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 OPENING BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Maine v. Thiboutot*, the U.S. Supreme Court held that Section 1983's reference to "rights, privileges, or immunities secured by … laws" includes rights secured by federal statutes. 448 U.S. 1, 4–6 (1980) (quoting 42 U.S.C. § 1983). In the roughly two decades that followed, though, courts struggled to find the right test to decide whether a federal statute creates a "right" enforceable under Section 1983.

In *Blessing v. Freestone*, the Supreme Court appeared to discern such a test, stating it had "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right." 520 U.S. 329, 340 (1997). But five years later in *Gonzaga*, the Court did an about-face, indicating it "consider[ed] this multifactor test problematic, to say the least." *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 709 (4th Cir. 2019) (Richardson, J., concurring) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

Still, *Gonzaga* did not "explicitly overrule" *Blessing*. *Planned Parenthood S. Atl. v. Kerr*, 27 F.4th 945, 959 (4th Cir. 2022) (Richardson, J., concurring in the judgment), *cert. granted, judgment vacated,* 143 S. Ct. 2633 (2023). And that left lower courts in a bind. "*Gonzaga* arguably laid down a different test than … *Blessing*." *Id.* (Richardson, J., concurring in the judgment). But it did not explicitly overrule it, leaving courts to wonder which case set out the governing test.

In its first decision in this case, this Court tried to solve that enigma by applying them both. *Baker*, 941 F.3d at 696–97 (applying *Blessing*'s three factors while modifying the first in light of *Gonzaga*). When the case came back before the Court last year, it took the same approach. *Kerr*, 27 F.4th at 955–57.

Earlier this year, though, in *Health & Hospital Corporation v. Talevski*, the Supreme Court made clear that *Gonzaga*—not *Blessing*—"sets forth [the Court's] established method for ascertaining" whether a statute unambiguously confers a privately enforceable right. 143 S. Ct. 1444, 1457 (2023). Indeed, all nine justices agreed on that point. *Id.* at 1452, 1457 (majority); *id.* at 1462 (Gorsuch, J., concurring); *id.* at 1463 (Barrett, J., & Roberts, C.J., concurring); *id.* at 1484–85 (Alito, J., & Thomas, J., dissenting).

Gonzaga did *not* apply *Blessing*'s "multifactor balancing test." 536 U.S. at 286. And neither did *Talevski*. Instead, both cases applied "traditional tools of statutory construction to assess whether Congress [had] 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belong[ed]." *Talevski*, 143 S. Ct. at 1457 (quoting *Gonzaga*, 536 U.S. at 283, 285–86).

That is a "significant hurdle." *Id.* And properly applied, the Medicaid Act's any-qualified-provider provision cannot clear it. This is not "the atypical case" in which Spending Clause legislation "create[s] § 1983-enforceable rights." *Id.*

Unlike the explicit rights-creating provisions in *Talevski*, the Medicaid Act's any-qualified-provider provision—located at 42 U.S.C. § 1396a(a)(23)—does *not* contain clear "rights-creating language." *Id.* (quoting *Gonzaga*, 536 U.S. at 290). Nor does it appear in a section expressly containing "[r]equirements relating to [individuals'] rights." *Id.* at 1457–58 (quoting 42 U.S.C. § 1396r(c)). That explains why, following its decision in *Talevski*, the Supreme Court granted the Director's pending petition for certiorari in this case, vacated the panel's prior decision in its entirety, and remanded for "further consideration in light of [*Talevski*]," Dkt. 91 at 3 of 3, instead of simply denying the petition.

In *Blessing*, the Supreme Court highlighted "three factors" that it had "traditionally" applied in its prior cases. 520 U.S. at 340. But that was a descriptive statement—not a prescriptive one. And twice now the Court has made clear that it no longer applies those factors to decide whether Spending Clause legislation creates § 1983-enforceable rights. "*Gonzaga* sets forth [the Supreme Court's] established method for ascertaining unambiguous conferral." *Talevski*, 143 S. Ct. at 1457. And *Talevski* shows what it takes to clear that "significant hurdle." *Id.* *Gonzaga* and *Talevski* have thus superseded this Court's prior decisions applying *Blessing*. And measured against the proper test, the any-qualified-provider provision falls short.

This Court should apply the test enunciated in *Gonzaga*—not *Blessing*—and reverse the decision below.

ARGUMENT

I. *Talevski* proves that the Supreme Court no longer applies the so-called *Blessing* factors, and lower courts are bound to apply the test set out in *Gonzaga* instead.

