No. 17-1492

IN THE

Supreme Court of the United States

REBEKAH GEE, SECRETARY,
LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,

Petitioner,

v.

PLANNED PARENTHOOD OF GULF COAST, INC., ET AL,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Planned Parenthood affiliates provide essential medical care to low-income individuals through state Medicaid programs. Louisiana terminated the Medicaid provider agreements of a Planned Parenthood affiliate without cause. The affiliate and its patients sued under 42 U.S.C. § 1983. They invoked the Medicaid Act's free-choice-of-provider provision, which states that "any individual eligible for medical assistance" "may obtain such assistance from any institution" that is "qualified to perform the service or services required" and "undertakes to provide [the individual] such services." 42 U.S.C. § 1396a(a)(23)(A). The question presented is:

Whether the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), confers a right enforceable under 42 U.S.C. § 1983.

RULE 29.6 STATEMENT

Respondent Planned Parenthood Gulf Coast, Inc. is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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BRIEF IN OPPOSITION

Respondents Planned Parenthood Gulf Coast, Inc. (PPGC) and Jane Does 1-3 respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Rebekah Gee, Secretary of the Louisiana Department of Health and Hospitals.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 862 F.3d 445. The opinion of the district court (Pet. App. 129a-226a) is reported at 141 F. Supp. 3d 604.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2017. A petition for rehearing was denied on November 28, 2017 (Pet. App. 229a). On February 1, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 27, 2018. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

PPGC provides essential medical services to low-income Louisiana residents through the state's Medicaid program. Louisiana terminated PPGC's participation in that program, initially claiming that it could do so at will, for no reason whatsoever. Pet. App. 7a. The state later attempted to justify its decision with reasons that the courts below found likely meritless. *Id.* at 7a-10a, 36a-42a, 212a-17a.

PPGC and three of its patients sued under 42 U.S.C. § 1983, contending that the state's decision violates (among other things) the Medicaid Act's free-choice-of-provider requirement, 42 U.S.C.

§ 1396a(a)(23). Pet. App. 3a-4a. That provision gives Medicaid recipients the right to choose to receive their medical care from any qualified and willing provider. *Id.* at 3a.

The district court preliminarily enjoined the state health secretary (petitioner) from terminating the state's Medicaid provider agreements with PPGC. Pet. App. 129a-226a. The court of appeals affirmed in pertinent part. *Id.* at 1a-81a. As relevant here, both the district court and court of appeals held that the patients may sue under Section 1983 to enforce the Medicaid Act's free-choice-of-provider requirement. *Id.* at 23a, 191a-92a.

1. PPGC is an independently incorporated affiliate of Planned Parenthood Federation of America (PPFA). Pet. App. 139a. It operates two health centers in Louisiana—one in Baton Rouge and one in New Orleans. *Id.* at 4a, 135a. Both are in medically underserved communities. *Id*. Neither of the health centers performs abortions. *Id.* at 4a, 136a.[1]

PPGC's health centers provide essential medical care to thousands of low-income Louisiana residents through Medicaid. Pet. App. 4a, 135a. They offer a range of services, including annual physical exams, screenings for breast cancer and cervical cancer, contraception, pregnancy testing and counseling, and other preventative health services. *Id.* at 4a, 135a-

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[1] Numerous state-imposed obstacles have prevented PPGC from providing abortion in Louisiana. *See generally* Compl. ¶¶ 33-74, ECF No. 11-4, *Planned Parenthood Gulf Coast, Inc. v. Gee*, No. 3:18-cv-176 (M.D. La. Feb. 23, 2018). In any event, Medicaid does not pay for abortion except under very narrow circumstances allowed by federal law. *See Harris v. McRae*, 448 U.S. 297, 302 (1980).

36a. As of 2014, these two health centers served over 5,200 Medicaid patients. *Id.* at 135a. More than 60% of visits to them are by Medicaid patients. *Id.*

The individual respondents are patients who have received care at PPGC's health centers. Pet. App. 4a-5a, 136a. They chose to obtain medical care there for many reasons, including because they receive excellent care; they trust and are comfortable with the providers; and they lack timely access to equivalent health care services through other providers. *Id*. They wish to continue to receive their care from PPGC and do not know where else they could get the same quality and type of care because of the small number of providers serving Medicaid recipients. *Id.* at 136a; Resp. C.A. Br. 12.

2. In 2015, an anti-abortion group released heavily edited videos that purportedly depicted individuals from PPFA and a PPGC health center in Texas discussing the sale of fetal tissue. Pet. App. 6a, 138a. The videos are misleading and deceptive—no Planned Parenthood affiliate sells fetal tissue for profit.[2] Indeed, although government officials in about a dozen states have conducted investigations, none has found evidence to support that claim. Resp. C.A. Br. 5 & n.6. And the videos have nothing to do with PPGC's Louisiana health centers. It is undisputed that neither of them "performs abortions or

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[2] Letter from Cecile Richards, President, Planned Parenthood, to John A. Boehner, Speaker, U.S. House of Representatives, et al. 6-7 (Aug. 27, 2015), ECF No. 37-4, *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 2:16-cv-2284 (D. Kan. July 5, 2016); Tamar Lewin, *Planned Parenthood Won't Accept Money for Fetal Tissue*, N.Y. Times (Oct. 13, 2015), https://www.nytimes.com/2015/10/14/us/planned-parenthood-to-forgo-payment-for-fetal-tissue-programs.html.

has ever participated in a program involving donation of fetal tissue." Pet. App. 2a-3a; *see id.* at 132a.

