

No. 21-1431

IN THE
Supreme Court of the United States

ROBERT M. KERR, in his official capacity as Director,
South Carolina Department of Health and Human Services,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,

Respondents.

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

**AMENDED MOTION TO EXPEDITE CONSIDERATION
OF PETITION FOR A WRIT OF CERTIORARI
AND CONSIDERATION OF THIS MOTION**

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Under Supreme Court Rule 21, Petitioner Robert M. Kerr files this amended motion for expedited consideration of his petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and for expedited consideration of this motion.

On March 8, 2022, the Fourth Circuit issued a published opinion reaffirming its prior panel decision holding that an individual Medicaid beneficiary can sue under § 1983 to enforce § 1396a(a)(23)(A) of the Medicaid Act, also known as the “any-qualified-provider” provision. App.14a. That made the Director’s petition for a writ of certiorari due in this Court on June 6, 2022.

On May 2, 2022, this Court granted certiorari in a case raising similar issues, but in a different statutory context, to “reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.” *Health and Hospital Corp. of Marion County v. Talevski*, No. 21-806.

On May 6, 2022, the Director filed his petition for a writ of certiorari in this Court along with a motion to expedite consideration of the petition to allow the Court to consider the petition at its June 2, 2022 conference, grant the petition, consolidate this case with *Talevski*, and order a single briefing schedule for the two cases.

On May 24, 2022, this Court granted the parties’ joint request in *Talevski* to extend the time to file briefs on the merits in that case. The Court extended the time to file the joint appendix and petitioners’ brief to July 18, 2022, and it extended the time to file respondent’s brief to September 16, 2022.

The Court has not yet acted on Petitioner Kerr’s motion to expedite, and the specific relief it requested—an order directing Respondents to respond to the motion by May 10, 2022, and to file their response to the petition by May 16, 2022—is now moot because those dates have passed. Despite that, the Court has distributed the motion to expedite for consideration at its June 2, 2022 conference. And Respondent’s response is due June 10, 2022.

The distribution date for paid petitions for the Court’s final conference of the Term is June 7, 2022. As a result—and because Petitioner has already waived the 14-day waiting period to file a reply—Petitioner respectfully requests that this Court distribute the instant petition and brief in response for consideration at the June 23, 2022 conference—nearly two full weeks after the brief in opposition is filed on June 10, 2022. If this Court does not distribute the petition for the June 23, 2022 conference, it will be unable to consolidate this case with *Talevski* given the briefing timeline in *Talevski*. And that result will deprive the Court of the opportunity to bring additional clarity to the questions of whether and when Spending Clause legislation gives rise to a private cause of action by considering both *Talevski* and the present case together.

As the decisions below in this case emphasize, the Court’s caselaw on the first question presented in *Talevski* “remains plagued by confusion and uncertainty.” App.28a (Richardson, J., concurring). And “clarity” is badly needed. *Ibid.*

This petition raises the same underlying private-right-of-action question: whether Spending Clause statutes ever give rise to privately enforceable rights under § 1983, and if so, what is the proper framework for deciding when they do? Pet. for Writ of Cert. at i, *Talevski*, No. 21-806 (Nov. 23, 2021); Pet. for Writ of Cert. at i, *Kerr v. Edwards*, No. 21-1431 (May 6, 2022). And granting this petition and considering it alongside *Talevski* would ensure the Court has the best possible opportunity to answer that question because, unlike in *Talevski*, the Medicaid Act provision at issue here involves an “important and recurring” question at the heart of a 5-2 circuit split: whether individual Medicaid recipients have a privately enforceable right to demand a provider of their choice. *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of certiorari).

The instant petition also involves a second important question on which the lower courts are squarely split 3-1 and which may remain unresolved after *Talevski*.

The lower courts disagree over the meaning of this Court’s decision in *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980), and the scope of the alleged right to choose a specific Medicaid provider. Pet. for Writ of Cert. at 31–32, *Kerr*; Motion to Expedite Consideration at 3, *Kerr v. Edwards*, No. 21-1431 (May 6, 2022). That issue on which the lower courts disagree is also worthy of certiorari.

Accordingly, Petitioner respectfully moves to amend his previously filed motion to expedite consideration of his petition so the Court can consider it at the Court’s June 23, 2022 conference. Specifically, Petitioner moves the Court to distribute the petition for consideration at the Court’s June 23, 2022 conference immediately upon receipt of Respondents’ brief in opposition on or before June 10, 2022.

To ensure the petition reaches conference as quickly as possible, Petitioner reiterates that he expressly waives the right to the 14-day waiting period before distribution under Rule 16. And if the Court grants the motion and the petition, Petitioner agrees to be bound by the briefing schedule currently in effect in *Talevski*, meaning Petitioner would file his opening brief and joint appendix on or before July 18, 2022.

Respondents do not consent to the Court granting this motion. But Respondents will not be prejudiced by expedited consideration because they will have had the full allotted time in which to file their brief in opposition. Further, this petition raises substantially the same issues and arguments raised the last time this case came before the Court in an appeal from the district court’s preliminary injunction. *Baker v. Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020) (No. 19-1186). Respondents suffer no prejudice.

If the Court elects not to expedite, pushing consideration of the petition until the Long Conference, the petition should not be held pending the outcome in *Talevski* but should instead be granted to resolve the mature circuit split at issue in the second question presented, an issue that *Talevski* does not raise and may not decide.

Respectfully submitted,

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