No. 23-1275

IN THE

Supreme Court of the United States

ROBERT M. KERR, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, *et al.*,

Respondents.

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

BRIEF OF AMICI CURIAE THE STATE OF KANSAS AND FIFTEEN OTHER STATES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Using its Spending Clause power, Congress provides funds to the States to carry out certain programs for the welfare of their people. In exchange, the States agree to comply with the terms and conditions attached to those funds. Those conditions must be clear and unambiguous when the funding is accepted.

If the States fail to comply with the conditions set by the statute, they can expect to lose the funding. However, in some cases, they are also open to lawsuits from private individuals under the relevant statute itself or under section 42 U.S.C. § 1983. Before an individual can recover under § 1983, he must show Congress unambiguously created an individual right that is enforceable under that section.

The lower courts have been inconsistent as to when a statute creates an unambiguous individual right enforceable under § 1983. Some courts apply a multi-factor balancing test, requiring extensive litigation just to determine if there is a right at all. Others say that test no longer applies, but it is not clear what does apply in its absence. So, the States lack proper notice of whether they are at risk of private

[1] Counsel for the parties were given notice of Amici's intent to file an amicus brief in support of Petitioner pursuant to Rule 37.2, but due to excusable neglect, notice was not given 10 days in advance.

suit when they accept federal funding and are often sued when they did not expect to be.

Amici States of Kansas, Alabama, Alaska, Florida, Georgia, Idaho, Iowa, Indiana, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Tennessee, Utah, and West Virginia are interested in clearing the confusion with an express statement from this Court that *Wright*, *Wilder*, and *Blessing*, the cases that created the multi-factor balancing test, are no longer good law.

SUMMARY OF THE ARGUMENT

When Congress makes funding available to the States to carry out programs for the general welfare, it often attaches conditions to that funding. Those conditions must be clear and unambiguous when the funding is accepted. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

In some cases, Spending Clause statutes give rise to individual rights of action against the States that are privately enforceable under 42 U.S.C. § 1983. In three cases, *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), and *Blessing v. Freestone*, 520 U.S. 329, 346 (1997), this Court created a multi-part balancing test to determine whether a federal Spending Clause statute creates such a right.

Arguably, that test was inconsistent with the rule that conditions attached to federal funding must be clear and unambiguous at the time the funds are accepted. Recognizing this, in three later cases, *Gonzaga University v. Doe*, 536 U.S. 273 (2002), *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), and *Health & Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023), the Court retreated from the test and impliedly—but not expressly—overruled it.

Since those decisions, much confusion has arisen in the lower courts about how to determine whether a State is liable to private parties if it does not comply with Spending Clause conditions. This in turn

has put States in a bind; they are unable to determine when they accept federal funds whether they are opening themselves up to lawsuits, including the accompanying liability for damages and attorney's fees.

This case presents the appropriate vehicle for the Court to declare that *Wright*, *Wilder*, and *Blessing* are no longer good law and to affirm that there is no private right of action in a Spending Clause statute enforceable under § 1983 unless Congress says so unambiguously.

ARGUMENT

Amici States seek to provide the court a complete analysis on this issue that would assist it in understanding the history of the confusion and why this court should grant the petition to resolve it.

I. *Wright*, *Wilder*, and *Blessing* and the *Blessing* Test

We begin with *Wright*. *Wright* started with a rent dispute between tenants and their city housing authority, an entity established by the United States Housing Act of 1937 (the Housing Act) to provide housing for low-income people. 479 U.S. at 419–20. The 1969 Brook Amendment (Brook Amendment) to the Housing Act provided that the tenants "'shall pay as rent' a specified percentage of [their] income." *Id.* at 420. So, the housing authority charged the tenants a percentage of their income as rent. But it also charged a "surcharge" for excess utility consumption. *Id.* at 421.

