most, the Medicaid Act provides administrative remedies for medical providers—the only parties directly affected by such decisions—to challenge adverse state action, and Planned Parenthood pursued those remedies after the deadline for doing so.

The Fourth Circuit treated the any-qualified-provider provision as a civil rights issue. But in so doing, the court usurped the United States Department of Health and Human Services' (HHS) authority and ignored case law and regulations that clarify the meaning of "qualified." The court also created a

loophole where providers may forfeit their administrative rights and use beneficiaries as proxies to evade the state administrative appeal process that Congress intended.

Accordingly, *amici* respectfully request that this Court grant *certiorari* and clarify the existence and contours of any implied private right of action arising from the any-qualified-provider provision. This Court should hold that Edwards lacks a private right of action to challenge South Carolina's qualification of medical providers under the Medicaid Act, reverse the Fourth Circuit, vacate the injunction, and restore the statutory regime that Congress enacted.

ARGUMENT

I. South Carolina's actions were consistent with its public policy interest in avoiding use of taxpayer funds to pay for abortions.

South Carolina has a "strong culture and longstanding tradition of protecting and defending life and liberty of the unborn." (Executive Order No. 2017-15, in Baker Pet. for Cert., p. 69a.) In furtherance of that policy, a South Carolina statute specifically prohibits state funds appropriated for family planning from being used to pay for abortions. S.C. Code Ann. § 43-5-1185. Pursuant to that statute, South Carolina's governor issued an executive order directing the State Department of Health and Human Services (DHHS) to, among other things, deem abortion clinics and associated medical practices as unqualified under the Medicaid program to provide family planning services.

(Exec. Order No. 2018-21, in Baker Pet. for Cert., pp. 76a to 78a.)

The federal and state governments are free to discourage abortion by prohibiting federal funds recipients from engaging in activities that directly or indirectly promote abortion. Rust v. Sullivan, 500 U.S. 173, 200-01 (1991). States participating in the Medicaid program are not required to pay for non-therapeutic abortions. Maher v. Roe, 432 U.S. 464, 465-66 (1977). "It is settled law that the government's refusal to subsidize abortion does not impermissibly burden a woman's right to obtain an abortion." Planned Parenthood of Indiana, Inc. v. Comm'r of the Indiana State Dep't of Health, 699 F.3d 962, 969 (7th Cir. 2012).

South Carolina's action was consistent with its public policy of protecting and defending the life and liberty of the unborn. South Carolina's action was also consistent with federal and state policies of preventing taxpayer funds from paying for abortions.

II. Our federal system allows States to retain their sovereignty except where expressly overridden by constitutionally authorized federal law.

The federal government and the States both wield sovereign powers. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018). "The legislative powers granted to Congress are sizable, but they are not unlimited." Id. at 1476. The Tenth Amendment reserves all powers not enumerated in the Constitution to the States. Id. The States have broad authority to

enact legislation for the public good through their police power. Bond v. U.S., 572 U.S. 844, 854 (2014).

Congress cannot issue direct orders to state governments. Murphy, 138 S. Ct. at 1476. The federal government may not adopt measures to indirectly encourage a State to adopt a federal regulatory system as its own. Nat'l Fed'n of Independent Business v. Sebelius, 567 U.S. 519, 578 (2012). This healthy balance of power is designed to reduce the risk of tyranny and abuse by the government. Murphy, 138 S. Ct. at 1477. It also places political accountability on the governmental actors who devised the regulatory program. National Federation, 567 U.S. at 578 (2012).

For these reasons, legislation affecting the federal balance requires a clear statement of Congressional intent. Bond, 572 U.S. at 858. Federal courts must be certain of legislative intent before interpreting a federal law to intrude on state police powers. Id. at 858-60. Any ambiguity in the federal statute will be resolved in favor of state law. Id. at 859-60.

III. Courts should be reticent to override state law in the context of Spending Clause legislation. That is why private enforceability of Spending Clause legislation has been interpreted narrowly.

