NO. 21-806

IN THE

Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, ET AL.,

Petitioners,

v.

GORGI TALEVSKI, BY HIS NEXT FRIEND IVANKA TALEVSKI,

Respondent.

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

BRIEF OF ROBERT M. KERR, DIRECTOR OF SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

As Director of the South Carolina Department of Health and Human Services, Robert M. Kerr is charged with faithfully implementing the state's Medicaid program. After South Carolina determined that abortion providers like Planned Parenthood were not "qualified" to receive Medicaid funding for family planning services, Planned Parenthood and a Medicaid recipient sued the Director's predecessor, claiming a private right of action to challenge that decision.

But Congress did not unambiguously create a private right of action in the Medicaid Act that allows Medicaid recipients to sue States (and their officials) for determining that their preferred provider is unqualified. And because the Act is Spending Clause legislation, that should have been enough to defeat the Medicaid recipient's claims against the Director.

Twice now, though, the Fourth Circuit, applying precedent this Court had previously abandoned, held that Congress *did* unambiguously create a privately enforceable right in the Medicaid Act's any-qualified-provider provision. The Director's petition for a writ of certiorari is pending. So the Director has a strong interest in seeing this Court clear up the confusion in its caselaw and expressly hold that Congress must explicitly create private rights *and* authorize private remedies under Spending Clause legislation like the Medicaid Act.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the amicus and his counsel made any monetary contribution to fund the preparation or submission of this brief. Petitioners and Respondent have submitted blanket consents to the filing of amicus briefs in case.

SUMMARY OF THE ARGUMENT

Spending Clause legislation is "much in the nature of a contract." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The "states receive federal funds in exchange for compliance with concomitant conditions." *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs.* v. *Kauffman*, 981 F.3d 347, 370 (5th Cir. 2020) (en banc) (Elrod, J., concurring). And, like any contract, States must "voluntarily and knowingly" accept those conditions. *Pennhurst*, 451 U.S. at 17.

"There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Ibid.* So Congress has a duty to "speak with a clear voice" and use unambiguous language about the conditions that Spending Clause legislation imposes on the States. *Ibid*. States cannot knowingly foresee a consequence on which Congress was "silen[t]." *McCready* v. *White*, 417 F.3d 700, 703 (7th Cir. 2005) (Easterbrook, J.) (cleaned up).

Yet in two related ways, the Judiciary has imposed on States terms and consequences not clearly specified in Spending Clause legislation. First, courts have held that Spending Clause legislation creates private rights, even when it does not contain "explicit rights-creating terms." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002). Second, together with these implied *rights*, courts have implied *remedies* that allow private individuals to enforce these so-called conditions against the States. Both errors flout traditional contract principles, upend standard statutory interpretation methods, and threaten federalism and the separation-of-powers.

For over 30 years, "the caselaw on implied private rights of action [has been] plagued by confusion and uncertainty." *Planned Parenthood S. Atl.* v. *Kerr*, 27 F.4th 945, 959 (4th Cir. 2022) (Richardson, J., concurring in the judgment). This case presents the perfect opportunity for this Court to clarify that plaintiffs cannot privately enforce Spending Clause statutes through Section 1983 unless Congress explicitly authorizes them to do so. See *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from the denial of certiorari) ("We created this confusion. We should clear it up."). At the very least, the Court should clarify that *Wilder* and *Blessing* are no longer good law, and that Congress does not create privately enforceable rights absent clear and unambiguous language.

ARGUMENT

I. The Court should resolve the confusion in its caselaw over what constitutes an unambiguously conferred private right.

This Court's guidance on when federal spending statutes create private rights enforceable through Section 1983 has not been a "model[ ] of clarity." *Gonzaga*, 536 U.S. at 278. The trouble started when the Court too easily inferred privately enforceable rights by looking at "legislative history" and statutory "objective[s]." *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 424 (1987) (Housing Act); *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 515 (1990) (Medicaid Act amendment). Within a seven-year span, this Court twice tried to pull back the throttle, offering a multifactor test that, even if satisfied, created only a "rebuttable presumption that

the right is enforceable under § 1983." *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997); see also *Suter* v. *Artist M.*, 503 U.S. 347 (1992). Then, the Court pumped the brakes even harder, replacing *Blessing*'s nebulous multifactor test with a firm rule: "unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Gonzaga*, 536 U.S. at 280 (cleaned up). And lest anyone miss the point, the Court *again* intervened to clarify that "later opinions," like *Gonzaga*, "[had] plainly repudiate[d] the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 n* (2015).

