No. 23-1275

IN THE
Supreme Court of the United States

EUNICE MEDINA, in her official capacity as Interim Director, South Carolina Dept. of Health and Human Services, *Petitioner*,
v.
PLANNED PARENTHOOD SOUTH ATLANTIC, *et al.*, *Respondent*s.

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

Brief *Amicus Curiae* of America's Future, One Nation Under God Foundation, Restoring Liberty Action Committee, LONANG Institute, and Conservative Legal Defense and Education Fund in Support of Petitioners

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February 10, 2025

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit corporations, exempt from federal income taxation under Internal Revenue Code section 501(c)(3). Restoring Liberty Action Committee and LONANG Institute are educational organizations. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

Congress enacted Medicaid in 1965 as "'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.'" Petitioner's Brief ("Pet. Br.") at 4. In 1967, Congress amended the statute to "require[] that state plans 'must' provide that 'any individual eligible for medical assistance … may obtain' it 'from any [provider] qualified to perform the service … who undertakes to provide' it. 42 U.S.C. 1396a(a)(23)(A)." *Id.* at 5.

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

On July 13, 2018, South Carolina Governor Henry McMaster signed an executive order directing the State Department of Health and Human Services to deem abortion providers unqualified to provide family planning services under Medicaid and to terminate state aid to abortion providers. *Id.* at 7. A Planned Parenthood abortion provider and one individual filed under 42 U.S.C. § 1983, claiming a civil rights violation based on this disqualification from being subsidized with public funds. The district court enjoined the disqualification. *Planned Parenthood South Atl. v. Baker*, 326 F. Supp. 3d 39, 50 (D. S.C. 2018). The district court "h[eld] § 1396a(a)(23)(A) confers a private right of action on Medicaid beneficiaries...." *Id.* at 44. The Fourth Circuit upheld the injunction. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 690 (4th Cir. 2019). In October 2020, this Court declined to review that decision. *Baker v. Planned Parenthood S. Atl,* 141 S. Ct. 550 (2020).

In September 2020, the district court granted summary judgment for the plaintiffs for the same reasons. *Planned Parenthood S. Atl. v. Baker*, 487 F. Supp. 3d 443, 446 (D. S.C. 2020). The Fourth Circuit affirmed. *Planned Parenthood S. Atl. v. Kerr,* 27 F.4th 945, 955 (4th Cir. 2022). This Court granted certiorari, vacated, and remanded in light of *Health and Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023). *Kerr v. Planned Parenthood S. Atl.*, 143 S. Ct. 2633 (2023). The Fourth Circuit admitted the "undoubted danger of opening private rights of action floodgates," but concluded *Talevski* changed nothing. *Planned Parenthood South Atl. v. Kerr*, 95 F.4th 152, 170 (4th Cir. 2024) ("*Planned Parenthood*").

SUMMARY OF ARGUMENT

Abortion-provider Planned Parenthood South Atlantic ("PPSAT") has challenged a decision by the State of South Carolina to exercise the authority given states under the Medicaid Act to determine who is a "qualified provider" of "family planning services" under its Medicaid program. Even the strongly pro-abortion Secretary of Health and Human Services declined to take the corrective action against South Carolina, as he was authorized to do. Despite there being no express private right of action provided in the statute, an abortionist group filed suit under 42 U.S.C. § 1983, claiming that such a private right can be inferred. By adopting that theory, the circuit court usurped the authority given the states and federal government in the Medicaid Act, ensuring that the tax dollars of Americans will continue to swell the coffers of the leading organization profiting from the killing of unborn babies in the United States. The circuit court was not justified in manufacturing a private right of action under *Talevski*. The circuit court freely admitted its decision risked opening the floodgates of courts reading private rights of action into exercises of the spending power. Moreover, while the circuit court denied it, it seems to have been motivated by its desire to allow women to choose "professionally qualified" Planned Parenthood for abortions, exercising "a right that could not be more personal, nor more precious." *Planned Parenthood* at 169. The truth is Planned Parenthood engages in barbaric acts that can be considered neither "medical care," nor "healthcare," nor legitimate "family planning."

ARGUMENT

I. THE CIRCUIT COURT USURPED THE AUTHORITY CONGRESS GAVE TO STATES TO DETERMINE WHICH HEALTHCARE PROVIDERS ARE QUALIFIED.