Following the videos' release, three states—Louisiana, Alabama, and Arkansas—immediately terminated the Medicaid provider agreements of the Planned Parenthood affiliates in those states, and other states began investigations.[3]

In Louisiana, petitioner sent PPGC a notice stating that the state was terminating PPGC's Medicaid provider agreements, effective 30 days later. Pet. App. 6a-7a, 140a-41a. Although federal law required Louisiana to give PPGC notice of the basis of exclusion, 42 C.F.R. §§ 1002.212, 1001.2001, petitioner gave no reason in the notice of termination. Pet. App. 7a, 140a-41a. Instead, the letter simply claimed that the agreements are terminable at will. *Id.* The Governor of Louisiana's simultaneous press release made clear, however, that the termination was motivated by animus toward Planned Parenthood. *Id.* at 7a, 141a-42a (Governor's statement that "Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life").

Faced with imminent termination of the contracts, respondents decided to bring suit to ensure continuity of care for patients, rather than pursuing administrative review (which would not preserve the

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[3] *See Does v. Gillespie*, 867 F.3d 1034, 1038 (8th Cir. 2017) (Arkansas); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1212 (M.D. Ala. 2015) (Alabama); *see also Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1212-13 (10th Cir. 2018), *petition for cert. pending*, No. 17-1340 (Mar. 21, 2018) (Kansas investigation).

status quo and was not available to the patients in any event). Resp. C.A. Br. 7, 11.[4]

3. Respondents sued under 42 U.S.C. § 1983 to challenge Louisiana's decision to terminate PPGC's participation in Medicaid. Pet. App. 8a. They allege that Louisiana's decision violates the Medicaid Act and the Equal Protection Clause and imposes an unconstitutional condition. *Id.* at 3a, 156a. The first claim relies upon the Medicaid Act's free-choice-of-provider provision, which requires a state Medicaid plan to "provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution" that is "qualified to perform the service or services required" and "undertakes to provide" those services. 42 U.S.C. § 1396a(a)(23)(A). Respondents sought a temporary restraining order and preliminary injunction so that patients could continue receiving care. Pet. App. 8a.

At a hearing on respondents' motion for temporary relief, petitioner's counsel agreed that PPGC was "competen[t]" to provide care to Medicaid patients and that the termination was unrelated to PPGC's qualifications. Pet. App. 8a & n.3, 28a, 147a-48a. Instead, petitioner's counsel said, the mislead-

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[4] Petitioner's initial termination decision would not have been stayed if PPGC had appealed the decision through the state administrative process. *See* Decl. of M. Linton 18-19, D.C. ECF No. 46-1 (Oct. 9, 2015) (state's initial termination letter, providing for administrative review under La. Rev. Stat. § 46:107, which does not stay termination pending administrative review). PPGC therefore sued rather than pursuing administrative remedies. Petitioner's second termination decision would have been stayed if PPGC had pursued administrative review, *id.* at 39 (second termination notice, providing for suspensive appeal)—but by then, PPGC already had sued to ensure continuity of care for its patients.

ing videos were the "motive" for the termination. *Id.* at 148a.

After the hearing, Louisiana changed its approach. It withdrew the "at will" termination letter and notified PPGC that it was now terminating PPGC's Medicaid provider agreements "for cause." Pet. App. 8a-9a, 150a-51a. The new notice of termination gave three reasons for the termination (all post hoc): (1) two False Claims Act cases that had been filed against PPGC—one that PPGC already had settled, and one that PPGC later settled, both without any admission of liability; (2) unspecified "misrepresentations" that PPGC allegedly made to petitioner in letters responding to questions about the deceptive videos; and (3) the mere fact that Louisiana was investigating PPGC. *Id*. at 9a-10a.

Respondents amended their complaint to address the revised termination notice and its specious reasoning. Pet. App. 10a, 153a. Respondents also renewed their request for temporary and preliminary relief. *Id*. Petitioner moved to dismiss. *Id.*

4. The district court denied petitioner's motion to dismiss and entered a temporary restraining order, which it later converted to a preliminary injunction by consent of the parties. Pet. App. 129a-226a. The court first concluded that respondents had established a likelihood of success on the Medicaid Act claim. *Id.* at 11a, 191a. As part of that analysis, the court considered whether the Medicaid Act's free-choice-of-provider requirement is enforceable under Section 1983. *Id.* at 11a, 191a-202a. Applying the factors identified by this Court in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the court concluded that it is. Pet. App. 192a-95a.

The district court explained that the statute contains "individual[ly] focus[ed]," "rights-creating . . . language" that "clearly empowers" a Medicaid patient to "choose amongst . . . competent" providers, because it gives "[*a*]*ny individual*" the right to obtain medical treatment from "*any*" provider that is "qualified." Pet. App. 194a, 199a (emphases added; internal quotation marks omitted). The statutory language also provides a "straightforward" standard for enforcement because it asks whether a provider is "qualified"—meaning "competent" to provide treatment. *Id.* at 204a-05a. And the statute uses "mandatory" terms—it says that the states "*must*" include the free-choice-of-provider right in their Medicaid plans. *Id.* at 191a, 194a, 196a. Finally, the court noted that the federal government had issued guidance and filed a brief in this case taking the view that the free-choice-of-provider provision is enforceable under Section 1983. *Id.* at 144a-45a, 210a-11a.