The Spending Clause in the federal Constitution has been interpreted to allow Congress to grant federal funds to the States while conditioning the grant upon compliance by the States with measures Congress could not directly mandate. National Federation, 567 U.S. at 576. "Relatively mild encouragement" of this

type is permissible, whereas "economic dragooning that leaves the States with no real option but to acquiesce" is forbidden. Id. at 580-82.

Legislation under the Spending Clause is in the nature of a contract. Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981). The federal government offers federal funds with strings attached, and the States have the option to agree to comply with the conditions in return for receipt of the federal funds. Id. The legitimacy of Spending Clause legislation depends upon whether a State voluntarily and knowingly accepts the terms of the contract. Id. Thus, any conditions on the grant of federal funds must be unambiguous. Id.

Under § 1983, citizens have a cause of action for the deprivation of rights, privileges, or immunities secured by the Constitution and federal laws. 42 U.S.C. § 1983. In early cases, this Court applied Section 1983 broadly unless exceptions applied. Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987). This Court held that mandatory conditions for state receipt of federal funds impose a binding obligation on the States that is enforceable by third-party beneficiaries if the conditions are found to be intended to benefit the putative plaintiff. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509-12 (1990).

Chief Justice Rehnquist dissented in Wilder. He argued that a private right of action should only be imposed when the text of the statute confers identifiable, enforceable rights on the particular plaintiff seeking to enforce those rights. Id. at 526. Chief Justice Rehnquist argued that substantive rights

are not conferred merely because federal funds are conditioned upon a particular requirement unless it is clear that Congress intended to allow private enforcement. Id. at 527.

In Blessing v. Freestone, 520 U.S. 329 (1997), this Court applied a three-prong test to ascertain whether a statutory provision gives rise to a federal right under Section 1983. "First, Congress must have intended that the provision in question benefit the plaintiff." Id. at 340. The plaintiff must demonstrate that the right assertedly protected is not so vague and amorphous that its enforcement would strain judicial competence. Id. at 340-41. Third, the statute must unambiguously impose a binding obligation on the States that is couched in mandatory, as opposed to precatory, terms. Id. at 341. If these three factors are met, there is a rebuttable presumption that the federal statute creates an individual right. This presumption may be rebutted if Congress either specifically foreclosed a remedy, or impliedly forbade recourse to Section 1983 by creating a comprehensive scheme that is incompatible with individual enforcement. Id. at 341.

This Court subsequently clarified that Blessing was *not* intended to allow a private right of action under Section 1983 merely because the plaintiff "falls within the general zone of interest that the statute is intended to protect." Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002). Only an unambiguously conferred right supports a cause of action under Section 1983. Id. Intent will not be inferred when the statute by its terms grants no private rights to any identifiable class. Id. at 283-84. The text of the federal statute must be

phrased with an unmistakable focus on the benefitted class. Id. at 284. When the text and structure of a statute provides no indication that Congress intended to create new individual rights, there is no basis for a private Section 1983 action. Id. at 286. Statutes that are merely directives and that lack rights-creating language will not suffice. Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 331 (2015).

An example of a statute that unambiguously creates a private right of action is found in 42 U.S.C. § 2000d, which provides that "no person shall be subjected to discrimination." Alexander v. Sandoval, 532 U.S. 275, 288 (2001). This provision focuses on the victims of discrimination and commands all government actors to refrain from discriminating against them. It strongly implies "not just a private right but also a private remedy." Id. at 286.

In contrast, Medicaid's any-qualified-provider provision suggests neither a private right nor a private remedy. The statute merely provides that "[a] State plan for medical assistance must . . . provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, . . . 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 focus is on the plan, not individual rights. The text and structure of the provision contains no hint that Congress supposed that the conditions it imposed on states accepting Medicaid funds were to be enforced by private parties through individual actions in federal court. Thus, the Eighth Circuit held that the any-

qualified-provider provision creates no private rights. Does v. Gillespie, 867 F.3d 1034, 1046 (8th Cir. 2017).

IV. Edwards lacks a private right of action to challenge South Carolina's decision to disqualify Planned Parenthood as a provider under its Medicaid program.