The circuit court defined the issue before it as: "whether the free-choice-of-provider provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(23), creates individual rights enforceable via 42 U.S.C. § 1983" and concluded the answer was yes. *Planned Parenthood* at 155. In explaining its decision, the court correctly acknowledged that the **"states maintained discretionary authority ... to 'disqualify providers' ... for legitimate medical and nonmedical reasons."** *Id*. at 158 (emphasis added). It also correctly acknowledged that:

> **[t]he statute ... tasks the Secretary with ensuring that states keep their end of the bargain**. If the Secretary later discovers "that in the administration of the plan there [has been] a failure to comply substantially" with federal requirements, the Secretary may withhold funds until "satisfied that there will no longer be any such failure to comply." 42 U.S.C. § 1396c. [*Planned Parenthood* at 156 (emphasis added).[2]]

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[2] This statutory scheme is confirmed by the Medicaid statute's legislative history. In a floor colloquy, the House Sponsor of the bill which became the Medicaid Act, Congressman Wilbur Mills (D-AR) stated that under his bill, "the state will be utilized to

Exercising the state's authority, the Governor of South Carolina issued an executive order directing South Carolina's Department of Health and Human Services ("DHHS"):

> to deem **abortion clinics** ... that are enrolled in the Medicaid program as **unqualified to provide family planning services** and, therefore, to immediately terminate them upon due notice and deny any future such provider enrollment applications for the same. [*Id*. at 157 (emphasis added).]

Even the strongly pro-abortion Department of Health and Human Services ("HHS") Secretary Xavier Becerra[3] declined to take any corrective action, ending the matter under a statute that provided no private right of action.

Nevertheless, the circuit court believed that an amendment to the Medicaid Act impliedly reversed

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determine whether its institutions and agencies qualify for the program, and the secretary may accept the states' certifications." 111 *Cong. Rec.* 18361 (July 27, 1965). Thus, it appears that no one contests the fact that under the original Medicaid Act, it is up to the state as an initial matter to determine which providers are "qualified." And further, if the Secretary determines that the state plan is not meeting Medicaid requirements, he alone may step in, exercising his authority power under Section 1904 of the Act, codified at 42 U.S.C. § 1396c.

[3] As a Member of the U.S. House of Representatives, Becerra received a 100 percent rating from National Abortion Rights Action League ("NARAL") in 2012. *See* NARAL, 2012 Congressional Record on Choice at 12.

this clear statutory plan — where the states determined which providers were qualified, subject to the authority vested in the Secretary of Health and Human Services to determine noncompliance, backed up by the power to curtail funding. Even though Congress did not expressly create a private right of action, by piecing together language from prior decisions of this Court, the circuit court felt empowered to read into the statute a private right of action, exercisable under 42 U.S.C. § 1983, based on the following statutory language:

> A state plan for medical assistance must ... provide that ... any individual eligible for medical assistance ... may obtain such assistance from any institution, agency, community pharmacy, or person, **qualified to perform** the service or services required ... who undertakes to provide him such services. 42 U.S.C. § 1396a(a)(23). [*Id.* at 156 (emphasis added).]

The circuit court then developed its own definition of the statutory term "**qualified**," to mean only "**professionally competent** to do so." *Id.* at 158 (emphasis added). And the circuit court believed that only it should have the last word as to which providers were "qualified." In adopting its definition of "professionally competent," the court abandoned its earlier stated view that "states maintained discretionary authority ... to 'disqualify providers' ... for legitimate **medical and nonmedical reasons**." *Id*. at 158 (emphasis added).

Believing that Planned Parenthood was fully competent to perform abortions, the circuit court found somewhere in what could be termed the "penumbras and emanations" of the Medicaid statute an implied right of action, empowering the court to find a civil rights violation which would empower the court to overrule the action of Governor McMaster, as well as the inaction of HHS Secretary Becerra. In this way, the circuit court **usurped** the power of both state and federal government to reach its pro-abortion ruling.

II. *TALEVSKI* REINFORCES *GONZAGA'S* "DEMANDING BAR" AGAINST CONVERTING THE SPENDING CLAUSE INTO A CIVIL RIGHTS LAW.

Tasked with reconsidering its earlier two decisions in light of *Talevski*, the circuit court found nothing had changed. In fact, *Talevski* had reinforced and clarified this Court's decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002), confirming that Congress's exercise of the Spending Power does not create an enforceable private right of action unless the plaintiff can pass a "demanding bar: Statutory provisions must *unambiguously* confer individual federal rights." *Talevski* at 180. Petitioner correctly notes that Respondents' proposed expansive reading of *Talevski* "would drop *Gonzaga*'s 'demanding bar' to the floor." Pet. Br. at 36.

In *Talevski*, this Court made clear that, to create a right of action, the statute must: be "phrased in terms of the persons benefited" and contain[] "**rights-creating**, **individual-centric** language with

an unmistakable focus on the benefited class." Indeed, this Court again made clear that it "rejected §1983 enforceability where," like here, the statutory provision "contain[ed] **no rights-creating language**; had an aggregate, **not individual**, focus; and serve[d] primarily to direct the [Federal Government's] distribution of public funds." *Talevski* at 183-84 (quoting *Gonzaga* at 284, 287, 290) (cleaned up, emphasis added). Justice Barrett's concurrence, joined by the Chief Justice, was fully in accord. *Id.* at 193 (quoting *Gonzaga* at 284, 290).