That should have settled the matter. See *Jones* v. *District of Columbia*, 996 A.2d 834, 845 (D.C. 2010) (calling *Gonzaga* a "game-changer"). But because this Court never "explicitly overrule[d]" any precedent over its 30-year jurisprudential evolution, lower courts have divided repeatedly on the issue. *Kerr*, 27 F.4th at 959 (Richardson, J., concurring in the judgment). Accord, *e.g.*, *Sabree ex rel. Sabree* v. *Richman*, 367 F.3d 180, 194 (3d Cir. 2004) ("While the analysis and decision of the [lower court] may reflect the direction that future Supreme Court cases in this area will take, currently binding precedent supports the decision of the Court.") (Alito, J., concurring); Pet. for Writ of Cert. at 14–29, 31–32, *Kerr* v. *Planned Parenthood S. Atl.*, No. 21-1431 (May 6, 2022) (discussing circuit splits).

Some courts have continued to follow *Wilder*'s heady approach to justify inferring privately enforceable rights in Spending Clause legislation. *E.g.*, *N.Y. State Citizens' Coal. for Children* v. *Poole*, 922 F.3d 69, 81 & n.4 (2d Cir. 2019). Others have used the "*Blessing* factors" to do the same. *E.g.*, *Saint Anthony Hosp.* v. *Eagleson*, 2022 WL 2437844, at *5 (7th Cir. July 5, 2022). Still others have trodden with "caution," see *Hernandez* v. *Mesa*, 140 S. Ct. 735, 742 (2020), and have refused to imply a privately enforceable right where Congress did not clearly and unambiguously create one, *e.g.*, *Does* v. *Gillespie*, 867 F.3d 1034, 1039–40 (8th Cir. 2017).

The Court should answer petitioner's first question presented by rejecting the notion that Spending Clause legislation ever implicitly allows for private enforcement under Section 1983. Pet. Br. 10–38; *infra* Part II. Considered against the backdrop of common-law contract principles in force at the time Congress enacted Section 1983, no one would have understood it to provide a private remedy for alleged violations of Spending Clause legislation.

At a minimum, the Court should resolve the confusion in its caselaw over what it means for Congress to have "unambiguously conferred" a private right. *Gonzaga*, 536 U.S. at 283. That confusion has spawned multiple circuit splits in the lower courts—including the 5-2 split at the heart of the Director's pending certiorari petition over whether the Medicaid Act's any-qualified-provider provision creates a private right to receive Medicaid funding for services from the provider of one's choice. Unless the Court provides that necessary clarity now, these splits will continue to deepen and spread.

A. To create a private right through Spending Clause legislation, Congress must use explicit, rights-creating terms.

Whether Congress has created a private right through Spending Clause legislation is an exercise in statutory interpretation. *Planned Parenthood S. Atl.* v. *Baker*, 941 F.3d 687, 694–95 (4th Cir. 2019). And when courts interpret statutes, they should always start with the text. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006). That text must use "explicit rights-creating terms" to create private rights. *Gonzaga*, 536 U.S. at 284. "[U]nspoken Congressional intent should be an oxymoron when examining whether Spending Clause legislation contains a private right of action." *Saint Anthony Hosp.*, 2022 WL 2437844, at *22 (Brennan, J., concurring and dissenting in part).

Nevertheless, most lower courts have latched on to "loose standard[s]"—standards this Court created but has since disavowed—and readily found private rights lurking unmentioned in Spending Clause statutes. *Gonzaga*, 536 U.S. at 282. The Court should stop these courts from allowing plaintiffs to enforce anything "short of an unambiguously conferred right" under Spending Clause legislation. *Id.* at 283.

B. Lower court divisions over Medicaid Act provisions highlight the need to clarify that *Gonzaga*'s clear-statement rule controls, not *Blessing*'s multifactor test.

In 1965, Congress created Medicaid, "a federal program that subsidizes the States' provision of medical services" to families and individuals "whose income and resources are insufficient to meet the costs of necessary medical services." *Armstrong*, 575

U.S. at 323 (quoting 42 U.S.C. 1396–1). The program "is a cooperative federal-state program that provides medical care to needy individuals." *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012).

"Like other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong*, 575 U.S. at 323. States create plans and submit them to the Secretary of Health and Human Services for approval and disbursement of funds. 42 U.S.C. 1396-1. If the Secretary later finds that a State has failed to "comply substantially" with the Act's requirements in the administration of the plan, the Secretary may withhold all or part of the State's funds until "satisfied that there will no longer be any such failure to comply." 42 U.S.C. 1396c.