"Although federal statutes have the potential to create § 1983-enforceable rights, they do not do so as a matter of course." *Talevski*, 143 S. Ct. at 1457. That's because, for "Spending Clause legislation in particular, … 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.* (quoting *Gonzaga*, 536 U.S. at 280) (cleaned up). As a result, the "dispute" between the parties in *Talevski* was whether it was the "atypical case," meaning one where the statute "unambiguously" conferred individual rights, "making those rights 'presumptively enforceable' under § 1983." *Id.* (quoting *Gonzaga*, 536 U.S. at 283–84).

Importantly, none of the justices in the majority or the dissent thought it appropriate to apply the three *Blessing* "factors" to answer that question. Quite the opposite, the justices repeatedly described the test the Court set out in *Gonzaga* as the singular test for deciding whether a Spending Clause statute unambiguously confers § 1983-enforceable rights:

- "Since *Thiboutot*, we have crafted *a test* for determining whether a particular federal law actually secures rights for § 1983 purposes." *Id.* at 1452 (citing *Gonzaga*, 536 U.S. at 283–85) (emphasis added).

- "*Gonzaga* sets forth our established method for ascertaining unambiguous conferral." *Id.* at 1457.
- "*Gonzaga University v. Do*e sets *the standard* for determining when a Spending Clause statute confers individual rights …." *Id.* at 1463 (Barrett, J., concurring) (emphasis added).
- "[O]ur decision in *Gonzaga* establishes *the standard* for analyzing whether Spending Clause statutes give rise to individual rights." *Id.* (Barrett, J., concurring) (emphasis added).
- "The majority and Justice Barrett correctly identify the plaintiff's burden under § 1983: a statute must unambiguously confer individual federal rights to create rights within the meaning of § 1983, and *Gonzaga* sets forth our established method for ascertaining unambiguous conferral." *Id.* at 1484 (Alito, J., dissenting) (cleaned up).

In *Gonzaga*, the Supreme Court did not apply the so-called *Blessing* factors either. Instead, the Court disparaged them, explaining that the factors exemplified the kind of "language" from the Court's prior opinions that "might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983." *Gonzaga*, 536 U.S. at 282. To clear up the resulting "confusion" that created, the Court took the opportunity to "reject the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. And when Justice Stevens argued in dissent that separation of powers would be better served by applying "the test [the Court had] 'traditionally' used, as articulated in

Blessing," *id.* at 300–02 (Stevens, J., dissenting), the majority countered that it "fail[ed] 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. *Accord Talevski*, 143 S. Ct. at 1484 (Alito, J., dissenting) (*Gonzaga* "reject[ed] the standard articulated in *Blessing*.").

Despite all that, this Court still applied *Blessing*'s "[t]hree factors" the first time this case came before it to decide whether the Medicaid Act's any-qualified-provider provision "creates a private right enforceable under § 1983." *Baker*, 941 F.3d at 696. "If these three factors are satisfied," the Court reasoned, then "there is 'a rebuttable presumption that the right is enforceable under § 1983,'" a presumption that can only "be defeated by showing that Congress expressly or implicitly foreclosed a § 1983 remedy." *Id.* (quoting *Blessing*, 520 U.S. at 341). And when the case came back before the Court last year, the Court applied the *Blessing* factors again, rejecting the Director's argument that "*Gonzaga* effectively abrogated *Blessing*." *Kerr*, 27 F.4th at 957. This Court did not read *Gonzaga* to have "indicated that *Blessing* is no longer good law." *Id.* And this Court had "held that the *Blessing* factors continue to govern following *Gonzaga*." *Id.* (citing *Doe v. Kidd*, 501 F.3d 348, 355 (4th Cir. 2007)). So the Court felt bound to apply them. *Id.*; *accord Baker*, 941 F.3d at 709 (Richardson, J., concurring); *Kerr*, 27 F.4th at 959 (Richardson, J., concurring in the judgment).

Even in *Blessing*, though, the Supreme Court did not explicitly hold that satisfying all "three factors" it had "traditionally looked at" would *always* create "a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 340–41. Instead, the Court held that many of the provisions in the "multifaceted statutory scheme" at issue there did "not fit [the Court's] traditional three criteria for identifying statutory rights." *Id.* at 344. So the lower court had erred by "taking a blanket approach to determining whether" the scheme as a whole created rights rather than separating out the "particular rights it believed [arose] from the statutory scheme." *Id.* at 344–45.

