No. 17-50282

In the United States Court of Appeals for the Fifth Circuit

PLANNED PARENTHOOD OF GREATER TEXAS FAMILY PLANNING AND PREVENTATIVE HEALTH SERVICES, INC.; PLANNED PARENTHOOD SAN ANTONIO; PLANNED PARENTHOOD CAMERON COUNTY; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; PLANNED PARENTHOOD GULF COAST, INC.; JANE DOE #1; JANE DOE #2; JANE DOE #4; JANE DOE #7; JANE DOE #9; JANE DOE #10; AND JANE DOE #11,

Plaintiffs-Appellees,

v.

CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF HHSC; AND SYLVIA HERNANDEZ KAUFFMAN, IN HER OFFICIAL CAPACITY AS ACTING INSPECTOR GENERAL OF HHSC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No. 1:15-cv-01058-SS

BRIEF OF 42 MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Interests of Amici Curiae

The amici curiae are eight United States Senators and 34 members of the United States House of Representatives. The amici curiae represent 21 different States that participate in the Medicaid program. The amici have an interest in ensuring that the federal Medicaid Act is interpreted properly and that their States are not subjected to requirements that are not spelled out clearly and unambiguously in the statute. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The amici curiae include:

Senator Ted Cruz (Texas)

Senator Bill Cassidy (Louisiana)

Senator John Cornyn (Texas)

Senator James Inhofe (Oklahoma)

Senator John Kennedy (Louisiana)

Senator Jerry Moran (Kansas)

Senator James E. Risch (Idaho)

Senator Tim Scott (South Carolina)

Representative Pete Olson (Texas)

Representative Robert Aderholt (Alabama)

Representative Jodey Arrington (Texas)

Representative Brian Babin (Texas)

Representative Diane Black (Tennessee)

Representative Kevin Brady (Texas)

Representative Bradley Byrne (Alabama)

Representative John Carter (Texas)

Representative Michael Conaway (Texas)

Representative Kevin Cramer (North Dakota)

Representative Blake Farenthold (Texas)

Representative Bill Flores (Texas)

Representative Trent Franks (Arizona)

Representative Louie Gohmert (Texas)

Representative Andy Harris (Maryland)

Representative Vicky Hartzler (Missouri)

Representative Jeb Hensarling (Texas)

Representative Walter Jones (North Carolina)

Representative Trent Kelly (Mississippi)

Representative Steve King (Iowa)

Representative Doug Lamborn (Colorado)

Representative Kenny Marchant (Texas)

Representative Michael McCaul (Texas)

Representative Paul Mitchell (Michigan)

Representative Alex X. Mooney (West Virginia)

Representative Robert Pittenger (North Carolina)

Representative John Ratcliffe (Texas)

Representative Keith Rothfus (Pennsylvania)

Representative Christopher H. Smith (New Jersey)

Representative Lamar Smith (Texas)

Representative Ann Wagner (Missouri)

Representative Randy Weber (Texas)

Representative Daniel Webster (Florida)

Representative Roger Williams (Texas)

Statement of Compliance with Rule 29

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici curiae, their members, or their counsel contributed money that was intended to finance the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Conditions on the receipt of the federal funds must be spelled out in clear and unambiguous statutory language. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously*.") (emphasis added). The district court ignored this bedrock canon of statutory construction and interpreted vague and ambiguous language in the Medicaid Act to override the decisions of state officials, contradicting a long line of Supreme Court decisions that require States to be given leeway in interpreting federal spending legislation. And the district court's decision to issue a preliminary injunction becomes all but impossible to defend when *Pennhurst*'s clear-statement rule is combined with the "clear showing" of likely success that the plaintiffs must make before a preliminary injunction can issue. *See Mazurek v. Armstrong*, 520 U.S. 968, 971, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." (citation omitted) (emphasis in original)).

The preliminary injunction should be vacated for an additional reason: The Jane Doe plaintiffs have failed to make a "clear showing" of Article III standing because they have not alleged or shown that Planned Parenthood's clinics will shut down or refuse to provide them with care if the State excludes Planned Parenthood from its Medicaid program. And although the Planned Parenthood plaintiffs undeniably have Article III standing, they lack

a cause of action to challenge the Inspector General's decision under section 1983. This leaves the plaintiffs without *anyone* who can demonstrate both Article III standing and a cause of action, so none of the plaintiffs can make a "clear showing" that they are entitled to judicial relief.