Congress amended the Medicaid Act to add Section 1396a(a)(23)(A) in response to concerns that States were forcing recipients to use one of a limited number of providers. The added provision requires that plans "must" allow "any individual eligible for medical assistance" to obtain "assistance from any [provider] qualified to perform the service . . . who undertakes to provide" it. 42 U.S.C. 1396a(a)(23)(A). Because the Medicaid Act does not define "qualified," States do. And on July 13, 2018, South Carolina's Governor issued an executive order that effectively deemed abortion clinics unqualified to provide family planning services. This prompted Planned Parenthood and one of its Medicaid clients to sue under Section 1983 for an alleged Medicaid Act violation.

Whether this Medicaid amendment—"sometimes referred to as the 'any-qualified-provider' or 'free-choice-of-provider' provision," *Kauffman*, 981 F.3d at 354[2]—provides a private right enforceable through Section 1983 has confounded the lower courts. Five circuit courts have held that it does. *Kerr*, 27 F.4th at 959 (Fourth Circuit); *Planned Parenthood of Kan.* v. *Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Planned Parenthood Ariz. Inc.* v. *Betlach*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc.* v. *Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012); *Harris* v. *Olszewski*, 442 F.3d 456 (6th Cir. 2006). Two circuits, including the Fifth Circuit sitting en banc, have reached the opposite conclusion. *Kauffman*, 981 F.3d at 350 (en banc Fifth Circuit) (overruling *Planned Parenthood of Gulf Coast, Inc.* v. *Gee*, 862 F.3d 445 (5th Cir. 2017)); *Does*, 867 F.3d at 1037 (Eighth Circuit).

Unsurprisingly, courts that have discovered a privately enforceable right in the any-qualified-provider provision have done so using *Wilder* and the *Blessing* factors. Consider the Fourth Circuit, which has now twice held that a private plaintiff can enforce the any-qualified-provider provision.

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[2] The latter label overlooks the express qualifier that beneficiaries may only choose from a "range of *qualified* providers." *O'Bannon* v. *Town Ct. Nursing Ctr.*, 447 U.S. 773, 785 (1980). So the former shorthand—"any-*qualified*-provider"—is more accurate.

In its first opinion, the Fourth Circuit applied the *Blessing* factors—reading *Gonzaga* as merely a gloss on the first—and then, citing *Wilder*, asserted that this Court has "already held that the Medicaid Act's administrative scheme is not sufficiently comprehensive to foreclose a private right of action enforceable under § 1983." *Baker*, 941 F.3d at 698–99 (cleaned up). Although the court recognized that *Gonzaga* had "cut back" on *Wilder*, it nonetheless maintained that "*Wilder*'s reasoning as to the comprehensiveness of the Medicaid Act's enforcement scheme has not been overturned." *Id.* at 699.

Even worse, the court ignored the *Armstrong* plurality's position that "intended beneficiaries" to "contracts between two governments" do not have a right to sue to enforce those contracts. *Armstrong*, 575 U.S. at 332. Instead, the court cited two words from that part of the opinion—the phrase "unambiguously conferred"—and turned the plurality's position on its head by insisting courts should not relieve "sovereign signatories to a contract" of the "consequences" of their agreement, including conferring private rights of action on third parties. *Baker*, 941 F.3d at 701.

In its second opinion, the Fourth Circuit doubled down on its earlier conclusions. The court again applied the three *Blessing* factors and held that they were satisfied, adding that "if this statute does not survive the *Blessing* factors, we cannot imagine one that would." *Kerr*, 27 F.4th at 956. The court also rejected the argument that "*Gonzaga* effectively abrogated *Blessing*" because, according to the court, "*Gonzaga* never indicated that *Blessing* is no longer good law." *Id.* at 957.

Contrast that approach with the en banc Fifth Circuit's. In *Kauffman*, the court started with *Gonzaga* and concluded that the any-qualified-provider provision "unambiguously provides that a Medicaid beneficiary has the right to obtain services from the *qualified* provider of her choice," but it "does *not* unambiguously say that a beneficiary may contest or otherwise challenge a determination that the provider of her choice is unqualified." 981 F.3d at 359 (emphasis added). As for *Wilder*, the court reached the opposite conclusion of the Fourth Circuit, noting that *Armstrong* meant what it said and had "plainly repudiate[d]" *Wilder*'s approach. *Id.* at 359. Seven judges in the eleven-judge majority would have gone further and recognized that this Court had discarded *Blessing*, too. *Id.* at 371 & n.1 (Elrod, J., concurring) ("In *Gonzaga*, the Court abandoned the lenient *Wilder*/*Blessing* framework, instead requiring 'an unambiguously conferred right' to support enforceability through § 1983.") (cleaned up).