There is no allegation in this case that the State of South Carolina took any action directly against Edwards. The alleged harm is that the State of South Carolina violated Edwards' rights by terminating Planned Parenthood from South Carolina's Medicaid program. Planned Parenthood South Atlantic v. Baker, 326 F. Supp. 3d 39, 42 (D.S.C. 2018). The relief she sought and obtained—an injunction preventing the State of South Carolina from terminating its Medicaid enrollment with Planned Parenthood—restrains South Carolina's action against Planned Parenthood. Id. at 50. The Fourth Circuit held that the any-qualified-provider "provision imposes limits on a state's qualification authority." Planned Parenthood South Atlantic v. Baker, 941 F.3d 687, 704 (4th Cir. 2019). The nexus between the alleged violation of Edwards' any-qualified-provider rights and South Carolina's actions exists only through a third party, Planned Parenthood. Any harm accruing to Edwards is only indirect.

This Court distinguishes between "government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally." O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 788 (1980).

This Court expressly rejected the argument that the any-qualified-provider requirement creates substantive rights in favor of Medicaid beneficiaries with respect to state actions directed against Medicaid providers. Id. at 786 ("In holding that [the any-qualified-provider requirement and two other] provisions create a *substantive* right to remain in the home of one's choice . . . the Court of Appeals failed to give proper weight to the contours of the right conferred by the statutes and regulations.") (emphasis added). This Court did not limit its holding to constitutional due process claims. This Court's specific holding was that the state's action against the provider "did not directly affect the patients' legal rights." O'Bannon, 447 U.S. at 790.

A separate statute establishes the authority of a State to qualify or disqualify a medical provider from its Medicaid program. The Medicaid Act sets forth the exclusion power of a State in 42 U.S.C. § 1396a(p) (hereinafter "the qualification provision"). That subsection provides that "[i]n addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity . . . ." "Exclude" is defined to "include[] the refusal to enter into or renew a participation agreement or the termination of such an agreement." 42 U.S.C. § 1396a(p)(3). A regulation promulgated under the authority of the any-qualified-provider statute confirms that States retain the ability to set reasonable standards relating to the qualifications of providers of Medicaid services. 42 C.F.R. § 431.51(b)(1)(I) and (c)(2).

This Court has held that a party seeking to enforce a statute must possess a private right of action under the particular statute sought to be enforced. Alexander, 532 U.S. at 285-86. For example, in Alexander, the plaintiff claimed disparate treatment in violation of a Department of Justice regulation. Id. at 278-79. This Court held that the claim could not be brought under Section 601 of Title VI of the Civil Rights Act of 1964 because that statute only prohibits intentional discrimination. Id. at 280-81. Thus, any disparate-impact claim could only be brought under Section 602, and any associated private right of action "must come, if at all, from the independent force of § 602." Id. at 286. This Court based its analysis solely on the language of Section 602 and found no evidence of Congressional intent to create a freestanding private right of action under that statute. Id. at 293.

Likewise here, Edwards cannot privately challenge South Carolina's decision to deem Planned Parenthood unqualified as a Medicaid provider. Edwards cannot assert Planned Parenthood's rights, and she was only indirectly affected by South Carolina's action against Planned Parenthood. O'Bannon, 447 U.S. at 790. Edwards does not allege any action by the State of South Carolina that was directed against her or the class she purportedly represents.

In this case, as in Alexander, Edwards must demonstrate unmistakable evidence of Congressional intent to create a private right of action in favor of *her* under the specific statute at issue. Because Edwards claims harm only through South Carolina's disqualification of Planned Parenthood as a provider,

she must have a private right of action to enforce the qualification provision, either separately or in addition to a private right of action under the any-qualified-provider requirement. Edwards cannot prove a private right of action to enforce the qualification provision.

The qualification provision bluntly specifies that a State may exclude a Medicaid provider for any reason that HHS could exclude that provider "in addition to any other authority." 42 U.S.C. § 1396a(p)(1). Because the qualification provision is not contained in a list of requirements for a state Medicaid plan, 42 U.S.C. §§ 1320a-2 and 1320a-10 do not apply and the strict requirements of Alexander, Gonzaga, and Armstrong apply with full force. Those cases set a high hurdle for proving a right of private enforcement.