In *Talevski*, this Court repeatedly made clear that the most important factor was that the language must indicate an "unambiguously conferred" "individual right[]." *Id.* at 183. This Court ascribed great weight to the fact that the statutory provisions at issue in *Talevski* "both reside in [a section] which expressly concerns '[r]equirements *relating to residents'* ***rights***.'" *Id.* at 184 (bold added). As this Court noted, the statute included language such as "*[t]he* ***right*** to be free from ... any physical or chemical restraints imposed for purposes of discipline," a patient's "transfer and discharge ***rights***." *Id.* at 184-85 (bold added). Many of the restrictions listing actions the government agency "may not" take, were "[n]estled in a paragraph concerning 'transfer and discharge ***rights***'" of patients. *Id.* at 184-85 (bold added). There is absolutely no comparable "rights" language in the amendment to the Medicaid Act relied on by the circuit court.

Petitioners correctly explain the statutory provision in question here, that "state plans 'must'

provide that 'any individual eligible for medical assistance … may obtain' it 'from any [provider] qualified to perform the service,'" is "nestled in a list labeled 'Contents' setting out 87 disparate items that plans must include.... That text and structure is nothing like FNHRA's rights-creating provisions, which *Talevski* analyzed." Pet. Br. at 5, 3. The Medicaid statute's provision is more accurately viewed as establishing conditions states must meet in order to qualify for federal funding, than as creating a vast new category of civil rights actions.

The complete absence of language creating "rights" in the Medicaid Act amendment was casually dismissed by the Fourth Circuit even though it was treated by this Court as the most important factor. Claiming unwillingness to "limit Congress to a thin thesaurus of our own design" (*Planned Parenthood* at 166), the court inexplicably asserted that even though "rights" were never mentioned, the statute "contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class'" (*id.* at 162), thereby creating a private right of action.[4]

In essence, the circuit court merged factors 1 and 2, concluding that "individual-centric," statutory language necessarily was "rights-creating." Then, if the language has "unmistakable focus on the benefited class," it creates a private right. This essentially

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[4] Although neither *Talevski* nor *Gonzaga* expressly requires that the word "rights" be used, there must be language "*unambiguously* confer[ring] individual federal rights." *Talevski* at 180. No such language exists here.

merges factors 2 and 3, creating, for all practical purposes, a one-factor test. The Fourth Circuit appears to have ruled that whenever a statute focuses on individuals within a benefitted class, a private right of action is created — a proposition that truly would open the floodgates to litigation, as the circuit court appeared to concede could occur.

Gonzaga, which was cited at length in *Talevski*, expressly forecloses the Fourth Circuit's reading. *Gonzaga* considered a statute which stated: "'[n]o funds shall be made available ... to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents.'" *Gonzaga* at 279. The statute expressly referred to, and protected, personal information of "students" and "their parents." This statute had an "*unmistakable* focus on the benefited class," which, under the Fourth Circuit's compressed, practical one-factor test, would be enough to create a private right of action. *Gonzaga* at 284 (citation omitted). As Petitioners correctly point out, the *Gonzaga* dissenters would approve of the Fourth Circuit's decision:

> The *Gonzaga* dissent thought the second provision "plainly [met] the standards" this Court "articulated in *Blessing* for establishing a federal right." *Gonzaga*, 536 U.S. at 295 (Stevens, J., dissenting). It was "**directed to the benefit of individual students and parents**," it was "**binding on States**," it was "couched in mandatory, rather than precatory,

> terms," it was "far from vague and amorphous," and **it spoke "of the individual 'student,' not students generally.**" *Ibid.* (cleaned up). The dissent also highlighted the "rights-creating language in the title" of FERPA — the Family Educational *Rights* and Privacy Act. [Pet. Br. at 29 (bolding added).]

Yet, in *Gonzaga*, this Court made clear that a focus on benefits to individuals was simply not enough, again hammering the fact that the statute "lack[ed] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga* at 287. This Court has consistently placed primacy on a "rights-creating language" prong, not "focus on the benefited class."

Both the *Talevski* main opinion and Justice Barrett's concurrence (joined by Chief Justice Roberts) warn that federal statutes "do not [create private rights of action] as a matter of course." *Talevski* at 183. Indeed, the case where they do is an "atypical case." Justice Barrett notes just how "atypical" such cases are: "Indeed, since [1981], we have interpreted **only two** Spending Clause statutes to be enforceable through §1983." *Id.* at 194 (Barrett, J., concurring) (emphasis added). Justice Barrett cautioned that "[t]his bar is high, and although the FNHRA clears it, many federal statutes will not.... **§1983 actions are the exception — not the rule** — for violations of Spending Clause statutes." *Id.* at 193-94 (Barrett, J., concurring) (emphasis added). In *Talevski*, this Court reiterated that:

> **[f]or Spending Clause legislation in particular,** we have recognized that "'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.'" [*Id.* at 183 (quoting *Gonzaga* at 280) (emphasis added).]