Though the confusion surrounding the any-qualified-provider provision has created a mature circuit split, it is not the only place in the Medicaid Act where lower courts have implied rights and remedies. The Medicaid Act is rife with provisions that lower courts have made actionable against the States. This includes a right for healthcare providers to challenge States' notice-and-comment process for setting payment rates, *BT Bourbonnais Care, LLC* v. *Norwood*, 866 F.3d 815, 824 (7th Cir. 2017) (interpreting 42 U.S.C. 1396a(a)(13)(A)); a right for individuals to object to not receiving "medical assistance . . . with reasonable promptness," *Doe* v. *Kidd*, 501 F.3d 348, 355–57 (4th Cir. 2007)

(interpreting 42 U.S.C. 1396a(a)(8)); accord *Bryson* v. *Shumway*, 308 F.3d 79, 88–89 (1st Cir. 2002); or for not receiving "medical assistance" in the first place, *Bontrager* v. *Ind. Fam. & Soc. Servs. Admin.*, 697 F.3d 604, 606–07 (7th Cir. 2012) (interpreting 42 U.S.C. 1396a(a)(10)); accord *Sabree*, 367 F.3d at 189–92. These are just the rights courts have found within 42 U.S.C. 1396a(a). The list goes on.

C. The Court should explicitly discard the discredited *Wilder* approach and *Blessing* factors.

To make clear to lower courts that nothing "short of an unambiguously conferred right" will suffice, this Court needs to clean up this jurisprudential "mess." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from the denial of certiorari). That starts with interring two precedents that, despite repeated admonitions from this Court to the contrary, *Gonzaga*, 536 U.S. at 282–83; accord *Armstrong*, 575 U.S. at 330 n.*, lower courts have continued to invoke: *Wilder* and *Blessing*.

Wilder embodies the "*ancien regime*," a time when this Court readily "impl[ied] causes of action not explicit in the statutory text itself." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017). In *Wilder*, the Court held that a Medicaid Act amendment "create[d] a right enforceable by health care providers" to "reasonable and adequate" reimbursement rates. 496 U.S. at 509–10. Though the amendment was silent about such a right, the Court held that the providers were the amendment's intended beneficiaries, and that "legislative history" affirmed that "Congress [also] intended . . . health care providers [to] be able to sue in federal court" to enforce this right. *Id.* at 515–16.

Four justices dissented and chided the majority for "virtually ignor[ing]" what mattered most: the statutory text. *Id.* at 526–27 (Rehnquist, C.J., dissenting). The dissenters' approach has since become the one adopted by this Court. In case after case, this Court has said that legislative history and vague notions of statutory purpose cannot supplant the language Congress enacts. *Wilder*'s approach is "a relic from a bygone era of statutory construction," *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (cleaned up)—a "doctrinal dinosaur" long since gone extinct, *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

But the problem did not stop with *Wilder*. Its casual disregard of the words Congress enacted into law set this Court on a collision course with "the limits of [its] constitutional authority." See *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1413 (2018) (Gorsuch, J., concurring in part and in the judgment).

When in *Blessing* this Court first tried to pull back from the *Wilder* precipice, it created a multi-factor test that ostensibly limited courts' ability to imply private rights. That test included three factors. First, "Congress must have intended that the provision in question benefit the plaintiff"; second, "the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence"; and third, "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340–41 (cleaned up).

Though intended to constrain the lower courts, *Blessing*'s approach, like all multifactor tests, has had the "practical consequence[]" of less "predictability" and more "open-ended" analysis. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Under open-ended tests like *Blessing*'s, judges wield so much "discretion" that they "produce[] disparate results" in practically identical cases. *Murphy* v. *Smith*, 138 S. Ct. 784, 790 (2018). This Court already has criticized the "confusion" that *Blessing* created and has firmly "reject[ed] the notion that [this Court's] cases permit anything short of an unambiguously conferred right." *Gonzaga*, 536 U.S. at 283. Notably, in doing so the Court refused to apply *Blessing*'s "multifactor balancing test." *Id.* at 286.