The tenants sued, arguing that this violated their rights under the Brook Amendment because their total "rent" payment exceeded the statutory cap. Though the Amendment did not define "rent" to include utilities, the Department of Housing and Urban Development ("HUD") had done so in its implementing regulations. *Id.* at 421.

The Court was asked to decide whether the statute, as interpreted by HUD, created a private right that could be enforced against the housing authority under § 1983. The Court began with its earlier holding in *Maine v. Thiboutot*, which held that federal statutes were "laws" that could give rise to a private right of action enforceable under § 1983. 448 U.S. 1, 3–4 (1980). Not all federal statutes provide such enforceable rights, however. There is no right of action "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright*, 479 U.S. at 423 (citing *Pennhurst*, 451 U.S. 1 & *Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1 (1981)).

The Court determined the Brook Amendment did create a private right of action. In doing so, it considered the text of the statute, the legislative history, and HUD's interpretation of the statute through its implementing regulations. It found nothing to indicate that Congress intended to preclude a person from suing in federal court under § 1983 if he was overcharged in rent. *Id.* at 429. And "rent" included the cost of utilities. "HUD's view [that]

tenants have the right to bring suit in federal court to challenge housing authorities' calculations of utility allowances" "is entitled to some deference by this Court." *Id.* at 427 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), *overruled by Loper Bright Enter. v. Raimondo*, No. 22-1219, 2024 WL 3208360, at *22 (U.S. June 28, 2024)). The Court did not directly address whether this interpretation of the statute was consistent with the Spending Clause.

Four Justices dissented. They also looked to the plain language of the statute and the legislative history and found no private right of action—let alone one that defined rent to include utilities. *Wright*, 479 U.S. at 437–38 (O'Connor, J. dissenting). In their view, a right found solely in HUD's interpretation of the Brook Amendment as expressed in its regulations did not show Congress had intended to create the right. *Id.* at 435. The regulations alone did not give the tenants a "statutory entitlement enforceable in federal courts by virtue of 42 U.S.C. § 1983." *Id.* at 780.

Three years later, the Court again considered the question in *Wilder*. There, the Court was asked whether the Boren Amendment to the Medicaid Act gave healthcare providers a right to sue the States under § 1983. Medicaid is a state and federal program. In exchange for federal funds, Congress required the States to submit to the Secretary for Health and Human Services a plan that, among other things, established "a scheme for reimbursing health care providers for the medical services provided to needy individuals." 496 U.S. at 502. In relevant part, the

State plan must "provide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities . . .*" *Id.* at 502–03 (emphasis in original, final ellipsis added) (quoting 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V)).

Relying on *Wright*, the Court found the Boren Amendment did create an enforceable right. It noted the mandatory language of the statute ("shall") and the intended beneficiary (healthcare providers). *Id.* at 510–11. It also found the States' obligation (to pay reasonable rates) was not so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce." *Id.* at 512, 519–20. Beyond the text of the statute, Court also considered the legislative history and determined that Congress had intended to create the private right. *Id.* at 516–517. Finally, the Court held the right was enforceable in federal court under § 1983 because Congress had neither included an express provision to the contrary nor provided for a sufficiently comprehensive administrative scheme as to foreclose such as remedy. *Id.* at 520–21. Therefore, the healthcare providers could sue the State for a violation of the Boren Amendment under § 1983.

Once again, four Justices dissented. Chief Justice Rehnquist noted "the Court looks beyond the unambiguous terms of the statute and relies on policy considerations purportedly derived from legislative history and superseded versions of the statute," *Wilder*, 496. at 527 (Rehnquist, C.J., dissenting), and that "the Court's interpretation takes far more liberties with the statutory language than does the position advanced by petitioners," *id.* at 528–29. On its own terms, the dissent argued, the Boren Amendment did not create any privately enforceable right.