"Statutes 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." Alexander, 532 U.S. at 289 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)). When the statute's focus is on the agency doing the regulating, the potential for private enforcement is even further removed. Alexander, 532 U.S. at 289.

The qualification provision "entirely lack[s] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." Gonzaga, 536 U.S. at 287. It grants no private rights to any identifiable class. Id. at 284. It is not phrased with an unmistakable focus on the parties claiming the benefit—Medicaid beneficiaries. Id. Moreover, "the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to

contracts between a private party and the government." Armstrong, 575 U.S. at 332.

Furthermore, the administrative remedies in the Medicaid Act are incompatible with private enforcement of the qualification provision. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Alexander, 532 U.S. at 290. The existence of such remedies is relevant not only to rebut a presumption of Congressional intent to create a private right of action under Blessing, it is also relevant to the question whether Congress intended to create a private right in the first place. Alexander, 532 U.S. at 290. When it is clear that Congress intended to confer a right, then the lack of an adequate scheme of administrative remedies supports an inference that the injured party may sue under Section 1983. Wright, 479 U.S. at 224-29. However, when there is no indication Congress intended to benefit a claimant, the lack of administrative remedies only buttresses the conclusion that a private right of action in favor of that claimant was not contemplated. It would be anomalous to imply a private right of action from Congressional silence after this Court has expressly held that no such right exists. O'Bannon, 447 U.S. at 790.

Nothing in the qualification provision provides the least hint of any indication that Congress intended Edwards and her fellow Medicaid beneficiaries to be allowed to privately enforce it under Section 1983. The structure and language of the Medicaid Act strongly supports the conclusion that a State's qualification or disqualification is reviewable only through the

prescribed administrative system and by only the directly affected party—the medical provider.

V. The improper posture adversely affected the substantive rights of the State of South Carolina and its citizens.

At best, the any-qualified-provider provision confers only a right to choose among *qualified* providers. 42 U.S.C. § 1396a(a)(23)(A); O'Bannon, 447 U.S. at 785. Nothing in that subsection grants Medicaid beneficiaries a right to determine for themselves which providers are qualified. The Medicaid Act addresses qualifications in a separate statutory provision: the qualification provision. 42 U.S.C. § 1396a(p)(1).

The Fourth Circuit erred by overlooking statutory context and applying a dictionary definition to interpret the word "qualified." See Baker, 941 F.3d at 702. The court narrowly construed "qualifications" to mean "a provider's competency to perform a particular medical service." Id. at 702. The court expressly held that the term does not relate to "any conceivable state interest." Id. In so doing, the court turned the qualification provision on its head. The qualification provision "preserves the state's ability to exclude entities from participating in Medicaid under 'any other authority.'" First Med. Health Plan, Inc. v. Vega-Ramos, 479 F.3d 46, 53 (1st Cir. 2007). The legislative history indicates that the qualification provision "was intended to permit a state to exclude an entity from its Medicaid program for any reason established by state law." Id. "The program was designed to provide the states with a degree of flexibility in designing plans that meet their individual needs." Addis v. Whitburn,

153 F.3d 836, 840 (7th Cir. 1998). Therefore, "states are given considerable latitude in formulating the terms of their own medical assistance plans." Id. This reflects the fact that establishing qualifications for medical providers is a traditional state function. Manion v. N.C. Med. Bd., 693 Fed. App'x 178, 181 (4th Cir. 2017). It also recognizes that States must expend significant taxpayer resources to participate in the Medicaid program. Planned Parenthood of Greater Tex. Family Planning and Preventive Health Servs., Inc. v. Smith, 913 F.3d 551, 571 (5th Cir. 2019) (Jones, J., concurring).

The Fourth Circuit also erred in holding that the qualification provision does not relate to any conceivable state interest. Whereas the any-qualified-provider provision tends to benefit Medicaid beneficiaries, the qualification provision gives States flexibility to tailor their Medicaid programs to the individual needs of the State. The any-qualified-provider provision is limited by the qualification provision, not vice versa. Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170, 177-78 (2nd Cir. 1991) (holding that Medicaid beneficiaries have a legitimate entitlement to a choice in providers only to the extent those providers are qualified and participating in the Medicaid program).