But because the Court did not explicitly overrule *Blessing* in the *Gonzaga* opinion, lower courts have continued to use *Blessing* at their fancy. Some courts view the multifactor test as unaffected and continue to use it. *E.g.*, *Saint Anthony Hosp.*, 2022 WL 2437844, at *5. Some see *Gonzaga* as merely establishing a threshold question for courts to address *before* applying the *Blessing* factors. *Schwier* v. *Cox*, 340 F.3d 1284, 1291 (11th Cir. 2003). Still others see *Gonzaga* as adding a safety valve that kicks in only *after* courts have evaluated the *Blessing* factors. *Health Sci. Funding, LLC* v. *N.J. Dep't of Health & Hum. Servs.*, 658 F. App'x 139, 141 (3d Cir. 2016).

This Court's equivocation on *Wilder* has had a similar effect. If anything, this Court has spoken more harshly about *Wilder* than *Blessing*. For instance, the dissent in *Gonzaga* recognized that the Court "*sub silentio* overrule[d] . . . *Wilder*" because the statute in *Wilder* "did not clearly and unambiguously intend

enforceability under § 1983." *Gonzaga*, 536 U.S. at 300 n.8 (Stevens, J., dissenting) (cleaned up). More recently, a plurality of this Court described *Wilder*'s approach as "plainly repudiate[d]." *Armstrong*, 575 U.S. at 330 n.*. Yet lower courts continue to apply *Wilder* as though it remains good law.[3] *E.g.*, *Planned Parenthood of Kan.* v. *Andersen*, 882 F.3d 1205, 1229 & n.16 (10th Cir. 2018).

In the end, the confusion that *Gonzaga* decried continues to dominate. "Courts are not even able to identity which of [this Court's] decisions are binding." *Gee*, 139 S. Ct. at 410 (Thomas, J., dissenting from the denial of certiorari) (cleaned up).

Tellingly, which decision the lower courts apply almost always determines whether they hold that Congress has created a private right. Courts that apply *Gonzaga* have, like this Court, ended up "adopt[ing] a far more cautious course." *Ziglar*, 137 S. Ct. at 1855. And like this Court, those lower courts have "repeatedly declined to create private rights of action under statutes that set conditions on federal funding of state programs." *Nasello* v. *Eagleson*, 977 F.3d 599, 601 (7th Cir. 2020) (Easterbrook, J.).

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[3] As the Eighth Circuit correctly noted, this Court will never again confront the statute at issue in *Wilder* because Congress has since repealed it. *Does* v. *Gillespie*, 867 F.3d 1034, 1040 (8th Cir. 2017). But see *Planned Parenthood S. Atl.* v. *Baker*, 941 F.3d 687, 699 (4th Cir. 2019) ("*Wilder*'s reasoning as to the comprehensiveness of the Medicaid Act's enforcement scheme has not been overturned.").

And then there are the lower courts that still apply *Wilder* and *Blessing*. Time and again, these courts have discovered private rights where Congress has been anything but clear on its intent to create them. For instance, these courts have held that foster parents may privately contest the amount of foster-care maintenance that States pay under the Adoption Assistance and Child Welfare Act. *E.g.*, *Poole*, 922 F.3d at 74 (joining the Sixth and Ninth Circuits in finding a privately enforceable right). They have said that nursing home residents can sue States for failing to ensure their "highest practicable physical, mental, and psychosocial well-being" under the Federal Nursing Home Reform Amendments. *E.g.*, *Grammer* v. *John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 524–25, 532 (3d Cir. 2009). And, as detailed more fully above, they have unearthed scores of privately enforceable rights under the Medicaid Act. See *supra* Part I.B.

Sometimes this confusion plays out not just across circuits but even within them. Majorities applying *Gonzaga* have declined to declare private rights that the dissent would have recognized by applying the *Blessing* factors. Compare *Does*, 867 F.3d at 1039–42 (following *Gonzaga* and identifying no private right), with *id.* at 1049–51 (Melloy, J., dissenting) (applying *Blessing* and discovering a private right). And vice versa. Compare *Poole*, 922 F.3d at 79 (applying *Blessing*'s "three-factor test" as "good law" and recognizing a private right), with *id.* at 94 (Livingston, J., dissenting) (questioning "the vitality of the *Blessing* test" and declaring no private right under *Gonzaga*).