But as Petitioners point out, should the Fourth Circuit's reading be adopted, it could be expected to result in a veritable explosion of federal private rights of action, from just three (including *Talevski*) since 1981, to an almost unlimited catalog. "Leaving aside that Section 1396a(a) uses the word 'individual' hundreds of times, eight of the 87 listed plan-requirement provisions contain individual-focused, benefit-conferring language that likely would satisfy Respondents' lax test." Pet. Br. at 37. Petitioners reference eight statutory sections laced with the words "individual" to describe beneficiaries, and the words "shall" and "must" to describe the responsibilities the Medicaid plan imposes on the states regarding Medicaid coverage of those beneficiaries.

The circuit court inverted both *Gonzaga* and *Talevski*, which set a "demanding bar" to prove creation of private rights of action "[f]or Spending Clause legislation in particular" — in "atypical case[s]" where statutes "unambiguously confe[r]" private rights of action — to creating a federal civil rights case any time a government spending program instructs how and for whom money shall be spent.

Lastly, it should be noted that the circuit court failed to address many important issues raised by five justices writing in two concurrences and two dissents in *Talevski*. Justice Gorsuch expressed concern that "there are other issues lurking here that petitioners failed to develop fully — whether legal rights provided for in spending power legislation like the Act are 'secured' as against States in particular and whether they may be so secured consistent with the Constitution's anti-commandeering principle." *Talevski* at 192 (Gorsuch, J., concurring). Justice Barrett (joined by the Chief Justice) stressed that only "*Gonzaga* establishes the standard for analyzing whether Spending Clause statutes give rise to individual rights." *Id*. at 193 (Barrett, J., concurring). Justice Thomas asserted that section 1983 only applies to redress rights "secured by law." *Id*. at 200 (Thomas, J., dissenting). Justice Alito believed that "the remedial scheme in the Act negated any individual rights created." *Id*. at 230 (Alito, J., concurring). These thoughtful reservations set out by five justices in 43 pages of this Court's opinion should have given the circuit court some pause in inventing new private rights of action. Nevertheless, all cautionary language was ignored by the circuit court, but for a passing reference to the concurring opinion by Justice Barrett in its concluding paragraph. *See Planned Parenthood* at 170.

III. THIS COURT HAS NO AUTHORITY TO OVERRIDE THE ROLE CONGRESS EMPOWERED THE STATES TO PERFORM.

Governor McMaster's order "'deem[ed] abortion clinics ... and any affiliated physicians or professional medical practices ... enrolled in the Medicaid program as unqualified to provide family planning services.'" As a result, the nation's leading killer of babies in the womb, Planned Parenthood, ceased to be qualified to provide the "medical assistance." This decision appears entirely reasonable on its face. And, although that decision antedated *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), it would appear to be the type of decision which that case anticipated and authorized when it returned the issue of abortion to the states. *See Dobbs* at 256 ("Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."). These may be some of the reasons that even strongly pro-abortion HHS Secretary Becerra did not challenge it.

As the Medicaid Act does not define the word "qualified," Respondent proposes the court read it to mean "being professionally capable or competent." Resp. Br. on Petition at 28. Respondent then makes the unsupported assertion that "Congress adopted that meaning when it specified that 'qualified' means 'qualified to perform the service or services required.'" *Id.* Respondent's proposition that Congress simply

defined "qualified" as "qualified" is utterly circular and unhelpful. Rather, the fact that the term is not defined in the statute indicates that the issue is left to the states. As Justice Brandeis wrote nearly a century ago, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

In *Gregory v. Ashcroft*, this Court elaborated on our federal system, consisting of dual sovereigns. The Court quoted James Madison in Federalist 45 that: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Court then explained the rationale undergirding dual sovereignties: "This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes [and] it allows for more innovation and experimentation in government." *Id.*

In *Gregory*, the Court explained that the separation of powers into dual federal/state sovereignties is intended to prevent centralization of power. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power

in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* at 458. The Court concluded, "These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty." *Id.* at 459.

Congress has established certain detailed, specific requirements for states to follow, but in many areas, uses general language empowering the states to administer the program. For example, the National Academy for Health Policy explains the state's role in applying the general term "medical necessity." "The federal statute does not define 'medical necessity' but rather describes a broad standard for coverage without providing a prescriptive formula for ascertaining necessity."[5] Its website provides a table of the various state definitions of what constitutes "medically necessary" treatment demonstrating that there are almost as many definitions as there are states. Likewise, states may determine what income thresholds entitle individuals in a wide variety of classes to Medicaid eligibility.[6] In Maine, a child in a family of four is Medicaid-eligible if the family's income is below $5,325 per month. In Massachusetts,

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[5] National Academy for Health Policy, "State Definitions of Medical Necessity under the Medicaid EPSDT Benefit" (Apr. 3, 2021).

[6] A. Martin, "Medicaid Eligibility By State: Map And Income Chart," *ChoiceMutual.com* (May 31, 2024).

the cutoff is $3,138. In the District of Columbia, it is $8,100.

