NO. 21-1043

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC; JULIE EDWARDS, on her behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court
for the District of South Carolina (Columbia)
The Honorable Mary G. Lewis
Case No. 3:18-cv-02078-MGL

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's previous two opinions applied the three factors set out in *Blessing v. Freestone*, 520 U.S. 329 (1997), giving Plaintiffs the benefit of a rebuttable presumption that the Medicaid Act's any-qualified-provider provision creates a private right that is enforceable under § 1983. Both opinions then concluded that South Carolina could not rebut that presumption because the State could not show that Congress expressly or implicitly foreclosed a § 1983 remedy.

As the Director has already shown, *Blessing*'s three-factor approach is history. Suppl. Opening Br. 4–7. In *Health & Hospital Corporation v. Talevski*, the Supreme Court made clear that *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), is the "established method" for deciding whether a statute "unambiguously confers" a privately enforceable right. 599 U.S. 166, 183 (2023). Only a "provision [that] surmounts this significant hurdle" creates "presumptively enforceable" rights. *Id.* at 184 (cleaned up). And as the majority opinion shows, *Blessing*'s three factors play no part in that analysis.

Without those factors, Plaintiffs cannot show that the any-qualified-provider provision creates privately enforceable rights. The Eighth Circuit and the en banc Fifth Circuit have so held. *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017); *Planned Parenthood of Greater Tex. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc). And so should this Court. Accordingly, the district court should be reversed.

ARGUMENT

I. This Court must assess whether the any-qualified-provider provision unambiguously confers private rights without applying the three *Blessing* factors.

There's no doubt that this Court's first opinion applied the three *Blessing* factors, then gave Plaintiffs a rebuttal presumption that the any-qualified-provider provision creates a private right enforceable under § 1983. As the Court put it in that opinion, the "[t]hree [*Blessing*] factors guide us in determining whether a statute creates a private right enforceable under § 1983." *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 696 (4th Cir. 2019) (citing *Blessing*, 520 U.S. at 340–41). After applying each of those factors, *id.* at 696–98, the Court concluded that "the three *Blessing* factors [we]re satisfied," so "the individual plaintiff benefits from a rebuttable presumption that the free-choice-of-provider provision is enforceable under § 1983," *id.* at 698 (citing *Blessing*, 520 U.S. at 341).

The Court then held that the resulting rebuttable "presumption ha[d] not been overcome." *Id.* The Medicaid Act did not "declare an express intent" to foreclose a § 1983 remedy. *Id.* Nor did it contain such a "comprehensive enforcement scheme" that an intent to foreclose a § 1983 remedy could be implied. *Id.* at 699 (citing *Blessing*, 520 U.S. at 341). As a result, the Court held the any-qualified-provider provision creates a privately enforceable right under § 1983. *Id.* at 699–700.

There's also no doubt that this Court's second opinion took the same approach. Again, the Court began its analysis with *Blessing*'s "three factors to determine whether a statute creates a private right enforceable under § 1983." *Planned Parenthood S. Atl. v. Kerr*, 27 F.4th 945, 955 (4th Cir. 2022) (citing *Blessing*, 520 U.S. at 340–41). And again, the Court noted that "[i]f these three factors are satisfied, there is 'a rebuttable presumption that the right is enforceable under § 1983.'" *Id.* (quoting *Blessing*, 520 U.S. at 341). After applying each factor, the Court held that if the any-qualified-provider provision "does not survive the *Blessing* factors," the Court could not "imagine one that would." *Id.* at 955–56. And the Court rejected the Director's argument that the Court "erred altogether" by "applying these factors." *Id.* at 957.

Having found the *Blessing* factors "satisfied," the Court again applied *Blessing*'s rebuttable presumption that the any-qualified-provider provision may be enforced under § 1983 unless the Medicaid Act evinces Congress's intent to "specifically foreclose a remedy under § 1983." *Id.* (quoting *Blessing*, 520 U.S. at 341) (cleaned up). And the Court once again could find "nothing" in the Medicaid Act suggesting Congress "categorically *precluded* enforcement" by private plaintiffs who benefitted from the any-qualified-provider provision. *Id.* at 958 (emphasis added). *Blessing*'s three-factor test and the resulting rebuttable presumption were controlling.

But *Talevski* shows that the Supreme Court no longer applies *Blessing*'s three-factor approach, and lower courts are bound to apply the test set out in *Gonzaga* instead. Suppl. Opening Br. 4–7. Neither the *Talevski* majority nor the dissent thought it appropriate to apply the three *Blessing* factors—even though the Seventh Circuit had used them in its own analysis below. *Id.* at 4–5. Instead, all nine Justices used traditional tools of statutory construction to determine whether the provision was "'phrased in terms of the persons benefited' *and contains 'rights-creating,' individual-centric language* with an 'unmistakable focus on the benefitted class.'" *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 284, 287) (emphasis added). That's precisely the approach the Fifth Circuit took in *Kauffman* and the Eighth Circuit took in *Gillespie*. And it's the approach this Court must take on remand.