As sometimes happens, the "shortcomings associated with" *Wilder*'s and *Blessing*'s approach had become "so apparent" to this Court in *Gonzaga* that it "abandoned" these precedents. *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (cleaned up). Their loose approach and nebulous multifactor test have "invited chaos in lower courts," and have "led to differing results in materially identical cases." *Ibid.* (cleaned up). Like all multifactor tests, the one endorsed in *Blessing* also has "created a minefield for legislators" in Congress—and for the States who agree to contract with the federal government by accepting federal funding. *Ibid.* (cleaned up). Lest the approach embodied in *Wilder* and *Blessing* become "some ghoul . . . that repeatedly sits up in its grave and shuffles abroad," cf. *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment), this Court should formally recognize these cases' collective demise, cf. *Kennedy*, 142 S. Ct. at 2428 n.4.

D. When determining whether Congress created a private right, courts should look for clear and unambiguous text.

In place of *Blessing*'s nebulous multifactor test, this Court should make clear that Congress creates a private right under Spending Clause legislation only using "explicit rights-creating terms." *Gonzaga*, 536 U.S. at 284. And the Court should expressly discard *Blessing*'s malleable factors as unhelpful and counter-textual. Instead, courts should do what they do best and interpret a statute with the tried-and-true tools of statutory interpretation.

In *Does*, for example, the Eighth Circuit demonstrated a principled approach that looks for "rights-creating terms" without relying on *Wilder* or *Blessing*. There, the court examined whether the Medicaid Act's any-qualified-provider provision creates a privately enforceable right. 867 F.3d at 1041. The court noted that "statutes with an *aggregate* focus," like the Medicaid Act, do not "give rise to *individual* rights." *Id.* at 1042 (emphasis added). So, too, with this particular provision. It "focus[ed]" on the "federal agency charged with approving" state Medicaid plans, whereas individuals were "two steps removed" from the statute. *Id.* at 1041. Moreover, Congress "expressly conferred" a means of enforcing the statute—not with individuals but instead with the Secretary of Health and Human Services. *Ibid.*

Finally, the court reasoned that the "structural elements of the statute and language in a discrete subsection"—specifically, language "nested within one of eighty-three subsections" and "two steps removed from the Act's focus"—at best gave "mixed signals about legislative intent." *Id.* at 1042–43. And mixed signals do not manifest a clear and unambiguous intent to create a private right. *Ibid.*

The Eighth Circuit's reasoning is sound. And it proves that, untethered from *Wilder*'s "bygone" approach and *Blessing*'s "multifactor balancing test," *Gonzaga*, 536 U.S. at 286, lower courts can more easily heed this Court's admonition that nothing "short of an unambiguously conferred right" can "support a cause of action brought under § 1983," *id.* at 283.

II. If Congress wants private individuals to enforce Spending Clause legislation, then Congress must explicitly authorize private remedies.

Spending Clause legislation must explicitly "create not just a private right but also a private remedy." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Some lower courts have discovered that remedy in a statute outside the Spending Clause legislation itself: Section 1983.

But Section 1983 provides only a general "remedy for the vindication of rights secured by federal statutes." *Gonzaga*, 536 U.S. at 284. And "[o]nce a plaintiff demonstrates that a statute confers an individual right," that right is only "*presumptively* enforceable by § 1983." *Ibid.* (emphasis added).

Spending Clause legislation's contractual context should defeat that general presumption. Under traditional contract principles—both at the time the 42d Congress enacted Section 1983 and today—outside parties, including third-party beneficiaries, are treated as "stranger[s] to the contract" who cannot sue to vindicate its terms. *Blessing*, 520 U.S. at 349–50 (Scalia, J., concurring). So if Congress wants to create a private right through Spending Clause legislation that is enforceable via Section 1983, Congress must explicitly say so.

A. The public in 1871 would not have understood Section 1983 to create a vehicle that allows private beneficiaries to enforce Spending Clause legislation.

When the 42d Congress enacted Section 1983 in 1871, the common law prevented a person "for whose benefit a promise was made, if not related to the promise," from suing "upon the promise." C. Langdell, A Summary of the Law of Contracts 79 (2d ed. 1880). The only person who could sue to vindicate a contract was "the party with whom the contract [was] made"—even if "the beneficial interest" vested in a third party outside the contract. 1 F. Hilliard, The Law of Contracts 422 (1872).

The 42d Congress was "familiar with common-law principles" and intended these "principles to obtain, absent specific provisions to the contrary." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); accord *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well-established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." (cleaned up)). When the 42d Congress enacted Section 1983, it expressed no specific intent to abrogate the common law of contracts. That principle remains in effect and prevents private parties from using Section 1983 to enforce Spending Clause legislation absent contrary congressional authorization.