Finally, even if one concludes that the Jane Doe plaintiffs *have* made a "clear showing" of Article III standing and a "clear showing" of likely success on the merits, the district court erred by failing to limit the scope of its injunction to the seven Jane Doe plaintiffs. This case was not certified as a class action, and Planned Parenthood has no cause of action that allows it to sue. So the district court had no authority to extend its injunction beyond the seven Jane Doe plaintiffs named in the lawsuit.

I. THE DISTRICT COURT IGNORED *PENNHURST*'S CLEAR-STATEMENT RULE

The Supreme Court has repeatedly and emphatically held that conditions on the receipt of the federal funds must be spelled out in clear and unambiguous statutory language. *See Pennhurst*, 451 U.S. at 17 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("[W]e have required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" (quoting *Pennhurst*, 451 U.S. at 17)); *Will v. Michigan Dep't of Police*, 491 U.S. 58, 65 (1989) ("Congress should make its intention 'clear and man-

ifest' . . . if it intends to impose a condition on the grant of federal moneys" (citation omitted)); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) ("*Pennhurst* established a rule of statutory construction to be applied where statutory intent is ambiguous."); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("[W]hen Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously'" (citation omitted)); *NFIB v. Sebelius*, 567 U.S. 519, 582–83 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (citation and internal quotation marks omitted)); *id.* at 676 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("[A]ny such conditions [on the receipt of federal funds] must be unambiguous so that a State at least knows what it is getting into.").

This Court has also held, entirely apart from *Pennhurst*, that provisions in the Medicaid Act cannot bind state officials unless they overcome "the presumption against preemption and its concomitant clear-statement rule." *Detgen v. Janek*, 752 F.3d 627, 631 (5th Cir. 2014); *see also id.* ("States have broad discretion to implement the Medicaid Act"). *Detgen*'s presumption against preemption supplies an additional clear-statement requirement, on top of the clear-statement rule already established in *Pennhurst*—and it gives States latitude to administer their Medicaid programs unless a federal statute "plainly prohibit[s]" the State's policy. *Id.* ("[W]e must affirm the summary

judgment [for the State] if the statutory language does not *plainly prohibit* [the State's Medicaid policy]." (emphasis added)).

So when section 23(A) of the Medicaid Act says that beneficiaries may obtain assistance from any institution "qualified to perform the service or services required," the question to resolve is whether this language *unambiguously* precludes Texas from excluding the Planned Parenthood plaintiffs as Medicaid providers. *See* 42 U.S.C. § 1396a(a)(23)(A); *Pennhurst*, 451 U.S. at 17; *Detgen*, 752 F.3d at 631. The Medicaid Act never defines the word "qualified," so the States have latitude under *Pennhurst* to interpret "qualified" in any reasonable or plausible manner—and the States may interpret "qualified" in a manner that differs from how a federal court would define that term. To admit that it is even *possible* to construe the word "qualified" to exclude the Planned Parenthood plaintiffs is to require a judgment for the State. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) ("*Pennhurst* established a rule of statutory construction to be applied where statutory intent is ambiguous.").

The district court did not (and could not) find that section 23(A) *unambiguously* precludes Texas from excluding the Planned Parenthood plaintiffs as Medicaid providers. Indeed, the district court did not even mention or acknowledge *Pennhurst*'s clear-statement rule or *Detgen*'s presumption against preemption. Neither did *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), which enjoined Louisiana from excluding Planned Parenthood affiliates under section 23(A) but never held or argued

that section 23(A) satisfies *Pennhurst*'s clear-statement rule in this regard. The *Gee* panel can perhaps be excused for failing to acknowledge or apply *Pennhurst* because Louisiana's brief did not even argue that *Pennhurst*'s or *Detgen*'s clear-statement requirements should apply to section 23(A). But in this case, the State of Texas trumpets *Pennhurst* and *Detgen* loud and clear. *See* Appellants' Br. at 1, 18, 27–29. And this Court cannot ignore those authorities or deprive Texas of its right to rely those cases simply because Louisiana forfeited the argument in *Gee*.