Seven years later, the Court took the factors from *Wright* and *Wilder* and created the *Blessing* test. This three-part test required courts to consider (1) whether Congress "intended the provision at issue to benefit the plaintiff"; (2) whether "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) whether the statute was "couched in mandatory, rather than precatory, terms" such that it "unambiguously imposed a binding obligation on the States." *Blessing*, 520 U.S. at 340–41 (citing *Wright*, 479 U.S. at 430 then *Wilder*, 496 at 510–511). If, applying these three factors, a plaintiff established that Congress intended to create an individual right, "there is only a rebuttable presumption that the right is enforceable under § 1983." *Id.* at 341. The burden is then on the State "to show Congress specifically foreclosed a remedy under § 1983. Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by

creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (internal quotation marks and citation omitted).

II. Retreating from *Wright*, *Wilder*, and *Blessing*

Though simple enough on its face, the *Blessing* test proved difficult for the lower courts to apply. Many applied the same test to the same statute and reached different conclusions. So, the Court sought to clarify the issue in *Gonzaga*, 536 U.S. 273.

In that case, the Court sought to resolve a circuit split as to whether the non-disclosure provision Family Educational Rights and Privacy Act of 1974 ("FERPA") gave rise to a private right of action that was enforceable against the States under § 1983. *Id.* at 278. The Court observed "other state and federal courts have divided on the question of FERPA's enforceability under § 1983. The fact that all of these courts have relied on the same set of opinions from this Court [including *Wright*, *Wilder*, and *Blessing*] suggests that our opinions in this area may not be models of clarity." *Id.*

In the end, the Court held FERPA did not create a right of action enforceable under § 1983. It clarified that § 1983 "provides a remedy only for the deprivation of '*rights*, privileges, or immunities secured by the Constitution and laws" of the United States'" and "not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Id.* at 283 (emphasis added). And "if

Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Id.* at 290. It held FERPA was not enforceable against the States by private parties for three major reasons. First, it did not contain "rights-creating language," such as the word "right." *Id.* at 290. Second, the provision had an "aggregate purpose" and was not concerned with the "needs of any particular person." *Id.* at 288. And third, it did not directly impose a duty on schools regarding their students; rather, it was directed to the Secretary of Education. *Id.* at 290.

In reaching this result, the Court veered away from its prior cases in three key ways. First, the Court noted that *Wilder* "appear[ed] to support[] the notion" "that our implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983. *Id.* at 283. It then affirmatively rejected that notion: "[O]ur implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." *Id.* This, as the dissent noted, "require[s] a heightened showing from § 1983 plaintiffs," 36 U.S. at 300 (Stevens, J., dissenting), over and above what *Wright*, *Wilder*, and *Blessing* seemingly would have required.

Next, the Court appeared to reject *Wright* and *Wilder*'s search for an implied right of action in the legislative history of the statute or in the agency regulations implementing it. "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there

is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286; *see also id.* at 285 n.5 (the dissent "would conclude that Congress intended FERPA's nondisclosure provisions to confer individual rights on millions of school students from kindergarten through graduate school without having ever said so explicitly. This conclusion entails a judicial assumption[] with no basis in statutory text . . ."). Thus, the Court seemed to conclude that only the plain language of the statute could create a private right of action.

Finally, and most importantly, the Court did not apply the multifactor *Blessing* test. In fact, it appeared to reject it altogether. "[W]e fail to see how relations between the branches are served by having courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not." *Id.* at 286. However, as the dissent noted then—and lower courts note now—it did not expressly overrule *Blessing*. To the contrary, Court's analysis involved some of the same reasoning as *Blessing*. *Compare id.* at 288 (focus of the statute should be on the individual); *with Blessing*, 520 U.S. at 343 (State must owe services to a "particular person). *See also Gonzaga*, 536 U.S. at 302 (Stevens, J., dissenting) ("[T]he Court's analysis, in part, closely tracks *Blessing*'s factors, as it examines the statute's language, and the asserted right's individual versus systematic thrust."). So, as noted, while the *Gonzaga* Court moved away from *Wright*, *Wilder*, or *Blessing*, it did not expressly overrule them.