B. Modern contract principles also prevent third-party beneficiaries from suing to vindicate Spending Clause legislation.

Modern contract principles also prohibit private parties from enforcing Spending Clause legislation through Section 1983. Just this year, this Court affirmed that Spending Clause legislation's contractual nature "limits the scope of available remedies in actions brought to enforce Spending Clause statutes." *Cummings* v. *Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1570 (2022) (cleaned up). In *Cummings*, this Court considered whether Congress authorized "damages for emotional harm" under a variety of Spending Clause statutes. *Id.* at 1569. After finding that the various statutory texts "contain[ed] no express remedies," this Court looked at "remedies traditionally available in suits for breach of contract." *Id.* at 1571 (quoting *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002)). Absent explicit statutory text to the contrary, "a federal funding recipient may be considered on notice that it is subject . . . [only] to those remedies traditionally available in suits for breach of contract." *Ibid.* (cleaned up).

The government "usually operates in the *general* public interest," so private individuals who benefit from Spending Clause legislation are at best "presumed to be incidental beneficiaries." 9 Corbin on Contracts § 45.6 (2019). Though today third-party beneficiaries can sometimes "sue to enforce the obligations of *private* contracting parties," that principle does not extend to "contracts between a private party and the government—much less . . . between two governments." *Armstrong*, 575 U.S. at 332 (plurality op.) (cleaned up); accord *Pharm.*

Research & Mfrs. of Am. v. *Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in the judgment) ("This contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation."); *Kwan* v. *United States*, 272 F.3d 1360, 1363 (Fed. Cir. 2001) (uncovering "no authority . . . whereby an individual has been found entitled to judicial enforcement of a government-to-government agreement on the legal theory that they are third party beneficiaries of the agreement").

A private action to enforce a contract between two governments is therefore "generally not available" and not considered a "*usual* contract" remedy. *Cummings,* 142 S. Ct. at 1571. Courts should not assume that States have, "merely by accepting funds, implicitly consented to" liability beyond what is traditionally available. *Ibid.*

To shut the door on implied Section 1983 enforceability for Spending Clause legislation would not leave private individuals without recourse, though. Instead, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 28.

Moreover, in Spending Clause statutes, Congress regularly authorizes the Executive Branch to "promulgate regulations" governing compliance and enforcement. *Does*, 867 F.3d at 1041 (Medicaid Act). Agencies take these duties seriously. After this Court decided *Armstrong*, Centers for Medicare and Medicaid Services promulgated regulations to "strengthen CMS review and enforcement capabilities." Medicaid

Program; Methods for Assuring Access to Covered Medicaid Services, 80 Fed. Reg. 67576, 67578 (Nov. 2, 2015). And if an agency refuses to perform legal obligations, an individual can "seek judicial review of the agency's refusal on the grounds that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and can "ask the court to compel agency action unlawfully withheld or unreasonably delayed." *Armstrong*, 575 U.S. at 336 (Breyer, J., concurring in part and in the judgment) (cleaned up).

If Congress wants to go further and condition States' receipt of federal funds on third-party lawsuits, then Congress "must make its intention to do so unmistakably clear in the language of the statute" so that the States understand this potential consequence. *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (cleaned up).

C. The lower courts' approach threatens the separation of powers.

Whenever the lower courts infer private rights, imply private remedies, or assume that Congress intended Spending Clause enforcement through Section 1983, they risk offending the Constitution's carefully balanced separation-of-powers principle. Under Article III, courts adjudicate rights; they do not create them. The "province of the court is, *solely*, to decide on the rights of individuals." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (emphasis added). The obvious converse is that courts do not make up rights by implying them from silent texts.

By contrast, creating rights and remedies is, "a legislative endeavor." *Egbert* v. *Boule*, 142 S. Ct. 1793, 1802 (2022). It involves "a range of policy considerations," such as "economic and governmental concerns, administrative costs, and the impact on governmental operations systemwide." *Id.* at 1802–03 (quoting *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in the judgment)) (cleaned up). Balancing these interests "often demands compromise," which may include "creat[ing] a right or prohibit[ing] specified conduct" but not "authorizing private" remedies. *Hernandez*, 140 S. Ct. at 742. "Weighing the costs and benefits of new laws is the bread and butter" of legislatures, not "federal courts charged with deciding cases and controversies under existing law." *Egbert*, 142 S. Ct. at 1810 (Gorsuch, J., concurring in the judgment).