When this case is considered in light of *Pennhurst*'s clear-statement rule, Texas wins easily. The word "qualified" is ambiguous and undefined in the Medicaid Act—and the phrase "qualified to perform the service or services required" is equally ambiguous because it does not specify who determines the relevant "qualifications" or what those qualifications should be. This gives Texas latitude to determine who is "qualified" to provide medical services in partnership with the State. And Texas may conclude—for at least two independent reasons—that Planned Parenthood is not "qualified" under section 23(A) without running afoul of any clear statement or unambiguous statutory requirement in the Medicaid Act.

First, Texas may, consistent with *Pennhurst*, require "qualified" Medicaid providers to refrain from using tradenames and symbols linked to offensive or controversial ideologies when they administer a state-sponsored program. There is no doubt that a State could exclude Medicaid providers who use tradenames linked to racism or eugenics; no different result should ob-

tain when the provider's tradename is linked to other controversial ideologies that the State is unwilling to associate with.

Second, Texas may, consistent with *Pennhurst*, exclude the Planned Parenthood plaintiffs from the ranks of "qualified" providers because Planned Parenthood refused to contest the Inspector General's accusations of unethical conduct in the state administrative proceedings and defaulted on the appellate remedies that the State provided. The State may treat Planned Parenthood's decision to spurn these administrative remedies as a concession of guilt and as a stipulation that it is not "qualified" to participate in Medicaid. At the very least, the State may do so without contradicting any clear and unambiguous language in the Medicaid Act—and that is all that is needed for the State to prevail in this lawsuit.

A. Texas May, Consistent With *Pennhurst*, Interpret The Word "Qualified" To Exclude Providers Who Use Tradenames Or Symbols Associated With Offensive or Controversial Ideologies

The Medicaid Act permits States to disassociate from health-care providers who conduct their business under a tradename or symbol that is linked to offensive or controversial ideologies. If a would-be Medicaid provider names itself after the Hemlock Society, the John Birch Society, or the Washington Redskins, a State may decide that the provider is not "qualified" to administer a state-run social-welfare program, even if the entity provides first-rate medical care. Texas, for example, has long excluded the Ku Klux Klan from its Adopt-a-Highway program—not because Texas doubts the

Klan's ability to keep the highways clean, but because Texas is unwilling to lend its imprimatur to organizations that espouse racism. *See State of Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995). A State may likewise decide that it will not partner with healthcare providers whose tradenames are linked to offensive or controversial ideologies, and that providers who insist on using such tradenames are not "qualified to perform" medical services within a state-run welfare program.

The name "Planned Parenthood" has become synonymous with an abortion-on-demand ideology that millions of Americans find abhorrent. The "Planned Parenthood" name has been further tainted by recently released videos that show employees and affiliates displaying cavalier attitudes toward abortion and discussing ethically questionable practices[1]—videos which prompted the organization's President, Cecile Richards, to publicly apologize for the "tone and statements" that were expressed.[2] And the "Planned Parenthood" name is inextricably connected to its founder Margaret Sanger, who uttered many controversial statements on race and eugenics.[3]

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1. See https://www.youtube.com/watch?v=jjxwVuozMnU (video of Deborah Nucatola, Senior Director of Medical Services for Planned Parenthood Federation of America, boasting that "we've been very good at getting heart, lunch, liver, because we know that, so I'm not gonna crush that part, I'm going to basically crush below, I'm gonna crush above, and I'm gonna see if I can get it all intact.").
2. *See* https://www.youtube.com/watch?v=dZUjU4e4fUI (video of Cecile Richards acknowledging that "[i]n the video, one of our staff members speaks in a way that does not reflect that compassion. This is unacceptable, and I personally apologize for the staff member's tone and statements.").
3. See Glenn Kessler, Fact Checker, *Margaret Sanger, Planned Parenthood, and Black Abortions: Ben Carson's False Claim*, Washington Post (April 18, 2015) (acknowledging that "Sanger was a supporter of [the] now-discredited eugenics movement, which