The district court then concluded that respondents were likely to succeed on the merits of their claim. Pet. App. 211a-17a. The court carefully considered each of the state's proffered reasons for the termination and concluded that likely none has merit. *Id.* The court held that the False Claims Act cases did not justify terminating PPGC from Medicaid because PPGC was never found liable by any factfinder and it expressly disavowed liability in settling. *Id.* at 212a-14a. The district court noted that Louisiana had investigated PPGC in 2013 and 2014 and found no "credible evidence of Medicaid fraud." *Id.* at 137a & n.12; *see id.* at 213a. The court next held that petitioner had not substantiated its allegations that PPGC made "misrepresentations" in responding to questions about the deceptive videos; in fact,

PPGC "credibly contradicted" those allegations. *Id.* at 214a-15a.

And petitioner could not terminate PPGC based solely on its assertion that the state was "investigat[ing]" PPGC—especially when the state had "no actual evidence" of wrongdoing. Pet. App. 215a-17a. Significantly, the court found that "no misconduct of any kind has been alleged, let alone shown, as it pertains to PPGC's operations in Louisiana." *Id.* at 217a. The court also noted the state's concession that PPGC is competent to perform medical care for Medicaid patients. *Id.* at 147a, 205a.

The court concluded that respondents demonstrated irreparable injury absent a preliminary injunction. Pet. App. 217a-20a. It found that the individual respondents and 5,200 other patients depended on PPGC's Louisiana clinics for treatment, and without an injunction, they would likely "have their healthcare disrupted." *Id.* at 218a. (The state conceded this point. *Id.*) Further, the court found that the balance of harms and the public interest favored entering the injunction. *Id.* at 220a-23a. Even the state agreed that "the public has an interest in the neediest of its members having access to healthcare." *Id.* at 222a (quoting state's brief).

5. The court of appeals affirmed. Pet. App. 1a-81a.[5] Like the district court, the court of appeals applied the framework from *Blessing* and *Gonzaga* and concluded that individual patients may sue un-

[5] Judge Owen initially joined the unanimous panel opinion affirming the preliminary injunction. Pet. App. 82a-128a. That opinion was later withdrawn and superseded after Judge Owen changed her position and authored a dissent. *Id.* at 1a-2a.

der Section 1983 to enforce the free-choice-of-provider requirement. *Id.* at 19a-29a.

First, the court held that "[t]he statutory language unambiguously confers [an individual] right upon Medicaid-eligible patients" by "mandating that all state Medicaid plans" permit "any [eligible] individual" to choose "any" provider that is "qualified." Pet. App. 21a-22a (internal quotation marks omitted).

Second, the court determined that the free-choice-of-provider provision "suppl[ies] concrete and objective standards for enforcement" because it asks whether a provider is "qualified" to perform the required medical services—a "simple factual question . . . courts decide every day." Pet. App. 22a (internal quotation marks omitted). Courts can decide the question based on "evidence such as descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and . . . expert testimony regarding appropriate credentials for providing the service"—all without "any balancing of competing concerns or subjective policy judgments." *Id.* at 22a-23a.

Third, the court concluded that "the free-choice-of-provider requirement is couched in mandatory terms." Pet. App. 23a-24a. By federal law, the state "must" include the free-choice-of-provider right in its Medicaid plans. 42 U.S.C. § 1396a(a)(23).

The court of appeals rejected the state's reliance on *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), which held that residents of a nursing home had no "due process rights" to intervene in *state* proceedings before the state closed the home. Pet. App. 24a. The court explained that the case is

"inapposite" because it addressed a due process claim and because the state had a valid health and safety reason to close the home, so the residents in that case had no right to continue receiving care there. *Id.* at 24a, 26a.

The court also rejected the state's argument about *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383-84 (2015), where this Court held that health care providers could not bring suit under the Supremacy Clause or general principles of equity to enforce an entirely different provision of the Medicaid Act. Pet. App. 27a. The court of appeals explained that *Armstrong* concerned a different part of the Medicaid Act with materially different language, and it did not address bringing suit under Section 1983. *Id.* at 27a-28a.

Finally, the court of appeals emphasized that Louisiana "has conceded that PPGC is competent to provide the relevant medical services to any and all non-Medicaid patients." Pet. App. 37a; *see id.* at 26a. The state's termination decision was "unrelated to [PPGC's] competence." *Id.* at 28a. The court explained that if respondents could not challenge a termination decision that is grounded in "reasons *unrelated* to that provider's qualifications," the free-choice-of-provider provision "would be hollow." *Id*.

On the merits, the court emphasized that Louisiana's stated grounds for termination do not relate to PPGC's qualifications to provide medical care and are not valid grounds for excluding a provider under the Medicaid Act. Pet. App. 32a-38a; *see* 42 U.S.C. §§ 1396a(p), 1320a-7. Louisiana cannot "insulate its actions from a § 1396a(a)(23) challenge" simply by alleging misconduct, because that would allow states to "terminate Medicaid providers with impunity and

avoid § 1396a(a)(23)'s mandate altogether." Pet. App. 45a.