Since Congress is "far more competent than the Judiciary to weigh such policy considerations," the Constitution, by separating the legislative power from the judicial, gives Congress the power to create rights and the means to enforce them. *Id.* at 1803 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988)); accord *Hernandez*, 140 S. Ct. at 742. This separation not only complements Congress's prerogatives but also forces legislators—members of the most accountable Branch—to make the hard choices that come "through the open debate of the democratic process." *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

As Justice Powell recognized over four decades ago, when the Judiciary implies rights and remedies, it inappropriately "assume[s]" that "policymaking authority vested by the Constitution in the Legislative Branch." *Ibid.* (Powell, J., dissenting). That in turn encourages Congress "to shirk its constitutional obligation and leave the issue to the courts"—the Branch *least* accountable to the public—with "attendant prejudice to everyone concerned." *Ibid.* (Powell, J., dissenting).

This Court already has taken steps to safeguard the separation-of-powers principle from judicial encroachment in similar contexts. Just this year, the Court affirmed that it is "[n]ow long past the heady days in which this Court assumed common-law powers to create causes of action." *Egbert*, 142 S. Ct. at 1802 (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)). Twelve times over the last 42 years, this Court refused to imply various causes of action under the Constitution. *Id.* at 1799–1800 (collecting cases). By "emphasiz[ing] that recognizing a cause of action under [the Constitution] is a disfavored judicial activity," *id.* at 1803 (cleaned up), this Court appropriately "corrected course," *Hernandez*, 140 S. Ct. at 751 (Thomas, J., concurring). It should do the same in the statutory context.

The Court can start by doubling down on *Gonzaga*'s admonition that courts *only* should recognize statutory rights and remedies when Congress uses explicit language. This approach protects the separation-of-powers principle by functioning much like a clear-statement rule. Clear-statement rules "ensure that the government does not inadvertently

cross constitutional lines." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (cleaned up). For instance, in administrative law, clear-statement rules require that agencies, when "seek[ing] to resolve major questions," act only "with clear congressional authorization and do not exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond those the people's representatives actually conferred on them." *Ibid.* (Gorsuch, J., concurring) (cleaned up). In the same way, *Gonzaga*'s requirement that Congress use "explicit rights-creating terms" in Spending Clause legislation ensures that courts do not impose conditions on States *ex ante* by "exploit[ing] some gap, ambiguity, or doubtful expression" in the Spending Clause legislation. *Ibid.* (Gorsuch, J., concurring).

The separation-of-powers principle—perhaps even "more than [the] contract-law analysis" noted above—"counsels against judicially authorizing" private enforcement of Spending Clause statutes where Congress has not explicitly provided the means to do so. *Cummings*, 142 S. Ct. at 1577 (Kavanaugh, J., concurring). This Court should so hold.

* * *

The lower courts need clarity. "What is the proper framework for determining whether a given statute"—particularly a Spending Clause statute—"creates a right that is privately enforceable?" *Baker*, 941 F.3d at 708 (Richardson, J., concurring). To answer that broad question, this Court must first answer a narrower one: "So are *Wilder*, specifically, and the *Blessing* factors, generally, still good law?" *Id.* at 709.

Tellingly, in "the three decades since *Wilder*, [this Court] has repeatedly declined to create private rights of action under statutes that set conditions on federal funding of state programs." *Nasello*, 977 F.3d at 601. The Court has described *Wilder* as "plainly repudiated" and has, in other contexts, abandoned its approach. This Court should take the necessary next step and inter *Wilder* once and for all.

This Court should do the same for *Blessing*. The *Blessing* factors worked so much mischief that this Court saw fit to criticize the test and eschew applying it. Yet in the absence of an explicit overruling from this Court, that mischief has continued. This Court should finally overrule the *Blessing* factors.

Free from this precedential baggage, this Court should firmly reiterate what it said in *Gonzaga*: Congress cannot create privately enforceable rights without clear and unambiguous language to the contrary. To determine whether Congress used "explicit rights-creating terms," courts should do what they do best and apply the traditional tools of statutory interpretation.

Finally, this Court should reaffirm that, with Spending Clause legislation specifically, Congress must explicitly authorize a private remedy—including Section 1983 enforcement. Although Section 1983 serves as a presumptive remedy in many other contexts, the contractual nature of Spending Clause legislation defeats that presumption and requires an explicit green light from Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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