In applying a dictionary definition, the Fourth Circuit overlooked more pertinent indicators of the legislative intent of the word "qualified" in the Medicaid Act. See Baker, 941 F.3d at 702. The word may not be defined in the any-qualified-provider subsection, but it is used frequently in the Medicaid

Act. The Definitions section includes several uses of the term. See 42 U.S.C. § 1396d(l)(2)(A) (defining "federally-qualified health center services" and "federally-qualified health center"); (m) (defining "qualified family member"); (n) (defining "qualified pregnant woman or child"); (p) (defining "qualified medicare beneficiary"); (q) (defining "qualified severely impaired individual"); and (s) (defining "qualified disabled and working individual"). In each of these definitions, the term "qualified" relates to qualifications under the Medicaid Act or other relevant statutes.

A good indicator of legislative intent can be found in 42 U.S.C. § 1396r-1c(b)(2). In that subsection, "qualified entity" is defined to mean an entity that is both "eligible for payments under a State plan approved under this subchapter" and "determined by the State agency to be capable of making [requisite] determinations." Section 1396r-1c(b)(2)(A). States are expressly allowed to limit the classes of entities that may become qualified entities in order to prevent fraud and abuse. Section 1396r-1c(b)(2)(B).

The lack of a definition of "qualified" in the any-qualified-provider requirement reflects the fact that States are given great latitude to determine qualifications for medical providers under the Medicaid Act. See Addis, 153 F.3d at 840. But the Medicaid Act generally uses the term to refer to qualifications under the statute, not just qualifications to perform a particular operation.

The Fourth Circuit also erred in construing "qualified" solely through the lens of Medicaid beneficiaries' rights under the any-qualified-provider

provision. HHS does not appear to interpret the word "qualified" in that provision independently of the qualification provision. A HHS regulation promulgated under the any-qualified-provider provision associates the word "qualified" with the freedom of States to set reasonable standards for qualifications of providers. 42 C.F.R. § 431.51(a)(1), (b) and (c)(2). HHS, in an April 19, 2016 letter providing guidance to state Medicaid agencies, interpreted the word "qualified" to mean "qualified to furnish Medicaid services" within the meaning of 42 C.F.R. § 431.51. (CMS letter, p. 2.) HHS subsequently rescinded even that minor narrowing of state authority because it unduly "limited states' flexibility with regard to establishing reasonable Medicaid provider qualification standards." (CMS letter dated Jan. 19, 2018.)

The word "qualified" in the any-qualified-provider requirement plainly refers to the qualification provision, and while its meaning *encompasses* both professional competence and licensure requirements, it is broad enough to include other state-specific reasons for making eligibility decisions as well. The Fourth Circuit's interpretation to the contrary contravenes this Court's precedent holding that the any-qualified-provider requirement does not extend enforceable rights to Medicaid beneficiaries. O'Bannon, 447 U.S. at 790.

VI. Recognition of a private right of action to challenge a State's qualification determination frustrates South Carolina's interests and Congressional intent.

The Fourth Circuit worried that unless federal courts step in and second guess State disqualifications of Medicaid providers, the any-qualified-provider requirement will be robbed of all meaning. Not so. This Court has held that private enforcement rights should not be implied unless the lack of enforcement mechanisms would reduce those rights to "a dead letter." Suter v. Artist M., 503 U.S. 347, 360-61 (1992). Refusing to allow private enforcement of a State qualification determination does not reduce the rights of Medicaid beneficiaries to a dead letter because they can still choose *among* qualified providers. And both the federal HHS and the affected medical provider can contest the State's determination if appropriate. Under South Carolina's Medicaid program, for example, medical providers have a right to a hearing before a proposed exclusion, suspension, or termination. S.C. Code Regs. 126-404. South Carolina also allows administrative appeals. S.C. Code Regs. 126-150.

The Eighth Circuit recognized that allowing a private right of action in favor of Medicaid beneficiaries "would result in a curious system for review." Does, 867 F.3d at 1041. The administrative regime requires the medical provider to exhaust its administrative remedies before seeking judicial review. Id. But a private right of action allows individual beneficiaries to separately litigate the qualifications of a provider immediately in federal court under Section 1983. Id.