States also may adopt a wide variety of approaches to coverage. A 2022 report by the Kaiser Family Foundation reviewed state coverage of five types of so-called "gender-affirming care" for persons identifying as "transgender."[7] Out of 41 responding states, 23 provided "gender reassignment surgery; the others did not. Two states, Maine and Illinois, reported that they cover all five types of services, while two states, Texas and Alabama, reported that they cover none."

This Court is currently considering *U.S. v. Skrmetti* (No. 23-477) involving an interpretation of the Equal Protection Clause, not a statute, but the Sixth Circuit's cautionary note is equally persuasive here: "The burden of establishing an imperative for constitutionalizing new areas of American life is not — and should not be — a light one, particularly when the States are currently engaged in serious, thoughtful debates about the issue." *L.W. v. Skrmetti*, 73 F.4th 408, 415-16 (6th Cir. 2023). Likewise, the federal judiciary should eschew the temptation of federalizing health policy through judicial mandate in an area that Congress has left to the States.

Efforts to standardize the practices of the States occur regularly, but this Court has often resisted. In

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[7] I. Gomez, U. Ranji, A. Salganicoff, L. Dawson, C. Rosenzweig, R. Kellenberg, and K. Gifford, "Update on Medicaid Coverage of Gender-Affirming Health Services," *Kaiser Family Foundation* (Oct. 11, 2022).

1996, this Court was asked to create a uniform statute of limitations in a statute that did not contain one. The Court properly stated, "although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon [this Court]. That Congress did not provide a uniform limitations provision for § 301 suits is not an argument for judicially creating one...." *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966).

The same principle obtains here. By not defining the term "qualified" provider, Congress left the question to the several States, as it did other matters, including procedure coverages, eligibility thresholds, and innumerable other details of the Medicaid statutes. Nothing in the text suggests Congress created a private right of action, perhaps because it understood this would allow a judicial override on the authority of the States. The circuit court's effort to read a private right of action into the statute is a backdoor assault on the law Congress wrote and the proper function of the "laboratory of the states" whenever the federal government funds a state program. As this Court has said: "Each side offers plausible reasons why its approach might make for the [better] policy. But who should win that debate isn't our call to make. Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018).

IV. PLANNED PARENTHOOD IS BOTH UNQUALIFIED AND UNWORTHY TO RECEIVE EITHER FEDERAL OR STATE FUNDS.

Petitioner reveals the discrepancy between Respondent Planned Parenthood South Atlantic's description of itself on its website as offering "a wide range of affordable and reliable reproductive and sexual health care services,"[8] and the reality that:

> PPSAT's two South Carolina locations offer only two prenatal/postpartum services: pregnancy tests (necessary for an abortion) and "miscarriage care" (including treatments for women who intentionally terminate their pregnancies with abortion drugs). PPSAT does not deliver healthy babies or help women become pregnant. [Pet. Br. at 8.]

Rather than being a conventional healthcare organization, Respondent is connected to that Planned Parenthood, whose founder, Margaret Sanger, is still hailed by the organization as a hero of birth control and women's rights. But the hidden history of Margaret Sanger is one of a racist and eugenicist, dedicated to the destruction of "inferior" races and classes. Sanger founded the American Birth Control League which later became Planned Parenthood.[9]

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[8] *See* https://www.plannedparenthood.org/planned-parenthood-south-atlantic/ who-we-are.

[9] T. Moses, "American Birth Control League," *Britannica*.

Sanger's 1922 book entitled The Pivot of Civilization asserted that:

> the "inferior races" were in fact "human weeds" and a "menace to civilization." She really believed that "social regeneration" would only be possible as the "sinister forces of the hordes of irresponsibility and imbecility" were repulsed. She had come to regard organized charity to ethnic minorities and the poor as a "symptom of a malignant social disease" because it encouraged the profligacy of those "defectives, delinquents, and dependents" she so obviously abhorred.[10]

In 1939, Sanger proposed and promoted the "Negro Project" which proposed to use birth control to address what she viewed as the problem that "[t]he mass of Negroes ... particularly in the South, still breed carelessly and disastrously, with the result that the increase among Negroes, even more than among Whites, is from that portion of the population least intelligent and fit." *Id.* at 73-74.