Finally, the court noted the obvious harms that would befall the individual respondents in the absence of preliminary injunctive relief, as well as the important public interest in "allowing some of the state's neediest citizens to continue receiving medical care from a medically qualified provider." Pet. App. 50a.

The court therefore affirmed the preliminary injunction, concluding that respondents are likely to succeed on the merits of their Medicaid Act claim and that the balance of equities favors freezing the status quo through a preliminary injunction. Pet. App. 29a-52a.

Judge Owen dissented. Pet. App. 53a-81a. Relying on *O'Bannon*, she took the view that a Medicaid beneficiary has no right to challenge the state's conclusion that a Medicaid provider is unqualified. *Id.* at 53a.

6. Petitioner filed a petition for rehearing en banc, which was denied, with seven judges dissenting. Pet. App. 229a-30a.

ARGUMENT

Petitioner contends (Pet. 22-25) that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), is not privately enforceable under 42 U.S.C. § 1983. The court of appeals applied this Court's settled precedents and correctly rejected that argument. Nearly every court that has considered the issue has reached the same conclusion. The fact that one outlier circuit has disagreed does not justify this Court's review at this time. That is especially

true because this case comes to the Court on a preliminary injunction, and the Court's resolution of the question presented may not matter to the ultimate outcome of this case. There are also pending developments that may shed further light on the legal issue here. Further review is therefore unwarranted. This Court has twice denied petitions presenting the same question, *Betlach v. Planned Parenthood Ariz., Inc.*, 134 S. Ct. 1283 (2014) (No. 13-621); *Sec'y of Ind. Family & Social Servs. Admin. v. Planned Parenthood of Ind., Inc.*, 569 U.S. 1004 (2013) (No. 12-1159), and it should do the same here.[6]

1. The court of appeals correctly held that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), is enforceable under 42 U.S.C. § 1983. Pet. App. 19a. Section 1983 expressly authorizes "any citizen of the United States or other person within [its] jurisdiction" to sue any person who, "under color of" state law, "depriv[ed] [her] of any rights, privileges, or immunities secured by" federal law. 42 U.S.C. § 1983. A Section 1983 action may be brought against a state actor who deprives a person of a right created by a federal statute. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

The federal statutory provision at issue ensures that Medicaid patients can obtain care from the qualified and willing provider of their choice. It states:

> A State plan for medical assistance must . . . provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution . . . qualified to perform the ser-

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6 This question also is presented in the pending petition in *Andersen v. Planned Parenthood of Kansas and Mid-Missouri*, No. 17-1340 (filed Mar. 21, 2018).

> vice or services required . . . [that] undertakes to provide him such services.

42 U.S.C. § 1396a(a)(23)(A). Congress enacted this provision to ensure that Medicaid recipients, like other individuals, could make deeply personal choices about where to obtain medical care free from state interference. *See, e.g.*, S. Rep. No. 90-744, at 183 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 3021. And Congress specifically recognized the importance of that right in the family planning context, providing that even when a state uses a managed-care system, it cannot limit a patient's free choice of provider of family planning services. *See* 42 U.S.C. § 1396a(a)(23)(B) (cross-reference to 42 U.S.C. § 1396d(a)(4)(C)).

a. The court of appeals correctly applied this Court's settled precedents for determining whether a federal statute may be enforced under Section 1983. Those precedents teach that, to be enforceable under Section 1983, a statute must provide "a federal *right*," not merely a federal rule. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). And the statute must "unambiguously" provide that right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

The Court has identified several factors that help answer the question whether a federal statute creates a right enforceable under Section 1983. The Court asks (1) whether Congress clearly "intended that the provision in question benefit the plaintiff"; (2) whether the asserted right is "not so vague and amorphous that its enforcement would strain judicial competence"; and (3) whether the obligation created by the statute is "mandatory." *Blessing*, 520 U.S. at 340-41 (internal quotation marks omitted); *see Gonzaga*, 536 U.S. at 284-85; *Wilder v. Va. Hosp. Ass'n*,

496 U.S. 498, 508-12 (1990). The Court also asks whether, despite those factors, Congress has expressly or impliedly evidenced an intention to foreclose private enforcement. *Gonzaga*, 536 U.S. at 284-85.

The court of appeals correctly identified (Pet. App. 20a-21a) and applied (*id.* at 21a-23a) those principles. First, the court concluded that the plain text of the free-choice-of-provider provision unambiguously shows Congress's intent to give individual Medicaid patients a specific right. *Id.* at 21a-23a. It identifies the people Congress intended to benefit—"individual[s] eligible for medical assistance" under Medicaid—and grants them a particular right—the right to "obtain such assistance" from any qualified and willing provider. 42 U.S.C. § 1396a(a)(23)(A). The statute is "phrased in terms of the persons benefited" and has an "*unmistakable focus*" on those persons, showing Congress's intent "to create not just a private *right* but also a private *remedy*." *Gonzaga*, 536 U.S. at 284 (internal quotation marks omitted). There is no question *who* Congress intended to benefit in this statute, or *what* benefit Congress intended to give them.