The potential for parallel litigation and inconsistent results rightly gave the court reason to doubt that a private right of action to contest a medical provider's qualifications under the Medicaid Act was intended. Id. at 1042.

Allowing Medicaid beneficiaries a private right of action to enforce the qualification provision would frustrate the administrative scheme Congress put in place. Planned Parenthood has a right to challenge its disqualification in state administrative proceedings. Planned Parenthood of Gulf Coast, Inc. v. Gee, 862 F.3d 445, 484 (5th Cir. 2017) (Owen, J., dissenting). Planned Parenthood (and associated entities) often fails to pursue its administrative remedies, preferring to join with its clients in their private action in federal court. Id. At a minimum, the existence of an adequate administrative remedy for Planned Parenthood does not render Edwards' rights under the any-qualified-provider requirement "a dead letter." Suter, 503 U.S. at 360-61.

As Judge Jones on the Fifth Circuit recently recognized in encouraging the Fifth Circuit to reconsider the questions presented here *en banc*, "it makes no practical sense to hold that a Medicaid provider . . . may simply bypass state procedures, which are required by the Medicaid statute, and use patients as stalking horses for federal court review of its status." Smith, 913 F.3d at 569 (Jones, J., concurring). The federal-court proceeding can effectively second-guess and/or force the hand of both HHS and the State Medicaid program administrator.

Moreover, it imposes the high cost of litigation on top of an enormously expensive program. Id. at 571.

CONCLUSION

Amici respectfully request that this Court grant the petition, definitively resolve which framework lower courts should use when deciding whether a statute creates a private right enforceable under § 1983, hold that Medicaid's any-qualified-provider provision does not create private rights, reverse the Fourth Circuit, and vacate the order enjoining South Carolina from enforcing its qualification determination.

Respectfully submitted,

Timothy J. Newton
Counsel of Record
Murphy & Grantland, P.A.
4406-B Forest Drive
P.O. Box 6648
Columbia, SC 29260
(803)782-4100
tnewton@murphygrantland.com

Counsel for Amici Curiae

APPENDIX

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APPENDIX A

Title	First	Last
Senate Majority Leader	Harvey	Peeler Jr.
Senator	Shane	Massey
Senator	Thomas	Alexander
Senator	Sean	Bennett
Senator	Paul	Campbell Jr.
Senator	George E. "Chip"	Campsen
Senator	Richard	Cash
Senator	Wes	Climer
Senator	Thomas "Tom"	Corbin
Senator	Ronnie	Cromer
Senator	Tom	Davis
Senator	Stephen	Goldfinch
Senator	Lawrence K. "Larry"	Grooms
Senator	Shane	Martin

Senator	Rex	Rice
Senator	Katrina Frye	Shealy
Senator	Scott	Talley
Senator	Ross	Turner
Senator	Daniel B. "Danny"	Verdin III
Senator	Tom	Young Jr.
Speaker	James H. "Jay"	Lucas
House Majority Leader	Gary	Simrill
Speaker Pro Tempore	Thomas E. "Tommy"	Pope
Representative	Merita A. "Rita"	Allison
Representative	Bruce	Bannister
Representative	Linda "Lin"	Bennett
Representative	Bart	Blackwell
Representative	Jeffrey A. "Jeff"	Bradley
Representative	Bruce	Bryant
Representative	James Mikell "Mike"	Burns

Representative	Micajah P. "Micah"	Caskey
Representative	William M. "Bill"	Chumley
Representative	Gary	Clary
Representative	Alan	Clemmons
Representative	Neal	Collins
Representative	Bobby	Cox
Representative	Westley P.	Cox
Representative	Heather	Ammons-Crawford
Representative	Joeseph	Daning
Representative	Sylleste	Davis
Representative	Greg	Delleney*
Representative	Jason	Elliott
Representative	Shannon	Erickson
Representative	Raye	Felder
Representative	Cally R. "Cal"	Forrest
Representative	Russell	Fry
Representative	Craig	Gagnon
Representative	Leon D. "Doug"	Gilliam
Representative	Patrick	Haddon