Planned Parenthood has continued targeting minority communities for reduction — at a substantial profit. As George Grant notes, "[d]uring the 1980s when Planned Parenthood shifted its focus from

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[10] Quoted in G. Grant, "Killer Angel: A Biography of Planned Parenthood's Founder Margaret Sanger," 2d ed. 70 (Ars Vitae Press: 1992). *See* R. Marshall & C. Donovan, Blessed are the Barren: The Social Policy of Planned Parenthood (Ignatius Press: 1991).

community-based clinics to school-based clinics, it again targeted inner-city minority neighborhoods."[11] In 1992, Grant made the shocking discovery that "[o]f the more than one hundred school-based clinics that have opened nationwide in the last decade, none have been at substantially all-White schools. None have been at suburban middle-class schools. All have been at Black, minority, or ethnic schools." *Id.*

In an undercover video released in August 2024, David Daleiden of the Center for Medical Progress spoke with Dr. Ann Schutt-Ainé, the chief medical officer of Planned Parenthood Gulf Coast, and the branch's vice president of abortion access, Tram Nguyen, showing:

> both Schutt-Ainé and Nguyen describing how they take measures to avoid prosecution under the federal **partial-birth abortion ban** [PBA] by dismembering the fetus while it is partially outside the womb to **preserve the internal organs of the fetus for harvesting**. "If I'm doing a procedure, and I'm seeing that I'm in fear that it's about to come to the umbilicus [navel], I might ask for a second set of forceps to **hold the body at the cervix and pull off a leg, or two, so it's not PBA**," Schutt-Ainé said in the video.[12]

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[11] G. Grant, Grand Illusions: The Legacy of Planned Parenthood 94 (Wolgemuth & Hyatt: 1988).

[12] G. Etzel, "Planned Parenthood sting video suppressed by Harris released after nine years," *Washington Examiner* (Aug. 8,

Planned Parenthood reports that its focus on abortion grows while the actual health care services it provides shrinks, revealing that "in the past ten years, the number of abortions performed by Planned Parenthood has increased by 20 percent. Meanwhile, cancer screenings fell by more than 58 percent, and prenatal services declined by more than 67 percent."[13] Planned Parenthood's commitment to abortion is underwritten by more than a half-billion federal taxpayer dollars each year.[14]

V. ABORTION IS A BRUTAL AND AN UNCONSCIONABLE MEANS OF FAMILY PLANNING.

A. Abortion Is Always Intended to Brutally Kill a Patient.

The Medicaid Act provides that "any individual eligible for medical assistance ... may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required." South Carolina has determined that abortion providers are not qualified to provide family services, an utterly logical determination. Abortion fails to meet any rational definition of

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2024) (emphasis added).

[13] M. New, "More Abortion, More Taxpayer Dollars, and Fewer Health Services," *National Review* (Apr. 17, 2024).

[14] J. Christensen, "Planned Parenthood took $1.8B in taxpayer money in 3 years— with $90M from COVID loans: feds," *New York Post* (Dec. 12, 2023).

medical assistance. If abortion is medical assistance, then so is assisted suicide, as both seek to cause the death of one on whom it is practiced. However, unlike assisted suicide, abortion can make no claim whatever to achieving "death with dignity."

Abortion violates the Hippocratic Oath, which requires the physician to pledge: "I will not give to a woman a pessary to produce abortion."[15] Thus, every physician who performs an abortion for reasons unrelated to the saving of the mother's life, violates the Hippocratic Oath.

Even if a physician can justify to himself performing an abortion, that procedure is not health care, nor "medical assistance," nor any legitimate means of "family planning."

Between its *Roe v. Wade* decision in 1973 that invalidated the laws of most States, and its reversal in 2022 returning the matter to the States in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), this Court frequently grappled with the horrifying reality of abortion. When this Court struck down Nebraska's law against partial-birth abortion, in dissent, Justice Kennedy explained what the procedure entailed:

> Dr. Carhart uses the traction created by the opening between the uterus and vagina to **dismember** the fetus, **tearing** the grasped

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[15] "Hippocratic oath," *Britannica*.

> portion away from the remainder of the body.... The fetus, in many cases, dies just as a human adult or child would: It **bleeds to death** as it is **torn limb from limb**.... The fetus can be **alive at the beginning** of the dismemberment process and can **survive for a time while its limbs are being torn off.** Dr. Carhart agreed that "[w]hen you **pull out a piece** of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, ... the fetus [is] alive." ... Dr. Carhart has **observed fetal heartbeat** via ultrasound with "extensive parts of the fetus removed," ... and testified that mere **dismemberment of a limb does not always cause death....** [*Stenberg v. Carhart*, 530 U.S. 914, 958-59 (2000) (Kennedy, J., dissenting) (emphasis added).]

Also in dissent, Justice Scalia stated:

> [O]ne day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*.... The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, ... and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this **visibly brutal means of eliminating our half-born posterity** is quite simply absurd. [*Id*. at 953 (Scalia, J., dissenting) (emphasis added).]