This implied rejection continued in two other relevant cases. First, in *Armstrong*, the Court discussed *Wilder* and the Boren Amendment, but

observed in a footnote that the plaintiffs did "not assert a § 1983 action, since our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." 575 U.S. at 330 n.* (citing *Gonzaga*, 536 U.S. at 283). And most recently, in *Talevski*, 599 U.S. 166, the Court cited *Blessing* just once in determining that the Federal Nursing Home Reform Act did create a right of action enforceable under section 1983. It did not discuss *Wright* or *Wilder* at all.

III. *Wright*, *Wilder*, *Blessing*, *Gonzaga*, and *Armstrong* in the lower courts

Today, the lower courts are divided as to whether *Wilder*, *Wright*, and *Blessing* remain good law. As Judge Richardson noted in an earlier version of this case, it is unclear (1) whether the multi-factor balancing test applies, (2) whether the courts may rely on implied-right-of-action cases to determine whether a right is enforceable under section 1983, and (3) what evidence is relevant to that analysis. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 709 (4th Cir. 2019) (Richardson, J., concurring).

At least one court has concluded on its own that *Wilder*, at least, is no longer good law. *Does v. Gillespie*, 867 F.3d 1034, 1045 (8th Cir. 2017) ("*Armstrong* confirmed that the 1990 *Wilder* decision has been repudiated by post–1994 precedent."). Most other courts, however, will not do so absent a statement from this Court. As Judge Richardson explained, it is unclear whether this Court must expressly overrule its precedent before lower courts may consider it discarded. *Planned Parenthood S. Atl. v. Kerr*, 95 F.4th

152, 170 n.2 (4th Cir. 2024) (Richardson, J., concurring).

To that end, some courts discuss the uncertainly as to *Wilder*, *Wright*, and *Blessing* are still good law, but continue to apply them regardless. One court noted that "recent Supreme Court authority casts doubt upon the continued applicability of the *Blessing* factors . . . Still, the Supreme Court has not expressly held that the *Blessing* factors are no longer relevant." *Fed. L. Enf't Officers Ass'n v. Att'y Gen. New Jersey*, 93 F.4th 122, 130 (3d Cir. 2024) (internal citation omitted). Another court observed:

> [A]n earlier Supreme Court case, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 522 (1990), had previously rejected Kansas's argument [that the "sole remedy Congress provided for a State's failure to comply with Medicaid's requirements is the withholding of Medicaid funds by the federal Secretary of Health and Human Services," not a private action under § 1983]. *Wilder* held that the "Medicaid Act's administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983. 'Generalized powers' to audit and cut off federal funds are insufficient to foreclose reliance on § 1983 to vindicate federal rights." 16 496 U.S. at 522 (quoting *Wright*, 479 U.S. at 428). And because Justice Kennedy didn't

> join Justice Scalia's Spending Clause reasoning [in *Armstrong*], it is not binding on us; *Wilder* still is.

Planned Parenthood of Kansas v. Andersen, 882 F.3d 1205, 1229 (10th Cir. 2018) (internal alterations omitted); *see also id.* at 1229 n.16 ("Even if the Supreme Court had [overruled *Wright* in *Armstrong*]—and we do not think it did—it would not impact our analysis."); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 184 (3d Cir. 2004) ("While in *Gonzaga University* the Court rejected the notion that its cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983, it carefully avoided disturbing, much less overruling, *Wright* and *Wilder*." (internal alterations and quotation marks omitted)).