Representative	Kevin	Hardee
Representative	William G. "Bill"	Herbkersman
Representative	William Lee	Hewitt
Representative	Jonathon	Hill
Representative	David	Hiott
Representative	William M. "Bill"	Hixon
Representative	Chip	Huggins
Representative	Max	Hyde Jr.
Representative	Jeffrey E. "Jeff"	Johnson
Representative	Stewart	Jones
Representative	Wallace H. "Jay"	Jordan Jr.
Representative	Randy	Ligon
Representative	Dwight	Loftis
Representative	Steven	Long
Representative	Phillip	Lowe
Representative	Josiah	Magnuson
Representative	Richard "Rick"	Martin
Representative	John	McCravy III
Representative	Adam	Morgan

Representative	Dennis	Moss
Representative	V. Stephen "Steve"	Moss
Representative	Christopher J. "Chris"	Murphy
Representative	Brandon	Newton
Representative	Weston	Newton
Representative	Melissa	Oremus
Representative	Joshua	Putnam*
Representative	Murrell	Smith Jr.
Representative	Garry	Smith
Representative	Tommy	Stringer
Representative	Edward R. "Eddie"	Tallon
Representative	Bill	Taylor
Representative	Anne	Thayer
Representative	McLain R. "Mac"	Toole
Representative	Ashley	Trantham
Representative	John Taliaferro "Jay"	West IV
Representative	Brian	White
Representative	Mark	Willis

Representative	Christopher Sloan "Chris"	Wooten
Representative	Richard L. "Richie"	Yow

*Former

APPENDIX B

DEPARTMENT OF
HEALTH AND HUMAN
SERVICES
Centers for Medicare &
Medicaid Services 7500
Security Boulevard, Mail Stop S2-26-12
Baltimore, MD 21244-1850

SMD: #18-003

RE: Rescinding SMD #16-005
Clarifying "Free Choice of
Provider" Requirement

January 19, 2018

Dear State Medicaid Director:

On April 19, 2016, the Center for Medicaid and CHIP Services (CMCS) and the Center for Program Integrity (CPI) issued a State Medicaid Director Letter that provided guidance to state Medicaid agencies on compliance with Section 1902(a)(23) of the Social Security Act (the "any willing provider" or "free choice of provider" provision).

We are concerned that the 2016 Letter raises legal issues under the Administrative Procedure Act, and limited states' flexibility with regard to establishing

reasonable Medicaid provider qualification standards. For these reasons, we are rescinding the April 19, 2016 Letter (SMD #16-005). States should continue to look to Section 1902(a)(23) and our regulations at 42 C.F.R. § 431.51 to determine their obligations under Section 1902(a)(23). We may provide further guidance in the future.

Sincerely,

/s/

Brian Neale
Director, CMCS

/s/

Alec Alexander
Director, CPI

APPENDIX C

DEPARTMENT OF
HEALTH AND HUMAN
SERVICES
Centers for Medicare &
Medicaid Services 7500
Security Boulevard, Mail Stop S2-26-12
Baltimore, MD 21244-1850

SMD # 16-005

Re: Clarifying "Free Choice of Provider" Requirement in Conjunction with State Authority to Take Action against Medicaid Providers

April 19, 2016

Dear State Medicaid Director:

The Center for Medicaid and CHIP Services (CMCS) and Center for Program Integrity (CPI) are issuing this State Medicaid Director Letter to provide guidance to state Medicaid agencies on protecting the right of Medicaid beneficiaries to receive covered services from any qualified provider willing to furnish such services when the state exercises its authority to take action against providers that affects beneficiary access to

those providers, including but not limited to the denial or termination of provider enrollment, or the exclusion of providers from program participation.

Background

Under section 1902(a)(23) of the Social Security Act, Medicaid beneficiaries generally have the right to obtain medical services "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide . . . such services." This provision is often referred to as the "any willing provider" or "free choice of provider" provision. Implementing regulations at 42 C.F.R. § 431.51(b)(1) require a state plan to allow a beneficiary to obtain Medicaid services from any institution, agency, pharmacy, person, or organization that is (i) qualified to furnish services and (ii) willing to furnish them to that particular beneficiary. There is an exception for beneficiaries enrolled in certain managed care plans (to permit such plans to restrict beneficiaries to providers in the managed care plan network), except that such plans cannot restrict free choice of family planning providers. See section 1902(a)(23)(B); 42 C.F.R. § 431.51(b)(1); 42 C.F.R. Part 438.