But a holding that *failing* to make that required minimum showing falls short of creating § 1983-enforceable rights is different from a holding that *making* the minimum showing will always be enough to create such rights. That might have been the precedential result if the Court had affirmed in *Blessing*. But the Court vacated the decision below, holding that the statutes there *did not* give the respondents "the right to have the State substantially comply" with the statutory scheme "in all respects." *Id.* at 342, 349. So *Blessing* established the minimum *necessary* showing, which the statutes there failed to meet. But because of the result, *Blessing* did not establish what will be *sufficient* in every case. And now that the Supreme Court has made clear that it no longer applies *Blessing*'s "multifactor balancing test," no lower court should do so and load the dice in favor of creating § 1983-enforceable rights.

II. *Talevski* proves that Spending Clause statutes that create § 1983-enforceable rights are the exception—not the rule—and this is not "the atypical case."

As the Director argued the last time this case came to this Court, the Fifth Circuit's decision in *Planned Parenthood of Greater Texas v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc), and the Eighth Circuit's decision in *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), prove that, "untethered from *Blessing*'s now defunct 'multifactor balancing test,' *Gonzaga*, 536 U.S. at 286, courts correctly hold that the any-qualified-provider provision does not unambiguously confer a private right on individual Medicaid beneficiaries." Opening Br. 29.

As *Does* makes clear, that's true for three reasons. First, the "focus" of the provision—on the "federal agency charged with approving" state plans—is "two steps removed from the interests of the patients who seek services from a Medicaid provider." *Does*, 867 F.3d at 1041. "A statute that speaks to the government official who will regulate the recipient of federal funding 'does not confer the sort of *individual* entitlement that is enforceable under § 1983.'" *Id.* at 1041 (quoting *Gonzaga*, 536 U.S. at 287). And the Medicaid Act does just that: subject to certain exceptions, it requires the Secretary of Health and Human Services to "approve any plan which fulfills the conditions specified in subsection (a)." 42 U.S.C. § 1396a(b). And subsection (a) declares that a "State plan for medical assistance must" satisfy some 87 separate conditions, including the one at issue here. 42 U.S.C. § 1396a(a).

"Second, Congress expressly conferred another means of enforcing" compliance: the "withholding of federal funds by the Secretary." *Does*, 867 F.3d at 1041 (citing 42 U.S.C. § 1396c). It "also authorized the Secretary to promulgate regulations that are necessary for the proper and efficient operation of a state plan," which the Secretary has done by requiring states "to give providers the right to appeal an exclusion from the Medicaid program." *Id.* (citing 42 C.F.R. § 1002.213); *accord* S.C. CODE ANN. REGS. 126-404 (giving Medicaid providers the right to a hearing before certain exclusions, suspensions, or terminations); S.C. CODE ANN. REGS. 126-150 (providing an administrative appeal process to anyone "possessing a right to appeal," which includes providers through their enrollment agreements). The "potential for parallel litigation and inconsistent results" that would follow from granting recipients the right to file their own federal lawsuits makes it "reasonable to conclude that Congress did not intend to create an enforceable right for individual patients under § 1983." *Does*, 867 F.3d at 1041–42.

"Third, statutes with an 'aggregate' focus," like the Medicaid Act's "substantial compliance regime," do not "give rise to individual rights." *Id.* at 1042 (quoting *Gonzaga*, 536 U.S. at 288). Under the Medicaid Act, the "Secretary is directed to discontinue payments to a State if he finds that 'in the administration of the plan there is a failure to comply substantially' with a provision of § 1396a," which includes the any-qualified-provider provision. *Id.* (quoting 42 U.S.C. § 1396c(2)).

All of that makes the any-qualified-provider provision distinguishable from the Federal Nursing Home Reform Act provisions invoked in *Talevski*. And *Talevski*'s emphasis on (1) the high bar that *Gonzaga* sets and (2) the explicit "rights-creating language" present in *Talevski*, drives home the point that *this* case is not "the atypical case" that *Talevski* clearly was. 143 S. Ct. at 1457–58 (cleaned up).

As with their agreement that *Gonzaga*—not *Blessing*—establishes the test for deciding whether § 1983-enforceable rights exist, all nine justices in *Talevski* agreed that *Gonzaga* sets a high bar:

- "[O]ur precedent sets a *demanding bar*: Statutory provisions must unambiguously confer individual federal rights." *Id.* at 1455 (emphasis added).
- "If a statutory provision surmounts this *significant hurdle*, it secures § 1983-enforceable rights, consistent with § 1983's text." *Id.* at 1457 (emphasis added) (cleaned up).
- "*This bar is high*, and although the FNHRA clears it, many federal statutes will not." *Id.* at 1463 (Barrett, J., concurring) (emphasis added).
- "As the Court explains, § 1983 actions are the exception—not the rule—for violations of Spending Clause statutes." *Id.* (Barrett, J., concurring); *accord id.* at 1462 (Gorsuch, J., concurring) ("largely track[ing] Justice Barrett's reasoning").
- "I agree with the Court's understanding of the *high bar* required to bring an action under 42 U.S.C. § 1983 for the violation of a federal statute, but I disagree with how that standard applies in this case." *Id.* at 1484 (Alito, J., dissenting) (emphasis added).