Plaintiffs' insistence that this Court can rest on its laurels because *Talevski* "relied on" *Blessing*, Suppl. Resp. Br. 2, badly misreads *Talevski*. The *Talevski* majority cited *Blessing* only one time and only as secondary support for the point that a detailed enforcement scheme is not necessarily incompatible with a private right if the right is set forth clearly in the statutory text. 599 U.S. at 189. That single citation is not an endorsement of *Blessing*'s three-factor analysis, nor does it suggest that courts should keep using *Blessing*'s now-discarded pre-*Gonzaga* approach.

Similarly, Plaintiffs are wrong to say that "*Talevski* applied the same test that this Court has now twice applied." Suppl. Resp. Br. 10, 15. Yes, this Court acknowledged the high bar that a plaintiff must overcome to show that a statutory provision confers privately enforceable rights. *Id.* at 17–18 (citing *Baker*, 941 F.3d at 700; *Kerr*, 27 F.4th at 957). And yes, the Court cited *Gonzaga* for the principle that such rights must be conferred "unambiguously." *Id.* at 15–16 (citing *Baker*, 941 F.3d at 700; *Kerr*, 27 F.4th at 955–57).

But simply affixing the "unambiguously conferred" label onto the incorrect test is not enough. If it were, the Court in *Talevski* would have simply copied the Seventh Circuit's *Blessing*-factor analysis. It did not because *Gonzaga*, not *Blessing*, "sets forth [the Court's] established method for ascertaining unambiguous conferral." *Talevski*, 599 U.S. at 183. And there is a world of difference between the traditional forms of statutory construction the Court endorsed in *Talevski* and *Gonzaga* and *Blessing*'s three-factor test. Suppl. Opening Br. 2–3, 5–6, 11–13. The Court may have "traditionally looked at" those factors pre-*Gonzaga*. *Blessing*, 520 U.S. at 340. But no more. Suppl. Opening Br. 4–7. *Gonzaga* rejected *Blessing*'s "multifactor" test, even as Justice Stevens in dissent tried to save it. Suppl. Opening Br. 5–6. *Contra* Suppl. Resp. Br. 17 n.3. And in *Talevski*, all nine Justices agreed that *Gonzaga*—and not *Blessing*—supplies the correct test. Suppl. Opening Br. 4–5.

Finally, it is wrong to say that *Talevski* "harmonized" *Blessing* with the more recent *Gonzaga*. Suppl. Resp. Br. 17. As noted, *Talevski* cited *Blessing* once, and it was not to endorse *Blessing*'s three factors. The *Talevski* majority and Justice Barrett's concurrence eschewed the factors, and the dissent endorsed that approach, correctly noting that *Gonzaga* "reject[ed] the standard articulated in *Blessing*." *Talevski*, 599 U.S. at 230 (Alito, J., dissenting on different grounds). Hence, this Court cannot faithfully apply *Talevski* and *Gonzaga* on remand while still applying *Blessing*'s "multifactor" test. Suppl. Opening Br. 5–6.

Plaintiffs try to avoid that conclusion by mostly ignoring those portions of this Court's previous opinions in which the Court applied the three *Blessing* factors. Suppl. Resp. Br. 6–8, 15–18. But it is that analysis that creates the broad "daylight" between this Court's earlier opinions and *Talevski*. Suppl. Resp. Br. 18. To be sure, a GVR does not mean this Court *must* rule for the Director. Suppl. Resp. Br. 18. But the fact that the Supreme Court vacated this Court's previous ruling—rather than simply denying South Carolina's petition for certiorari—*does* mean the Supreme Court thought that *Talevski* created "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and that a GVR would "assist[ ]" this Court "by flagging a particular issue that it does not appear to have fully considered." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam).

II. *Talevski* and *Gonzaga* show why the any-qualified-provider provision does not create private rights.

Talevski found privately enforceable rights in the FHNRA nursing-home provisions at issue in that case, while *Gonzaga* rejected a privately enforceable right in the FERPA non-disclosure provisions at issue there. Read together, *Talevski* and *Gonzaga* show why the Eighth Circuit and the en banc Fifth Circuit were right to conclude that the any-qualified-provider provision does *not* create a right that is privately enforceable under § 1983.[1] To see why, the Court can simply juxtapose the provisions at issue in each of those cases with the any-qualified-provider provision at issue here, focusing especially on the presence or absence of "rights-creating" language, which is what *Gonzaga*'s "demanding bar" requires. *Talevski*, 599 U.S. at 180.

FHNRA provisions in *Talevski*. The two FHNRA provisions invoked in *Talevski* both "reside in 42 U.S.C. § 1396r(c), which expressly concerns '[r]equirements *relating to residents' rights*.'" 599 U.S. at 184 (citation omitted). "This framing is indicative of an individual 'rights-creating' focus." *Id.* Specifically, FHNRA's "unnecessary-restraint provision requires nursing homes to 'protect and promote … *[t]he right* to be free from … any physical or chemical restraints … not required to treat *the resident's* medical symptoms.'" *Id.* (citation omitted).