State Authority to Establish Provider Qualifications

The "free choice of provider" provision does not infringe on states' traditional role of setting "reasonable standards relating to the qualifications of providers." 42 C.F.R. § 431.51(c)(2). States must propose any standards relating to the qualifications of providers

during the Medicaid state plan approval process, as specified in section 1902(a)(22) of the Act. Because the "free choice of provider" provision guarantees Medicaid beneficiaries the right to see any willing and "qualified" provider of their choice, this provision limits a state's authority to establish qualification standards, or take certain actions against a provider, unless those standards or actions are related to the fitness of the provider to perform covered medical services—*i.e.*, its capability to perform the required services in a professionally competent, safe, legal, and ethical manner—or the ability of the provider to appropriately bill for those services. Such reasons may *not* include a desire to target a provider or set of providers for reasons unrelated to their fitness to perform covered services or the adequacy of their billing practices. The failure of a state to apply otherwise reasonable standards in an evenhanded manner may suggest such targeting. For instance, if a state were to take certain actions against one provider or set of providers, but not other similarly situated providers, it would raise questions as to whether the state is impermissibly targeting disfavored providers.

Moreover, when invoking standards that are validly related to a provider's "qualifications," the "free choice of provider" provision ensures that a state may not deny Medicaid beneficiaries the right to see the provider of their choice unless there is a sufficient basis. A state's action against a provider affecting beneficiary access to the provider must be supported by evidence of fraud or criminal action, material non-compliance with relevant requirements, or material issues concerning the fitness of the provider to perform

covered services or appropriately bill for them. Taking such action against a provider without such evidence would not be in compliance with the free choice of provider requirement. If a state does not have evidence supporting its finding that a provider failed to meet a state standard, that provider remains "qualified to furnish" Medicaid services. 42 C.F.R. § 431.51(b)(1)(I).

The "free choice of provider" provision is specific with respect to the free choice of family planning providers. Consistent with the reasonable standards guidance above, states may not deny qualification to family planning providers, or take other action against qualified family planning providers, that affects beneficiary access to those providers—whether individual providers, physician groups, outpatient clinics or hospitals—solely because they separately provide family planning services or the full range of legally permissible gynecological and obstetric care, including abortion services[1] (not funded by federal Medicaid dollars, consistent with the federal prohibition), as part of their scope of practice.

Conclusion

Pursuant to § 431.51(b)(1)(i), states may establish provider standards or take action against Medicaid providers that affects beneficiary access to those providers only (1) based on reasons relating to the fitness of the provider to perform covered medical

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[1] Federal Medicaid funding of abortion services is not permitted under federal law except in certain extraordinary circumstances (in cases of rape, incest, or when the life of the woman would be in danger).

services or to appropriately bill for those services, and (2) with supporting evidence of the provider's failure to meet the state's reasonable provider standards. This is consistent with longstanding CMS policy that Medicaid beneficiaries are provided with competent care by qualified providers and have the same ability to choose among available providers as those with private coverage.

Providing the full range of women's health services neither disqualifies a provider from participating in the Medicaid program, nor is the provision of such services inconsistent with the best interests of the beneficiary, and shall not be grounds for a state's action against a provider in the Medicaid program.

CMS is available to work closely with each state to ensure compliance with Medicaid's "free choice of provider" provision while at the same time preserving states' authority to take appropriate actions against providers in their Medicaid programs. If you have any questions regarding this information, please contact Kirsten Jensen, CMCS Director Division of Benefits and Coverage, 410-786-8146.

Sincerely,

/s/

Vikki Wachino
Director

cc:

National Association of Medicaid Directors

National Academy for State Health Policy

National Governors Association

American Public Human Services Association

Association of State Territorial Health Officials

Council of State Governments

National Conference of State Legislatures