To meet that high bar, "[c]ourts must employ traditional tools of statutory construction to assess whether Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs." *Id.* at 1457 (quoting *Gonzaga*, 536 U.S. at 283, 285–86). That "test is satisfied where the provision … is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Id.* at 1457 (quoting *Gonzaga*, 536 U.S. at 284, 287) (cleaned up). And the two provisions in *Talevski* satisfied that test given the explicit "rights-creating language" they both contain. *Id.* at 1457–58 (cleaned up).

For example, both "reside in 42 U.S.C. § 1396r(c), which expressly concerns '[r]equirements relating to *residents' rights*.'" *Id.* (quoting 42 U.S.C. § 1396r(c)). "This framing is indicative of an individual 'rights-creating' focus." *Id.* at 1457 (quoting *Gonzaga*, 536 U.S. at 284). Likewise, "the text of [both] provisions unambiguously confers rights upon the residents of nursing-home facilities." *Id.* "The unnecessary-restraint provision requires nursing homes to 'protect and promote … *[t]he right* to be free from … any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat *the resident's* medical symptoms.'" *Id.* at 1458 (quoting 42 U.S.C. § 1396r(c)(1)(A)(ii)).

The "predischarge-notice provision is more of the same." *Id.* "Nestled in a paragraph concerning 'transfer and discharge *rights*,' that provision tells nursing facilities that they 'must not transfer or

discharge [a] *resident*' unless certain preconditions are met, including advance notice of the transfer or discharge to the resident and his or her family." *Id.* (quoting 42 U.S.C. § 1396r(c)(2)) (cleaned up); *accord id.* at 1462 (Gorsuch, J., concurring) ("[T]he text of the Act's operative provisions refers to individual 'rights.'").

"The unnecessary-restraint and predischarge-notice provisions thus [stood] in stark contrast to the statutory provisions that failed *Gonzaga*'s test in *Gonzaga* itself." *Id.* at 1458. "Those provisions lacked 'rights-creating language,' primarily directed the Federal Government's 'distribution of public funds,' and had 'an aggregate, not individual, focus.'" *Id.* (quoting *Gonzaga*, 536 U.S. at 290). "The opposite [was] true" in *Talevski*. *Id.* So the Court held that the provisions invoked "satisfy *Gonzaga*'s stringent standard, and the rights they recognize are presumptively enforceable under § 1982." *Id.* at 1458–59.

By contrast, the any-qualified-provider provision lacks clear rights-creating language. It is much more like the provision that failed to create § 1983-enforceable rights in *Gonzaga*. Under the any-qualified-provider provision, state plans are required to allow eligible individuals to obtain medical assistance "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required … who undertakes to provide … such services." 42 U.S.C. § 1396a(23)(A). But unlike the provisions in *Talevski*, nothing in the text labels that requirement an individual "right."

To the contrary, the any-qualified-provider provision's text is analogous to the nondisclosure provisions of the Family Educational Rights and Privacy Act at issue in *Gonzaga*. That provision provided that "[n]o funds shall be made available … to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information … unless" there was "written consent from *the student's parents*," or a court order. *Gonzaga*, 536 U.S. at 294 n.2 (Stevens, J., dissenting) (emphasis added) (quoting 42 U.S.C. § 1232g(b)(2)). In the dissent's view, that provision "plainly [met] the standards [the Court] articulated in *Blessing*." *Id.* at 295 (Stevens, J., dissenting). Relevant here, it was "directed to the benefit of individual students and parents," and it spoke "of the individual 'student,' not students generally." *Id.*

But the majority unequivocally rejected that argument, holding that the text "lack[ed] the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." *Id.* at 287 (cleaned up). The same is equally true here.

Talevski reaffirms what *Gonzaga* held: Spending Clause statues like the any-qualified-provider provision lacking clear rights-creating language do not satisfy *Gonzaga*'s "demanding bar." *Talevski*, 143 S. Ct. at 1455. The any-qualified-provider provision does not create § 1983-enforceable rights, and this Court should reverse the decision below.

III. *Gonzaga* and *Talevski* undermine and thus supersede any contrary prior decisions in this circuit that have applied the so-called *Blessing* factors.