Seven years later, this Court reversed itself, upholding a similar ban at the federal level. *Gonzales v. Carhart*, 550 U.S. 124 (2007). However, abortionists have developed a work-around to evade the Partial-Birth Abortion Ban — by killing the baby before allowing it to partially exit the mother's body (as defined in 18 U.S.C. § 1531) at which point the baby would become protected by the law.[16] Indeed, many different techniques have been developed to kill unborn babies *in utero* — which Planned Parenthood wants this Court to deem protected, tax-funded family planning, by qualified providers. Consider these various methods:

> **Suction (Vacuum) Aspiration**. In the most common abortion method, the cervix is dilated, and a hollow plastic tube with a sharp tip is inserted into the cervix and then into the uterus. An aspirator attached to the tube tears the body of the fetus apart and suctions the pieces through the tube.
>
> **Dilation and Curettage (D&C)**. A curette (a sharp looped knife) is inserted into the uterus to dismember the fetus and placenta.
>
> **Intracardiac Injection Abortion.** A needle is guided into the fetus's heart with the aid of ultrasound, and poison (often potassium chloride or digoxin) is injected, causing a heart attack. Intracardiac injection is most commonly used for "pregnancy reduction" abortions following in vitro fertilization (IVF)

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[16] *See* Justin Diedrich, M.D., "Induction of fetal asystole before abortion," *Society of Family Planning* (Sept. 2024).

procedures, if multiple embryos were implanted to increase the likelihood of pregnancy. Intracardiac injection is used in late-term abortions when there is the likelihood of delivering a live baby in order to avoid state laws that would require the baby to be resuscitated and given medical care.

Dilation and Evacuation (D&E). In the second trimester, the fetus's tendons, muscles, and bones are more developed. Therefore, forceps are inserted into the uterus to forcibly dismember the fetus, and the pieces are removed individually. Larger fetuses must also have their skulls crushed so the pieces can pass through the cervix.

Instillation (Saline) Abortion. Amniotic fluid is removed from the uterus and replaced with a saline solution, which the fetus swallows. The fetus is killed by salt poisoning, dehydration, brain hemorrhage, and convulsions.

Prostaglandin Abortion. A dose of prostaglandin hormones is injected into the uterine muscle, which induces violent labor resulting in the death of the fetus. Prostaglandin abortions, typically performed in the second and early third trimester, are rarely used today, due to the relatively high chance that the fetus will survive the abortion and be born alive.

Chemical (Medical) Abortion. A woman is administered an abortion-inducing compound called mifepristone (also called RU-486 or Mifeprex) to block the action of progesterone,

> the hormone vital to maintaining the lining of the uterus. As the nutrient lining disintegrates, the embryo starves. Subsequently, the woman takes a dose of artificial prostaglandins which initiate uterine contractions and cause the embryo to be expelled from the uterus.[17]

Former Planned Parenthood clinic director Abby Johnson has described her own former career. "I worked in the abortion industry for 8 years. During that time, I coerced women. I manipulated them. I dehumanized their children … and during that process, I dehumanized these women. I lied over and over again," she said. Then one day, Johnson was asked to assist a doctor performing an ultrasound abortion. "During that abortion on a 13 week old baby.... I saw this baby fight for his life against the abortion instruments," she said. "I had believed that the unborn didn't have any sensory development, didn't feel anything.... And so to see this, I was surprised, and then [I] also realized it had been this big lie and then I thought, 'What else have we been lying about?'"[18]

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[17] *See* Abortion Facts, Pro-Life Action League. *See also*, "Abortion Procedures," *Abort73.com*. Videos reveal even more starkly the unbelievable brutality of abortion, such as "This is Abortion," at *Abort73.com*.

[18] B. Hallowell, "'I saw this baby fight for life': This 'big lie' stunned Abby Johnson," *Christian Post* (June 16, 2020).

In 1970, Dr. Bernard Nathanson co-founded the NARAL, now called NARAL Pro-Choice America.[19] Dr. Nathanson participated in 75,000 abortions, performing more than 5,000 personally, including on his pregnant girlfriend. "In 1973, Dr. Nathanson and a growing contingent of pro-abortion doctors and medical professionals proved pivotal in convincing the Supreme Court to legalize abortion with the Roe v. Wade decision." *Id.* "I am one of those who helped usher in this barbaric age," Nathanson wrote in 1996. *Id.* But after watching an ultrasound abortion, Dr. Nathanson began to change. Nathanson became an advocate for the lives of the unborn he had previously destroyed. *Id.* In 1984, he released a film called "The Silent Scream," showing ultrasound images of an infant *in utero,* revealing the pain suffered by the baby during abortion.[20]

In 2017, Texas federal judge Lee Yeakel struck down Texas' ban on partial-birth abortion. His decision made the case that abortion is not health care about as well as it can be made. "An **abortion always results in the death of the fetus**. The extraction of the fetus from the womb occurs in every abortion. **Dismemberment** of the fetus is the inevitable result."[21] However, Judge Yeakel was

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[19] A. Lambert, "Mission aborted: The conversion of ex-abortionist Dr. Bernard Nathanson," *CatholicEducation.org*.

[20] B. Nathanson, "The Silent Scream."