Because many courts still consider *Wright*, *Wilder*, and *Blessing* to be binding, this discussion occurs more often in concurrences or dissents. For example, in her dissent in *York State Citizens' Coal. for Child. v. Poole*, Judge Livingston said:

> The Supreme Court has held that Spending Clause legislation created an individually enforceable right under § 1983 in only three cases. The majority cites these cases repeatedly, but glosses over the nearly three decades of case law following *Wilder*, the most recent of the trio, during which time the Supreme Court has never again recognized a private right enforceable under § 1983 in Spending Clause legislation. This trend has not been accidental. As the Court

> clarified in 2015, "our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." The majority criticizes citation to *Armstrong* as glomming on to one sentence of dicta, but the Court's migration away from recognizing § 1983 rights is both pervasive and undeniable. Indeed, this Court has already conceded as much.

922 F.3d 69, 90 (2d Cir. 2019) (Livingston, J., dissenting) (internal quotation marks, citations, and brackets omitted) (citing *Pennhurst*, 451 U.S. at 44, 101 S. Ct. 1531). So, she thought, if the States had agreed to mandatory spending provisions that opened them up to private suit in federal court, "they did so unwittingly." *Id.* In *Saint Anthony Hospital v. Whitehorn*, Judge Brennen observed "*Wright* and *Wilder* predate *Gonzaga*'s requirement that a statute must contain explicit 'rights-creating' language to unambiguously confer a private cause of action under § 1983. The two cases also predate the Court's 'rejection of' attempts to infer enforceable rights from Spending Clause statutes." 100 F.4th 767, 800 (7th Cir. 2024) (Brennan, J., dissenting) (internal brackets and citation omitted) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 281, 284 (2002)). *See also Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1202 n.8 (8th Cir. 2013) ("The dissent goes to great lengths to point out that *Wilder* remains good law. We agree of course, but we find *Wilder* to be distinguishable." (internal citation omitted)).

Finally, in some cases, the courts treat *Wilder*, *Wright*, and *Blessing* as good law. Some simply do not

address the tension those cases have with *Gonzaga*. *See, e.g.*, *Anderson v. Ghaly*, 930 F.3d 1066, 1073 (9th Cir. 2019); *Burban v. City of Neptune Beach, Fla.*, 920 F.3d 1274, 1279 (11th Cir. 2019); *Est. of Place v. Anderson*, 398 F. Supp. 3d 816, 841 (D. Colo. 2019), *aff'd sub nom. Est. of Angel Place v. Anderson*, No. 19-1269, 2022 WL 1467645 (10th Cir. May 10, 2022). Others compare the plain language of the statues they are asked to interprete to the statutes in *Wilder* and *Wright*—without noting that the Court in those cases located the rights in the implementing regulations and legislative histories rather than the plain language of the statutes. *See, e.g.*, *Poole*, 922 F.3d at 82 ("This case is [] much closer to *Wilder* and *Wright*, where the Supreme Court found an enforceable right, than it is to *Gonzaga* and *Blessing*, where it did not."); *Garnett v. Zeilinger*, 323 F. Supp. 3d 58, 72 (D.D.C. 2018) ("The statutory text at issue here strongly resembles those at issue in *Wilder* and *Wright*.").

IV. *Kerr v. Planned Parenthood*

The lower courts' confusion can best be summed up by the case at bar. In 2019 (at the preliminary injunction stage), the Fourth Circuit applied the multifactor *Blessing* test and found Medicaid's qualified-provider provision creates a private right of action enforceable against the State under § 1983. *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 697, 706 (4th Cir. 2019); *see also Baker*, 941 at 710 (Richardson, J., concurring) ("Today, our opinion is guided by the three factors from *Blessing*." (internal brackets and quotation marks omitted)). In so deciding, the Fourth Circuit joined five other circuits that reached the same result. *See Planned Parenthood of Kansas v. Andersen*, 882 F.3d 1205 (10th Cir. 2018);

Planned Parenthood of Gulf Coast, Inc. v. Gee, 862 F.3d 445 (5th Cir. 2017), *overruled by Planned Parenthood of Greater Texas Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020); *Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006). At the time, only the Eighth Circuit had reached the opposite conclusion. *See Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017). The State appealed, and this Court denied certiorari. *Baker v. Planned Parenthood S. Atl.*, 141 S. Ct. 550 (2020).