Relatedly, the court of appeals observed that Congress defined this individual right using administrable terms. When a statute is written in "vague and amorphous" terms, that is good evidence that Congress did not intend for courts to enforce the statute through individual lawsuits. Pet. App. 21a; *Blessing*, 520 U.S. at 340-41. But here, Congress defined the right using clear and administrable terms: An individual has a right to use any provider that is "qualified" to perform the medical services required and that "undertakes to provide" those services. 42 U.S.C. § 1396a(a)(23)(A). The term "qualified" has a

clear, plain meaning, and courts decide similar questions of qualification and expertise every day. Pet. App. 22a. (Application of that definition is particularly easy in this case, because Louisiana "conceded that PPGC is competent to provide the relevant medical services." *Id.* at 36a; *see id.* at 45a.)

The court of appeals also concluded that the free-choice-of-provider provision is "mandatory," as it must be to be enforceable under Section 1983. Pet. App. 23a. That analysis is straightforward, because the statute specifies that states "must" include the free-choice-of-provider right in their plans. *Id.* at 196a; *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013).

Finally, there is no indication in the statutory text that Congress intended to foreclose a Section 1983 remedy. No language expressly rejects that remedy, and the federal government's "generalized powers . . . to audit and cut off federal funds [are] insufficient to vindicate federal rights." *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1229 (10th Cir. 2018) (quoting *Wilder*, 496 U.S. at 522), *petition for cert. pending*, No. 17-1340 (filed Mar. 21, 2018).

That application of settled law is straightforward and unremarkable. Indeed, nearly every court to have considered the issue has reached the same conclusion. *See* pp. 20-21 & note 9, *infra.*

b. Petitioner's primary response is that the court of appeals' decision conflicts with this Court's approach to the enforcement of Spending Clause legislation in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), and *Gonzaga*, 536 U.S. at

281. Pet. 22-25. But those cases involved materially different statutes.

In *Gonzaga*, this Court considered whether a federal statute "prohibit[ing] the federal funding of educational institutions" that improperly disclose educational records is privately enforceable under Section 1983. 536 U.S. at 276. Unlike the provision here, that statute did not even mention the "individual[s]"—students and parents—who sought to enforce it; it "sp[oke] *only* to the Secretary of Education." *Id.* at 287 (emphasis added). And a separate provision of federal law expressly granted students and parents a "federal review mechanism." *Id.* Those factors, this Court concluded, "squarely distinguished" the case from *Wilder*, 496 U.S. at 501-02, which held that a health care provider *could* sue under Section 1983 to enforce a provision of the Medicaid Act regarding reimbursement rates. Those same factors distinguish *Gonzaga* from this case. *Gonzaga* identifies the relevant principles for determining whether statutory rights are enforceable under Section 1983, but here, those principles support enforcement through Section 1983. The court of appeals appropriately recognized that.

Armstrong concerned both a different legal issue and a different provision of the Medicaid Act. Pet. App. 27a-28a. The issue was not whether the plaintiffs could sue under Section 1983—which expressly provides a right of action in federal court but was not invoked by the plaintiffs—but whether they could imply a right of action under the Supremacy Clause or general principles of equity. *Armstrong*, 135 S. Ct. at 1383-85. The purpose of Section 1983 is to create a cause of action to redress deprivation of a federal right. As a result, "[o]nce a plaintiff demonstrates

that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284.

Further, the provision in *Armstrong*, 42 U.S.C. § 1396a(a)(30)(A), was materially different from the provision here. Pet. App. 28a. It required states to adopt rate-setting plans in accordance with certain "broad and nonspecific" standards. *Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring). Unlike the provision here, it did not identify specific individuals to benefit or describe an individual right in specific and administrable terms. *Id.* at 1385. The court of appeals therefore appropriately recognized that petitioner's "reliance" on *Armstrong* was "misplaced." Pet. App. 27a.

Petitioner is also wrong that under *Armstrong* and *Gonzaga*, the free choice-of-provider provision may be enforced only through the federal government withholding funds from noncomplying states. Pet. 22, 24. As this Court recognized in *Wilder*, the possibility of federal enforcement does not foreclose a private remedy under the Medicaid Act. 496 U.S. at 522.[7] Since *Wilder*, this Court has reaffirmed that the possibility of federal enforcement does not "close the door on § 1983 liability." *Blessing*, 520 U.S. at 348. To be sure, Congress could foreclose a Section 1983 remedy by creating a separate, "comprehensive

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[7] *Wilder* remains good law: The Court distinguished it in *Gonzaga*, 536 U.S. at 289-90, and cited it with approval in *Blessing*, 520 U.S. at 347-48, and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005). To the extent language in *Armstrong* suggests to the contrary, *see* 135 S. Ct. at 1387-88, that language was dicta (the provider did not sue under Section 1983 or the Medicaid Act), and it did not command a majority of the Court.

enforcement scheme" that includes a "private remedy" for the party whose rights are violated. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005). But that has not happened here. And the key question is whether Congress has provided a "more restrictive *private* remedy," *id.* (emphasis added), not whether it has authorized *federal* enforcement, *see, e.g.*, *Suter v. Artist M.*, 503 U.S. 347, 358 (1992); *see also Armstrong*, 135 S. Ct. at 1385 ("The provision for the Secretary's enforcement by withholding funds" did not "*by itself* preclude the availability of equitable relief.").