It is hardly surprising that the State of Texas would seek to disassociate itself from this baggage by refusing to allow entities to use the name "Planned Parenthood" while carrying out a state-run welfare program. Nor is it surprising that voters and taxpayers in Texas would be loath to allow their government to finance and partner with entities named after "Planned Parenthood," which lends the State's imprimatur to Planned Parenthood's abortion-on-demand ideology. A State may insist, consistent with *Pennhurst* and *Detgen*, that "qualified" Medicaid providers drop "Planned Parenthood" from their tradename—along with words or symbols linked to

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aimed to improve humans by either encouraging or discouraging reproduction based on genetic traits"); *id.* (acknowledging that Sanger "crafted a proposed law that included this provision: 'Feeble-minded persons, habitual congenital criminals, those afflicted with inheritable disease, and others found biologically unfit by authorities qualified judge should be sterilized or, in cases of doubt, should be so isolated as to prevent the perpetuation of their afflictions by breeding.' Sanger said she wanted 'to give certain dysgenic groups in our population their choice of segregation or sterilization,' which some have interpreted as a reference to concentration camps."); *id.* (acknowledging that "Sanger in 1938 appeared to speak positively about the German program undertaken by the Nazis"); *see also* Ellen Chesler, *Woman of Valor: Margaret Sanger and the Birth Control Movement in America* (1992) (acknowledging, in an otherwise positive biography of Margaret Sanger, that "[t]here is no denying that [Sanger] allowed herself to become caught up in the eugenic zeal of the day and occasionally used language open to far less laudable interpretations."). In fairness to Planned Parenthood, the organization has disavowed some of Sanger's controversial statements. *See* Glenn Kessler, *Herman Cain's Rewriting of Birth-Control History*, Washington Post (November 1, 2011) (quoting Veronica Byrd, Planned Parenthood's director of African American media, who acknowledged that "Margaret Sanger made statements some 80 years ago that were wrong then and are wrong now."). But that does not sever the association of the "Planned Parenthood" name with Margaret Sanger and the controversial beliefs that she espoused.

other offensive or controversial organizations or beliefs—before the State will allow those entities to administer a state-run healthcare program.[4]

The district court held that a State *must* deem a medical provider "qualified" whenever it is "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." ROA.3797. That is an absurd and untenable construction of the Medicaid Act. It would mean that a State is powerless to disqualify *any* Medicaid provider that insists on doing business under an offensive or controversial tradename—no matter how offensive or controversial that tradename might be. Imagine if the Ku Klux Klan or the Westboro Baptist Church opened a clinic to serve Medicaid patients and insisted on including the name of their controversial organizations in the name of their clinic. A State has every right to disqualify a provider of that sort under section 23(A)—even if it provides excellent health care—because a provider is not "qualified" if it insists on administering a State's Medicaid program under a tradename that the State (or the State's taxpayers) are unwilling to associate with. The same goes for any other

4. Of course, Planned Parenthood has every right to advocate for legal abortion under the First Amendment—just as the Ku Klux Klan has a constitutional right to espouse racism and the Westboro Baptist Church has a constitutional right to picket military funerals and direct hateful messages toward homosexuals. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Snyder v. Phelps*, 562 U.S. 443 (2011). But the constitutionally protected right to espouse offensive and controversial beliefs does not obligate a State to lend its imprimatur to those views. And it does not require a State to allow these organizations to use their controversial tradenames when acting in partnership with the State. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) (holding that Texas may exclude the confederate battle flag from its specialty license-plate program).

health-care providers whose tradenames are linked to offensive or controversial ideologies, including abortion, euthanasia, eugenics, racism, nativism, anti-Semitism, communism, or jihad. Under the district court's interpretation of section 23(A), a Medicaid program could not exclude a provider that uses a name associated with any of these ideologies unless the State could find a deficiency in the health care that it provides.

More importantly, the district court's construction of section 23(A) cannot be reconciled with *Pennhurst*'s clear-statement requirement. There is no clear and unambiguous language in section 23(A), or anywhere else in the Medicaid Act, that precludes a State's Medicaid plan from excluding providers who insist on using offensive or controversial tradenames when providing services to Medicaid beneficiaries. The word "qualified" is undefined in the Medicaid Act, and it is far too vague to *clearly* preclude a State from adopting a "qualification" of this sort. And the text and structure of the Medicaid Act indicate that the States have authority to define their own "qualifications" for Medicaid providers. 42 U.S.C. § 1396a(p)(1) provides:

> *In addition to any other authority*, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title.