Judge Richardson concurred, but he questioned whether "*Wilder*, specifically, and the *Blessing* factors, generally, [are] still good law?" *Baker*, 941 F.3d at 709 (Richardson, J., concurring). Without an answer to that question, "the proper framework for determining whether a given statute creates a right that is privately enforceable under § 1983" was uncertain. *Id.* at 708. However, "[d]espite the 'confusion' and 'uncertainty,'" Judge Richardson concluded "we must apply the law as we find it." *Id.* at 710.

A year later, the *en banc* Fifth Circuit reconsidered its opinion in *Gee* and overruled it in *Kauffman*. The Fifth Circuit held that *Gonzaga* and *Armstrong* "plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Kauffman*, 981 F.3d at 359. Medicaid's qualified-provider provision did not create a private right of action because Congress did not "unambiguously say that a beneficiary may contest or otherwise challenge a determination that the provider of her choice is

unqualified." *Id.* This decision created a 5-2 circuit split over whether the qualified-provider provision creates a right of action privately enforceable under § 1983.

In 2022 (at the merits stage), the Fourth Circuit reached the same conclusion it had before. *Planned Parenthood S. Atl. v. Kerr* (*Kerr I*), 27 F.4th 945 (4th Cir. 2022), *cert. granted, judgment vacated*, 143 S. Ct. 2633 (2023). Once again, Judge Richardson noted in his concurrence that "the caselaw on implied private rights of action remains plagued by confusion and uncertainty." *Kerr I*, 27 F.4th at 959 (Richardson, J., concurring). This time, when the State appealed, this Court granted certiorari, vacated the judgment, and reversed so the Fourth Circuit could consider the question in light of *Talevski*. *Kerr v. Planned Parenthood S. Atl.*, 143 S. Ct. 2633 (Mem) (2023).

This year, even with the benefit of *Talevski*, the Fourth Circuit has reached the exact same conclusion it did when it first applied the—potentially inapplicable—*Blessing* balancing test. *Planned Parenthood S. Atl. v. Kerr* (*Kerr II*), 95 F.4th 152 (4th Cir. 2024). Once again, Judge Richardson asked this Court "for clarity on the precedential status of [*Wilder*]—and, to a lesser extent, [*Blessing*]." *Kerr II*, 95 F.4th at 170 (Richardson, J., concurring). "[E]ven after [*Talevski*]," he said, the lower courts "continue to lack the guidance inferior judges need." *Id.*

***

The uncertainty regarding the statuses of *Wright*, *Wilder*, and *Blessing* causes more than just headaches for concurring judges. It has led to greater

uncertainty for the States as well. When a State accepts money from the federal government, it accepts the conditions attached to those funds. As the Court explained in *Pennhurst*, the conditions attached to federal funding must be clear and unambiguous. 451 U.S. at 17. This includes whether a State is subject to suit—especially, as here, where the State may be liable for monetary damages and attorney's fees. But, because courts are uncertain about the law, there is no consistency in determining whether a Spending Clause statute confers an "unambiguous" individual right of action privately enforceable under § 1983. So, the States cannot determine whether they can be sued by individuals under any given Spending Clause statute.

CONCLUSION

The factors first identified in Wright and Wilder, and compiled into a simple multi-factor test by blessing, arguably never gave States the required clear notice of their obligations under the Spending Clause. Recognizing this, the Court has retreated from them, either by implying they have been overturned or by not mentioning them at all.

The lower courts have not revived the message, and are still subjecting States to suits under statutes with no clear and unambiguous private right of action. This case presents the appropriate vehicle for the Court to expressly say *Wright*, *Wilder*, and *Blessing* are no longer good law and to restore State and federal balance. The Court should, therefore, grant the petition.

Respectfully submitted this the 5th day of July, 2024,

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