



Planned Parenthood
Federation of America

August 21, 2017

Lyle W. Cayce
Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

RE: *Planned Parenthood Gulf Coast, Inc., et al. v. Gee* (No. 15-30987)

Dear Mr. Cayce:

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs respond to Defendant’s letter regarding *Does v. Gillespie*, 2017 WL 3496164 (8th Cir. Aug. 16, 2017). That 2-1 opinion does not support the pending Petition for Rehearing En Banc.

As the *Does* dissent recognized, *Does* is an outlier that is inconsistent not only with the Panel, but also with the decisions of every other Circuit (6th, 7th, and 9th) to consider whether U.S.C. § 1396a(a)(23) creates a private right of action under 42 U.S.C. § 1983. 2017 WL 3496164, at *11 (Melloy, J., dissenting). Like those other Circuits, the Panel properly applied *Gonzaga* and *Blessing*, holding that § 1396a(a)(23): (1) “unambiguously confers [an individual] right,” (2) “suppl[ies] concrete and objective standards for enforcement’ which are ‘well within judicial competence to apply,’” and (3) “is couched in mandatory terms.” Op. 18-20.

Does, furthermore, goes beyond anything urged in the Petition or the dissent in this matter, both of which conceded, as Circuit precedent requires, that § 1396a(a)(23) provides a right of action in “certain instances.” Pet for Reh’g En Banc at 6; Op. 45-46. *Does*’ “broad analysis,” under which it “consider[ed] the Medicaid Act as a whole to find that the freedom-of-choice provision is part of a directive to the Secretary of Health and Human Services . . . cannot stand because it is inconsistent with” cases that have “found a private right of action under other provisions of the Medicaid Act.” *Does*, 2017 WL 3496164, at *12 (Melloy, J., dissenting). That includes at least two decisions of this Court. See *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603-04 (5th Cir. 2004) (applying *Blessing/Gonzaga* test to find that Medicaid Act provision conferred an individual right enforceable through § 1983); *Romano v. Greenstein*, 721 F.3d 373, 377-79 (5th Cir. 2013) (same).

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Finally, the concurrence in *Does* incorrectly relies on *O'Bannon v. Town Center Nursing Center*, 447 U.S. 773 (1980). The *Does* dissent properly recognizes, as did the Panel, that *O'Bannon* is inapplicable. *Does*, 2017 WL 3496164, at *15 (Melloy, J., dissenting). Thus, *Does* should be disregarded, and the Petition denied.

Respectfully submitted,

/s/ Carrie Y. Flaxman

Carrie Y. Flaxman

Counsel for Plaintiffs-Appellees

cc: All counsel of record (via CM/ECF)