The federal government itself has taken the position that federal enforcement does not preclude a federal right of action here. The federal government filed briefs in the courts below to make the point that that the free-choice-of-provider provision is enforceable under Section 1983. *See*, *e.g.*, U.S. C.A. Br. 7-9. And federal withholding of funds is cold comfort to the many low-income individuals who will be denied necessary medical care if states are allowed to terminate providers' contracts without any judicial oversight. *See Andersen*, 882 F.3d at 1229 (concluding that the "federal Secretary's withholding Medicaid funds would not redress [the patients'] injuries at all").

Petitioner also relies (Pet. 25-27) on *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). But that case also did not concern enforcement under Section 1983. The question in *O'Bannon* was whether residents of a nursing home had a procedural due process right to a hearing in front of *state* authorities before those authorities closed the home, *id.* at 775—not whether they could bring a Section 1983 action in *federal* court. Further, there was no claim that state

authorities had closed the home on an invalid ground not authorized by the Medicaid Act. Rather, the Court took it as a given that the facility was unqualified, and determined that the residents had no right to a pre-termination hearing on whether an unqualified facility should be closed. *Id*. at 785-88. *O'Bannon* therefore does not cast doubt on enforceability of the free-choice-of-provider right under Section 1983. Pet. App. 24a-27a. And it is especially inapt here, because the state has conceded that PPGC is competent to provide care. *Id.* at 36a, 45a.

Finally, petitioner contends that states have "considerable latitude to determine what makes a potential Medicaid provider 'qualified.'" Pet. 7 (citing 42 U.S.C. § 1396a(p)(1)). That argument goes to the merits, not whether the free-choice-of-provider provision is enforceable under Section 1983. And petitioner's merits argument is wrong. As the court of appeals explained (Pet. App. 32a-33a), Section 1396a(p)(1) does not authorize states to terminate providers for any reason; rather, it provides a list of specific reasons that generally relate to whether a provider is qualified. 42 U.S.C. §§ 1396a(p)(1); 1320a-7, 1320a-7a; *see* Pet. App. 49a. A federal regulation confirms that states may set "reasonable standards *relating to the qualifications of providers*." 42 C.F.R. § 431.51(c)(2) (emphasis added). The provision at issue here likewise focuses on whether the provider is "qualified." 42 U.S.C. § 1396a(a)(23)(A). The important point is that the reason for termination generally must be related to whether the provider is qualified to provide the requested medical services, rather than a pretextual reason.

Here, petitioner conceded that PPGC was "competen[t]" to provide care to Medicaid patients, and that

the termination was unrelated to PPGC's ability to provide such care. Pet. App. 8a & n.3, 28a, 147a-48a. And the district court found that "no misconduct of any kind has been alleged, let alone shown, as it pertains to PPGC's operations in Louisiana." *Id.* at 217a. The courts below therefore found a likelihood of success on respondents' claim that PPGC is a qualified provider and that petitioner violated Section 1396a(a)(23) by terminating its contracts. *Id.* at 35a-42a, 211a-17a. Petitioner did not seek this Court's review of that holding.

2. a. Every court of appeals but one has agreed that the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), is privately enforceable under Section 1983. *See* Pet. App. 19a-29a; *Andersen*, 882 F.3d at 1205; *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 966-68 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283; *Planned Parenthood of Ind., Inc.*, 699 F.3d at 974-75; *Harris v. Olszewski*, 442 F.3d 456, 461-62 (6th Cir. 2006); *see also Silver v. Baggiano*, 804 F.2d 1211, 1216-18 (11th Cir. 1986) (noting in passing that "Medicaid recipients do have enforceable rights under § 1396a(a)(23)"), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 618 (2002). *But see Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017).[8] And nearly every district court that has considered the question presented has agreed that the

[8] Petitioner claims (Pet. 16) a broader circuit split by arguing that the predominant approach conflicts with the Second Circuit's decision in *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1990). But *Kelly Kare* did not involve the enforcement of statutory rights under Section 1983, and as petitioner recognizes (Pet. 16), the court did not apply the *Gonzaga* standard.

free-choice-of-provider provision is enforceable under Section 1983.[9]

The Eighth Circuit's decision is an outlier in both outcome and approach. That court failed to use the analysis set out by this Court in *Blessing*, *Gonzaga*, and similar cases, which focuses on whether the specific language at issue includes the necessary "rights-creating language." *Gonzaga*, 536 U.S. at 290. Ra-