[1] The Director has not argued Spending Clause statutes *never* create privately enforceable rights. So it's unclear why Plaintiffs spend pages building that strawman and tearing it down. Suppl. Resp. Br. 10–13.

Similarly, FHRNA's predischarge-notice provision, "[n]estled in a paragraph concerning 'transfer and discharge *rights*,' … tells nursing facilities that they 'must not transfer or discharge [a] *resident*' unless certain preconditions are met." *Id.* at 184–85 (quoting 42 U.S.C. § 1396r(c)(2)) (cleaned up).

FERPA provisions in *Gonzaga*. The FERPA non-disclosure provisions "stand in stark contrast" to those provisions. *Talevski*, 599 U.S. at 185. The FERPA provisions speak "only to the Secretary of Education, directing that '[n]o funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.'" *Gonzaga*, 536 U.S. at 287 (quoting 20 U.S.C. § 1232g(b)(1)). And they "entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id.* (cleaned up). Instead, they have an "'aggregate' focus," and they are "not concerned with 'whether the needs of any particular person have been satisfied.'" *Id.* at 288 (citation omitted).

Any-qualified-provider provision. Like the provisions in *Gonzaga*, "the any-qualified-provider provision lacks clear rights-creating language." Suppl. Opening Br. 12. Indeed, it says nothing about a "right." The clause appears in a long list detailing what "State plan[s] for medical assistance must" have. 42 U.S.C. § 1396a(a). And it directs the Secretary of Health and Human Services to "approve any plan which fulfills the conditions" that list sets out. 42 U.S.C. § 1396a(b).

In other words, it is "a directive to the federal agency charged with approving state Medicaid plans, not … a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 331 (2015). It does not say, for example, that a beneficiary has any right to declare which providers are "qualified," or a right to challenge a state's decision that a provider is not qualified; the clause's references to individuals are made *only* in the context of what a state must do to procure federal funding. There is no "unambiguously conferred right." *Gonzaga*, 536 U.S. at 283. And in addition to giving providers themselves the right to an appeal, *see* 42 C.F.R. § 1002.213; S.C. CODE REGS. 126-404, 126-150, the Medicaid Act, like FERPA, gives the Secretary a means of enforcing compliance: "no further payments," 42 U.S.C. § 1396c. The provision simply does not envision private-party lawsuits.

Plaintiffs' claim that the provision is more like the provisions in *Talevski* because of its "individual-centric language," Suppl. Resp. Br. 14, would drop *Gonzaga*'s "demanding bar" to the floor, 599 U.S. at 180. The words "individual" and "individuals" appear more than 400 times in 42 U.S.C. § 1396a. The mere presence of the word in the any-qualified-provider provision can hardly confer an individual *right* when the provision itself says nothing about rights, and the enforcement scheme nowhere contemplates privately enforceable rights.

III. *Talevski* is a superseding, contrary decision.

Plaintiffs also claim that the Director "cannot simply march into this Court and rehash old arguments about how the Court's holdings were wrong." Suppl. Resp. Br. 19. But that's not what the Director is doing. Far from marching to the beat of its own drum, the Director is simply following the Supreme Court's marching orders to return to this Court for further consideration. And *Talevski* shows it was error when this Court applied *Blessing*'s three factors in its two prior opinions.

Plaintiffs try to reconcile *Talevski* with this Court's opinions by pointing to *Talevski*'s rejection of "the argument that the presence of a 'detailed enforcement regime' automatically precludes a Section 1983 remedy." Suppl. Resp. Br. 21 (cleaned up). But that misunderstands the Director's argument. The Director argues the rebuttable presumption does not need to be overcome because the any-qualified-provider provision does not unambiguously confer presumptively enforceable rights. Suppl. Opening Br. 12–13.

Finally, Plaintiffs say that "nothing in *Talevski* suggests that a statute must contain the magic word 'right' in order to unambiguously confer privately enforceable rights." Suppl. Resp. Br. 22. True enough. But that's not the Director's argument either. *Talevski* (and *Gonzaga* before it) make clear that a provision *does* have to contain clear rights-creating language. There is no such language in the any-qualified-provider provision. And that is dispositive.

CONCLUSION

This case is not a referendum on Planned Parenthood. Nor is it a referendum on South Carolina's decision to direct taxpayer funding away from providers who perform abortion. It *is* a referendum on whether the any-qualified-provider provision unambiguously creates a private right enforceable under § 1983 under the test the Supreme Court announced in *Gonzaga* and applied in *Talevski*—a test that precludes reliance on *Blessing*'s loose "multifactor" analysis. *Gonzaga*, 536 U.S. at 286. As explained above and in the Director's earlier briefing, the any-qualified-provider provision does not unambiguously confer rights that are privately enforceable under § 1983. Accordingly, applying the Supreme Court's reasoning in *Talevski* and the test enunciated in *Gonzaga*, this Court should reverse.

Dated: October 13, 2023

By: */s/ John J. Bursch*

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CERTIFICATE OF COMPLIANCE

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Dated: October 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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