Finally, this Court "need not follow precedent by a panel or by the court sitting en banc 'if the decision rests on authority that subsequently proves untenable' considering Supreme Court decisions." *United States v. Banks*, 29 F.4th 168, 175 (4th Cir. 2022) (quoting *United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015)). "Authority is untenable if its reasoning or holding is inconsistent with a Supreme Court decision." *Id.* Stated differently, the Court is not "bound to follow" a prior decision if its "holding is clearly undermined by … more recent Supreme Court decisions." *United States v. Williams*, 155 F.3d 418, 421 (4th Cir. 1998). That means the Court is required to "consider whether either [the] reasoning or holding[s]" of its prior cases "are inconsistent with subsequent Supreme Court decisions." *Banks*, 29 F.4th at 175.

The last time this case came before this Court, the Court said that it was bound—either by the law of the case or the law of the circuit—to follow its first panel decision in this case. *Kerr*, 27 F.4th at 953–54. For the reasons the Director explained in his earlier briefs, the law of the circuit does not apply here, and the law of the case does not prevent the Court from correcting its prior errors. Opening Br. 12–21; Reply Br. 8–23. Regardless, *Talevski* clearly undermines this Court's previous reliance on the so-called *Blessing* factors, so the panel is not bound to follow those earlier decisions.

By declining to apply the *Blessing* factors and instead confirming that *Gonzaga*—not *Blessing*—sets out the correct test that lower courts are to apply to decide whether Spending Clause statutes create § 1983-enforceable rights, *Talevski* "clearly undermined," and thus superseded this Court's prior decisions applying the three factors listed in *Blessing*. *Williams*, 155 F.3d at 421; *Banks*, 29 F.4th at 175. That includes this Court's first panel decision. *See Baker*, 941 F.3d at 696–97. It would have included this Court's (now vacated) more recent panel decision. *Kerr*, 27 F.4th at 955–57. And it includes this Court's prior decision in *Doe v. Kidd*, 501 F.3d 348, 355–56 (4th Cir. 2007).

Importantly, it does not matter that those cases all came after *Gonzaga*. "[A] Supreme Court decision need not be subsequent to a panel decision in order to supersede it …." *United States v. Brooks*, 524 F.3d 549, 579 n.3 (4th Cir. 2008) (Niemeyer, J., concurring in part and dissenting in part) (cleaned up). And of course, this Court did not have the benefit of *Talevski* when it decided those prior cases. That makes this case directly analogous to the circumstances in *Banks*. There, this Court concluded that some of its prior decisions had been "undermined by" and were "no longer tenable" in light of two Supreme Court decisions. 29 F.4th at 178. "And although some of these cases were decided after" the first of those Supreme Court decisions, that did not make a difference. *Id.* The Court found "their reasoning inconsistent with Supreme Court authority and thus declin[ed] to follow it." *Id.*

So too here. *Talevski* confirms what *Gonzaga* strongly indicated: deciding whether a Spending Clause statute "unambiguously" confers § 1983-enforceable rights requires examining the text of the statute using "traditional tools of statutory construction," and such tools do *not* include the so-called *Blessing* factors. *Talevski*, 143 S. Ct. at 1457.

Properly applied, *Gonzaga* and *Talevski* support the conclusion that the any-qualified-provider provision does not create individual rights enforceable under Section 1983 because the provision's text does not contain clear rights-creating language, the provision's directive is two steps removed from the patients themselves, Congress expressly conferred another means of enforcing compliance, and the statute as a whole has a more aggregate focus. *Supra* 8–9, 11–13. This Court's prior decisions to the contrary are "no longer tenable," and this Court should "decline to follow [them]." *Banks*, 29 F.4th at 178; *accord K.I. v. Durham Pub. Schs. Bd. of Educ.*, 54 F.4th 779, 792 (4th Cir. 2022) (declining to follow prior circuit precedent because it was "inconsistent with more recent Supreme Court authority" requiring a "clear [statement of] congressional intent").

CONCLUSION

It has now been more than five years since South Carolina's Governor issued his executive order diverting taxpayer funds away from abortion providers to make them more available to providers offering life-affirming women's health and family-planning services.

This appeal does not ask the Court to resolve whether it agrees with that choice as a matter of policy. It asks only whether the plain text of the any-qualified-provider provision creates § 1983-enforceable rights under the test enunciated in *Gonzaga* and applied in *Talevski*. For the reasons stated above and in the Director's prior briefing in this case, it does not. This Court should reverse.

Dated: August 23, 2023

By: */s/ John J. Bursch*

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Dated: August 23, 2023

/s/ John J. Bursch
John J. Bursch
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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 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.

/s/ John J. Bursch
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