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[9] *See* Pet. App. 191a-97a; *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 236 F. Supp. 3d 974, 978 (W.D. Tex. 2017), *appeal docketed*, No. 17-50282 (5th Cir. Apr. 4, 2017); *Planned Parenthood Se., Inc. v. Dzielak*, No. 3:16-cv-454, 2016 WL 6127980, at *1 (S.D. Miss. Oct. 20, 2016), *appeal docketed*, No. 16-60773 (5th Cir. Nov. 21, 2016); *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 2:16-cv-2284, 2016 WL 3597457, at *15 (D. Kan. July 5, 2016), *aff'd in part, vacated in part sub nom. Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Bader v. Wernert*, 178 F. Supp. 3d 703, 718-20 (N.D. Ind. 2016); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1217 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-566, 2015 WL 13710046, at *6 (E.D. Ark. Oct. 5, 2015), *vacated sub nom. Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017); *Planned Parenthood Ariz., Inc. v. Betlach*, 922 F. Supp. 2d 858, 864 (D. Ariz. 2013), *aff'd*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 902 (S.D. Ind. 2011), *aff'd in part, rev'd in part*, 699 F.3d 962 (7th Cir. 2012); *G. ex rel. K. v. Hawai'i Dep't of Human Servs.*, No. 08-cv-551, 2009 WL 1322354, at *12 (D. Haw. May 11, 2009); *Women's Hosp. Found. v. Townsend*, No. 07-cv-711, 2008 WL 2743284, at *8 (M.D. La. July 10, 2008); *Kapable Kids Learning Ctr., Inc. v. Ark. Dep't of Human Servs.*, 420 F. Supp. 2d 956, 962 (E.D. Ark. 2005); *L.F. v. Olszewski*, No. 04-cv-73248, 2004 WL 5570462, at *7 (E.D. Mich. Nov. 1, 2004), *rev'd on other grounds and remanded sub nom. Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Martin v. Taft*, 222 F. Supp. 2d 940, 979 (S.D. Ohio 2002). *But see M.A.C. v. Betit,* 284 F. Supp. 2d 1298, 1307 (D. Utah 2003).

ther than analyze the specific text of 42 U.S.C. § 1396a(a)(23), the Eighth Circuit instead focused on the fact that the provision exists within a set of requirements for state Medicaid plans. *Gillespie*, 867 F.3d at 1041. The Eighth Circuit also treated the possibility of federal enforcement as a clear indication that Congress intended to preclude private enforcement, *id.*—even though *Wilder*, a binding precedent of this Court, rejected that exact argument, *see* 496 U.S. at 521-23, and the Eighth Circuit has recognized *Wilder*'s continuing vitality, *see Ctr. for Special Needs Tr. Admin., Inc. v. Olson,* 676 F.3d 688, 700 (8th Cir. 2012).[10]

b. There is no urgent need to resolve the lopsided disagreement in the courts of appeals. Petitioner suggests that the decision below will expose states to "hundreds of § 1983 claims" challenging "hundreds of disqualification decisions" based on the free-choice-of-provider provision. Pet. 5, 19. But that assertion has been disproven by the experience in the many circuits that have permitted individuals to bring those claims. Since the first appellate decision permitting enforcement of the free-choice-of-provider provision under Section 1983 (the Sixth Circuit's decision in *Harris* in March 2006), we are aware of only nine district court decisions involving lawsuits challenging the termination of Medicaid providers through the free-choice-of-provider provision and Section 1983, *see* note 9, *supra* (first nine cases), plus

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[10] Post-*Armstrong*, courts of appeals have continued to hold that other provisions of the Medicaid Act are enforceable under Section 1983 despite the prospect of federal enforcement. *See, e.g.*, *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 370-73 (5th Cir. 2018) (42 U.S.C. § 1396a(bb)); *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 817, 820-21 (7th Cir. 2017) (42 U.S.C. § 1396a(a)(13)(A)).

a handful of cases challenging other state policies using those statutes, *see, e.g.*, *id*. (next five cases).

All but one of the nine decisions are part of a recent trend of state actions targeting Planned Parenthood affiliates that courts have recognized as unwarranted and politically motivated. *See Bader*, 178 F. Supp. 3d at 724; *see also* Pet. 20 (characterizing PPGC as a "politically controversial provider"). They involve pretextual termination attempts lacking any legal basis or evidentiary support. A typical decision to terminate a provider, by contrast, is based on valid standards and supporting evidence. *See, e.g.*, U.S. C.A. Br. 15-16. In the typical case, therefore, the patient has no reason or basis to claim that she has been denied her choice of any qualified and willing provider. *See id*.

And it would be wrong to assume that Medicaid recipients—some of the poorest members of our society—are enthusiastic about the prospect of bringing lawsuits against states under Section 1983. They would much prefer that states just follow the rules and allow them to obtain health care from qualified and willing providers.

Petitioner also contends (Pet. 19, 24-25, 28-29) that immediate review is necessary because the decision threatens "the administrative and judicial-review processes Congress required states to establish for *providers*." *Id.* at 19. But *patients*—the people with the free-choice-of-provider right—cannot participate in this administrative review process. Pet. App. 191a n.30. (Petitioner conceded this below. *Id.*) The patients are not thwarting the administrative process by filing suit, because they cannot participate in the administrative process in the first place. Accordingly, the only way for patients to se-

cure their right to continued care by a qualified provider of their choice is by filing suit under Section 1983 and obtaining judicial relief.

In any event, it is well-established that a person is not required to exhaust administrative remedies before filing suit under Section 1983. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982). Section 1983 was understood from the start to "provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Id*. at 506. That principle is especially salient here, because the state's asserted reasons were post hoc and plainly pretextual, Pet. App. 43a, and the Governor's statements preordained the outcome of any administrative proceedings, *id.* at 43a, 141a. Especially in these circumstances, there is nothing anomalous about permitting patients to protect their federal rights in a federal forum.