42 U.S.C. § 1396a(p)(1) (emphasis added). This statute refers to the Secretary's authority to exclude providers from Medicaid under sections 1320a-7, 1320a-7a, and 1395cc(b)(2), which allow the Secretary to exclude provid-

ers who deliver substandard care or engage in illegal or unethical conduct.[5] Section 1396a(p)(1) allows State officials to exclude providers from Medicaid for these reasons, *as well as* for reasons provided under "*any other* authority," including state law. At the very least, this sweeping language in section 1396a(p)(1) is *capable* of being construed to permit States to establish their own state-law "qualifications" for Medicaid providers, and that is all that is needed under the clear-statement regimes of *Pennhurst* and *Detgen*.

The panel opinion in *Gee* never held the Medicaid Act contains a clear or unambiguous statement that precludes States from excluding Planned Parenthood affiliates as Medicaid providers. Indeed, *Gee* never even applied *Pennhurst*'s clear-statement rule to section 23(A) because Louisiana never argued that it should apply, and because Louisiana *conceded* that the term "qualified" should refer only to whether a provider is "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *Gee*, 862 F.3d at 462 ("The Medicaid statute does not define the term 'qualified,' but LDHH concedes that . . . '[t]o be "qualified" in the relevant sense is to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner.'").

5. *See* 42 U.S.C. § 1320a-7(b)(4) (allowing the Secretary to exclude "any individual or entity" who lost or surrendered their license for reasons related to "professional competence, professional performance, or financial integrity); 42 U.S.C. § 1320a-7(b)(5) (allowing the Secretary to exclude "any individual or entity" who was excluded from any federal or state health-care program "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity").

The doctrine of stare decisis does not apply when an argument was not raised or litigated in a previous case,[6] and the State of Texas cannot be bound by Louisiana's concessions and its failure to invoke *Pennhurst* when Texas was not even a party to the *Gee* litigation. *See generally* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2002).

B. Texas May, Consistent With *Pennhurst*, Interpret The Word "Qualified" To Exclude Providers Who Spurn Their Opportunities To Contest Accusations Of Wrongdoing In State Administrative Proceedings

When the Inspector General issued his misleadingly named "Final Notice of Termination," he explained the accusations and evidence against Planned Parenthood and the legal authorities supporting his decision. ROA.2414–16. But he also explained Planned Parenthood's right to appeal his termination decision to the state agency's appeals division:

> You may appeal this enrollment termination. **In order to do so, HHSC-IG must receive a written request from you asking for an administrative hearing before HHSC's appeals divi-**

6. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *United States v. Verdugo-Urquidez*, 494 U. S. 259, 272 (1990) (holding that the Supreme Court's "assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions."); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

> **sion on or before the 15th calendar day from the date you receive this notice**. 1 Tex. Admin. Code § 371.1703(f)(2). . . . Pursuant to 1 Tex. Admin. Code §§ 371. l 615(b)(2) and (4), any request for an administrative hearing must:
>
> 1. be sent by certified mail to the address specified above;
> 2. include a statement as to the specific issues, findings, and/or legal authority in the notice letter with which you disagree;
> 3. state the bases for your contention that the specific issues or findings and conclusions of HHSC-IG are incorrect;
> 4. be signed by you or your attorney; and
> 5. arrive at the address specified above on or before the 15th calendar day from the date you receive this Final Notice of Termination.
>
> **IF HHSC-IG DOES NOT RECEIVE A WRITTEN RESPONSE TO THIS NOTICE WITHIN 15 CALENDAR DAYS FROM THE DATE YOU RECEIVE IT, YOUR FINAL NOTICE OF TERMINATION WILL BE UNAPPEALABLE**.

ROA.2417 (emphasis in original). Planned Parenthood responded by waiving its right to appeal and refusing to contest the Inspector General's accusations before the state's Health and Human Services Commission. Texas may treat Planned Parenthood's insouciance toward the Inspector General's findings—and its disdain for the appellate remedies that the State provided—as a no-contest plea and an effective admission of guilt.