[21] *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938, 947 (W.D. Tex. 2017) (emphasis added) rev'd by *Whole Woman's Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021).

wrong in one respect — abortion occasionally fails. In one famous case, in 1977, four years after *Roe v. Wade*, a 17-year-old woman walked into an abortion clinic in Los Angeles to undergo a saline abortion. Eighteen hours later, the woman delivered the baby, still alive, weighing only 2.5 pounds.[22] In 2005, that baby, Gianna Jessen, told her story to the BBC: "The saline solution injected into the mother is to burn the baby, which gulps it in the womb," Gianna explained. "But after being literally burned alive for 18 hours I was delivered live." *Id.* She has cerebral palsy as a result of the procedure. *Id.* She survived only because of "a shocked nurse," who was "so taken aback by Gianna's live delivery that she summoned an ambulance to whisk her from the abortion clinic to the hospital." *Id.*

> Initially the prognosis for Gianna, who comes from Tennessee, was poor. Because of her cerebral palsy her foster mother was told that she was unlikely to ever crawl or walk. She, however, was determined and eventually learned to sit, crawl and then stand. She started to walk with leg braces and by the age of four was walking with the aid of a walker - now she walks without any assistance. [*Id.*]

"What happened to me was all being done in the name of women's rights, but the only one who cared about my rights was the nurse in the clinic, who got me the heck out of there." *Id.*

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[22] J. Elliott, "'I survived an abortion attempt,'" *BBC* (Dec. 6, 2005).

Jessen has needed and will need constant medical assistance the rest of her life because of the "medical assistance" rendered to her mother by the abortion clinic. And Gianna is not alone. Melissa Ohden is another victim of a botched saline abortion who today uses her platform to advocate for other abortion survivors.[23] The Abortion Survivors Network features on its website the stories of numerous others damaged by botched abortions, who today advocate for life, and cry out against the merchants of death.[24] South Carolina is wholly justified in determining that these abortion chambers termed abortion clinics are merchants in death, not "qualified" to render actual medical assistance or family planning services.

B. Abortion Violates Holy Writ.

The Holy Scriptures teach that God created human life.

- "The spirit of the Lord hath made me, and the breath of the almighty hath given me life." *Job* 33:4.
- "Thus says the Lord, thy redeemer, and he that formed thee from the womb, I am the Lord that maketh all things." *Isaiah* 44:24.

The Holy Scriptures reveal that life begins in the womb at conception.

- "For thou hast possessed my reins, thou hast covered me in my mother's womb. I will praise

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[23] *See* https://melissaohden.com/about-me/.

[24] *See* https://abortionsurvivors.org/.

thee; for I am fearfully and wonderfully made.... My substance was not hid from thee, when I was made in secret.... Thine eyes did see my substance, yet being unperfect...." *Psalm* 139:13-16.

• "Before thee camest forth out of the womb I sanctified thee...." *Jeremiah* 1:5.

• As thou knowest not what is the way of the spirit, nor how the bones do grow in the womb of her that is with child: even so thou knowest not the works of God who maketh all." *Ecclesiastes* 11:5.

The Holy Scriptures speak of abortion as sin.

• "These six things doth the Lord hate ... hands that shed innocent blood...." *Proverbs* 6:16-17.

• "If men strive, and hurt a woman with child, so that her fruit depart from thee, ... and any mischief follow [*i.e.*, the child dies] then thou shalt give life for life." *Exodus* 21:22-23.

• "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." *Genesis* 9:6.

The Holy Scriptures impose a God-given duty to defend the innocent unborn.

• "Open thy mouth for the dumb in the cause of all such as are appointed to destruction." *Proverbs* 31:8-9.

• "If thou forbear to deliver them that are drawn unto death, and those that are ready to be slain ... doth he not know it? and shall not he render to every man according to his works?" *Proverbs* 24:11-12.

In the Roman empire, "[a]bortion was common, and 'the killing of deformed infants was mandated by Roman law.'"[25] But the early Christians:

> challenged the pagan practices of Rome in the first "culture war." The first-century *Didache* (meaning "teaching" in Greek and bearing the full title *The Teaching of the Lord Given to the Gentiles by the Twelve Apostles)* ... contains direct commands against the pagan Roman practices.... *Didache* 2:2 says, "...You shall not kill a child in the womb nor expose infants [to die in the elements due to disabilities]." [*Id.* at 121-22.]

In *Roe v. Wade,* however, Justice Blackmun considered and rejected the Biblical tradition of defending unborn life, in favor of the traditions of the pagan Greek and Roman religions. "[A]bortion was practiced in Greek times as well as in the Roman Era, and ... 'it was resorted to without scruple.' ... Greek and Roman law afforded little protection to the unborn.... Ancient religion did not bar abortion." *Roe v. Wade*, 410 U.S. 113, 130 (1973). Indeed, it did not.[26]

Abortion is not health care. It is not medical care. It is not family planning. And the State of South Carolina has the right to decide that Planned

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[25] R. Boyer, God, Caesar, and Idols at 120 (Ambassador International: 2022).

[26] *See* M.S. Evans, The Theme is Freedom at 127-28 (Regnery: 1994).

Parenthood is not "qualified" to participate in that State's Medicaid plan.

CONCLUSION

The decision of the Fourth Circuit should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted,

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February 10, 2025