Petitioner argues (Pet. 24) that Congress wanted providers to pursue state administrative remedies. But Congress did not require states to provide an administrative review process; an agency did by regulation, long after Congress established the free-choice-of-provider right. *See* 42 C.F.R. § 1002.213. The regulation says nothing about *Congress's* intent. And the mere availability of administrative review does not preclude other remedies—especially under Section 1983.

3. This case would be an unsuitable vehicle for reviewing the question presented for several reasons.

a. The Court's resolution of the question presented may not matter to the ultimate outcome in this case. This case comes to the Court on grant of a pre-

liminary injunction. The court of appeals emphasized the preliminary, narrow nature of its decision. Pet. App. 2a ("The merits of this case are not now before us; this litigation has not even reached the summary judgment stage, much less the merits."). The district court simply froze the status quo so that low-income individuals would not immediately lose their health care while the courts determined whether the state's termination decision was lawful. *See id.* at 191a-223a. This Court reviews a preliminary injunction for "abuse of discretion" and "uphold[s] the injunction" if "the underlying . . . question is close." *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004) (internal quotation marks omitted).

Further proceedings may make resolution of the question presented unnecessary. The preliminary injunction is based on only one of respondents' claims for relief, the Medicaid Act free-choice-of-provider claim. Respondents also challenged the state's termination decision on other grounds, including under the Equal Protection Clause. Pet. App. 224a-25a. Although the district court ultimately declined to rule on the equal protection claim, it strongly suggested that the claim has merit. *Id.* at 224a ("[I]t appears likely that Plaintiff will be able to prove that the attempted terminations against it are motivated and driven, at least in large part, by reasons unrelated to its competence and unique to it."). Thus, even if the Court granted review and petitioner prevailed on the question presented, it may not matter to the ultimate outcome in this case.

The Court normally does not review interlocutory orders, and for good reason. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) (explaining that fur-

ther proceedings assist the Court by sharpening the dispute and providing additional context). There is no reason to depart from that practice here. Petitioner could, of course, seek this Court's review of the question presented once the courts below have definitively resolved the merits. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

b. There are additional pending developments that may shed light on the issues in this case.

First, petitioner's argument rests in significant part on the availability of federal enforcement of the Medicaid Act. *See* Pet. 24. But as petitioner recognized in requesting an extension of time in which to file her certiorari petition, recent developments suggest that the federal government's views on what states must do to comply with the free-choice-of-provider provision may be changing. *See* Appl. 2 (filed Jan. 30, 2018) (invoking this uncertainty to support an extension of time to file a certiorari petition). In April 2016, the Department of Health and Human Services issued "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." U.S. Dep't of Health & Human Servs., State Medicaid Director Letter No. 16-005, Clarifying "Free Choice of Provider" Requirement in Conjunction with State Authority to Take Action against Medicaid Providers (Apr. 19, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/smd16005.pdf. The guidance did not address whether the free-choice-of-provider right is enforceable under Section 1983, but it did set out the federal government's view of the scope of that right. *E.g.*, *id.* at 2 (under that provision, a state

may not "target a provider or set of providers for reasons unrelated to their fitness to perform covered services or the adequacy of their billing practices," and failure to apply otherwise reasonable standards evenhandedly suggests improper targeting).

On January 19, 2018, the Department issued a new letter to state Medicaid directors rescinding its prior guidance and stating that the federal government "may provide further guidance in the future." *See* U.S. Dep't of Health & Human Servs., State Medicaid Director Letter No. 18-003, Rescinding SMD #16-005 Clarifying "Free Choice of Provider" Requirement (Jan. 19, 2018), https://www.medicaid.gov/federal-policy-guidance/downloads/smd18003.pdf. As a result, there is uncertainty about whether and how the federal government will enforce the free-choice-of-provider provision.

Moreover, there may be further developments in the courts of appeals that bear on the issue in this case. The Eighth Circuit, like the courts below, considered the question presented in the preliminary-injunction context. *Gillespie*, 867 F.3d at 1039. That court may refine its views in further proceedings. And another case is pending in the Fifth Circuit that raises the same issue as in this case. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, No. 17-50282 (5th Cir. argued June 4, 2018).

In light of the interlocutory posture of this case, the questions about enforcement by the federal government, and the ongoing cases in the courts of appeals, it would be better for the Court to allow the issues to percolate than to grant certiorari at this time.

4. If this Court nonetheless wishes to grant certiorari to decide the question presented, it should do so in this case, rather than in *Andersen v. Planned Parenthood of Kansas and Mid-Missouri*, *petition for cert. pending*, No. 17-1340 (filed Mar. 21, 2018). Both petitions present the same question. But the Fifth Circuit decided this case first, and the Tenth Circuit relied on the Fifth Circuit's reasoning throughout its decision. *See Andersen*, 882 F.3d at 1224-29; *see also* Pet. at 21, *Andersen*, *supra* ("[T]he Tenth Circuit's decision follows the reasoning of the Fifth Circuit's majority opinion in [*Gee*].") . And granting review in this case, as opposed to the case from the Tenth Circuit, would ensure that the full Court can hear the case. Of course, the better route would be to deny certiorari in both cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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