Of course, one need not exhaust state administrative remedies before suing under 42 U.S.C. § 1983. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496 (1982). But the issue here is not whether exhaustion is a prerequisite to suit. It is whether Texas may interpret section 23(A) of the Medicaid Act to exclude providers that refuse to contest its Inspector General's accu-

sations of wrongdoing in the forum that the State provides, and who spurn the appellate remedies that the State provides to challenge an Inspector General's determinations.[7] There is no clear or unambiguous statement in the Medicaid Act that precludes Texas from interpreting the word "qualified" to exclude providers of this sort. *See Pennhurst*, 451 U.S. at 17; *Detgen*, 752 F.3d at 631.

II. The Preliminary Injunction Should Be Vacated Because The Jane Doe Plaintiffs Failed To Make A "Clear Showing" Of Article III Standing

The Jane Doe plaintiffs have failed to plead and show the facts needed to establish Article III standing. And the Planned Parenthood plaintiffs do not have a cause of action under 42 U.S.C. § 1983. That leaves the plaintiffs without anyone who can seek relief at the preliminary-injuction stage.

A. The Jane Doe Plaintiffs Have Failed To Make A "Clear Showing" Of Article III Standing

The Jane Doe plaintiffs' claims cannot get off the ground unless they establish Article III standing. *See Lujan*, 504 U.S. at 560-61 (Article III standing requires a plaintiff to show (1) an injury in fact; (2) that is fairly traceable

7. And in all events, Planned Parenthood does not even have a cause of action under section 1983, because the federally protected "rights" that *Gee* found in section 23(A) belong to Medicaid beneficiaries, not to Medicaid providers. *See Gee*, 2017 WL 2805637 at *9 ("The statute speaks only in terms of recipients' rights rather than providers' rights, so the right guaranteed by § 1396a(a)(23) is vested in Medicaid recipients rather than providers. Providers like PPGC cannot bring a challenge pursuant to § 1396a(a)(23)."). Only the Medicaid *beneficiaries* have a possible claim under section 1983, and no one is suggesting that the *beneficiaries* were required to exhaust state administrative remedies before bringing suit.

to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision). And the Jane Doe plaintiffs must satisfy these Article III standing requirements in two separate and distinct ways.

First, the complaint must "clearly . . . allege facts demonstrating" each of the three requirements of Article III standing: injury in fact, causation, and redressability. *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016) (citation omitted); *Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant *clearly to allege facts demonstrating* that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." (emphasis added)); *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1150 n.5 (2013) ("[P]laintiffs bear the burden of *pleading and proving concrete facts* showing that the defendant's actual action has caused the substantial risk of harm." (emphasis added)); *see also Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (vacating a preliminary injunction and ordering a jurisdictional dismissal because the plaintiffs failed to allege sufficient facts to establish Article III standing).

Second, because the plaintiffs are seeking a preliminary injunction, they must *also* make a "clear showing" that they satisfy each component of the Article III standing inquiry. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." (citation omitted)); *Barber v.*

Bryant, 860 F.3d 345, 352 (5th Cir. 2017) ("Because a preliminary injunction 'may only be awarded upon a clear showing that the plaintiff is entitled to such relief,' the plaintiffs must make a 'clear showing' that they have standing to maintain the preliminary injunction."); *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) ("At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing.").

The Jane Doe plaintiffs have failed to make a "clear showing" of injury in fact—and they have failed to plead sufficient facts to that effect. If the Planned Parenthood plaintiffs are excluded from Texas Medicaid, they will *still* be allowed to offer services to Medicaid beneficiaries, including the Jane Doe plaintiffs. The Planned Parenthood plaintiffs will no longer receive reimbursement from state taxpayers for doing so, but that does not inflict *any* injury on the Jane Doe plaintiffs unless Planned Parenthood decides to turn them away at the door or start charging them for its services. The Planned Parenthood plaintiffs have not alleged that this will happen, and they offered no proof of this at the preliminary-injunction hearing.

Paragraph 79 of the plaintiffs' amended complaint says that the Planned Parenthood plaintiffs "*may* be unable to continue to provide services in the same manner" and "*may* be forced to lay off staff members, reduce hours, or close a health center." ROA.3245 (emphasis added). These are speculative allegations, and conjectural possibilities of what *might* happen to the Jane Doe plaintiffs are insufficient to establish Article III injury. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1149 (2013) ("speculative" or

"conjectural" future injuries cannot confer Article III standing); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury in fact must be "actual or imminent, not 'conjectural' or 'hypothetical'"); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III" [because] "[a] threatened injury must be 'certainly impending' to constitute injury in fact.").

At the preliminary-injunction hearing, Planned Parenthood produced no evidence that the seven Jane Doe plaintiffs would be unable to receive health care from their preferred Planned Parenthood affiliate if the State were to exclude the Planned Parenthood plaintiffs from Medicaid. And the plaintiffs came nowhere close to showing that an injury of this sort is "certainly impending." *Clapper*, 133 S. Ct. 1138, 1143 (2013) ("[The] threatened injury must be 'certainly impending.'" (quoting *Whitmore*, 495 U.S. at 158)). Jeffrey Hons, the President of Planned Parenthood South Texas, was downright flippant when the State asked him on cross-examination whether his organization could continue providing care to Medicaid beneficiaries absent reimbursement from the State.

> Q. So you will be able to provide care for some of the individuals if Medicaid funds are withheld?
> A. We'll just have to wait and see, won't we?

ROA.4297. Apparently it did not occur to Hons that the burden of proof on these standing-related questions rests with the plaintiffs and not the State. It is the *plaintiffs* who must refute the possibility that Planned Parenthood's

clinics will stay open and continue serving the seven Jane Doe plaintiffs. They have not done so, and they have failed to make a "clear showing" that the Jane Doe plaintiffs will suffer injury in fact.

B. The Planned Parenthood Plaintiffs Do Not Have A Cause Of Action To Challenge The Inspector General's Decision

The Planned Parenthood plaintiffs clearly have Article III standing because the Inspector General's decision will cost them money. ROA.3245. But they have no cause of action under 42 U.S.C. § 1983. *See Gee*, 862 F.3d at 460 ("The statute speaks only in terms of recipients' rights rather than providers' rights, so the right guaranteed by § 1396a(a)(23) is vested in Medicaid recipients rather than providers. Providers like PPGC cannot bring a challenge pursuant to § 1396a(a)(23)."). The upshot is that *none* of the plaintiffs can obtain a preliminary injunction: the Jane Doe plaintiffs because they failed to make a "clear showing" of Article III standing, and the Planned Parenthood plaintiffs because they lack a cause of action under 42 U.S.C. § 1983.

III. If This Court Concludes That Plaintiffs Are Entitled To A Preliminary Injunction, Then Relief Must Be Limited To The Seven Jane Doe Plaintiffs

If for some reason this Court finds that the Jane Doe plaintiffs *have* made a "clear showing" of Article III standing, and that they have further made a "clear showing" of likely success on the merits notwithstanding *Pennhurst*'s

clear-statement rule, then this Court should *still* modify the preliminary injunction by limiting it to the seven Jane Doe plaintiffs.

As we have noted, Planned Parenthood has no cause of action under 42 U.S.C. § 1983. *See* Part II.B, *supra*; *Gee*, 862 F.3d at 460. And the district court permitted only the Jane Doe plaintiffs to challenge the Inspector General's actions under section 1983. ROA.3796 ("[B]ecause this Court finds the Individual Plaintiffs have a right of action, it need not decide whether the Provider Plaintiffs also have such a right, either on their own behalf or on the behalf of their patients."). The district court was therefore obligated to limit its relief to the seven Jane Doe plaintiffs who could assert a cause of action. The district court did not certify a class of affected Medicaid beneficiaries, and it had no business awarding classwide relief in the absence of class certification. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs"); *Prof'l Ass'n of Coll. Educators v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 273–74 (5th Cir. 1984) ("Intrusion of federal courts into state agencies should extend no further than necessary to protect federal rights of the parties."); *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (Easterbrook, J.) ("Because a class has not been certified, the only interests at stake are those of the named plaintiffs.").

Conclusion

The preliminary-injunction order should be vacated, and the case remanded with instructions to enter judgment for the defendants.

Respectfully submitted.

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I certify that this document has been filed with the clerk of the court and served by ECF or e-mail on August 14, 2017, upon:

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