No. 17-50282

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 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, NO. 1:15-CV-01058, HON. SAM SPARKS

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is No. 17-50282. The case is styled as *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. v. Smith*. Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge. The undersigned counsel also certifies that *amicus curiae* Eagle Forum Education & Legal Defense Fund is a nonprofit corporation with no parent corporation, and that no publicly held corporation owns ten percent or more of its stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: August 14, 2017

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, submits this *amicus* brief with the parties' consent.[1] Founded in 1981, EFELDF has consistently defended federalism and supported states' autonomy from the federal government in areas – like public health – that are of traditionally local concern. In addition, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. For these reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Following undercover reporting into abortion-industry practices for unlawful distribution of aborted fetal tissue and organs, the Texas Health and Human Services Commission initiated enforcement proceedings against several Planned Parenthood affiliates, culminating in decertification from Texas's Medicaid program. Those affiliates ("Providers") and several of one facility's patients ("Individuals") sued two Commission officers (collectively, "Texas") to enjoin the decertification under Medicaid's "free-choice" provision, 42 U.S.C. §1396a(a)(23)(A) and 42 U.S.C. §1983. Texas appeals the district court's preliminary injunction.

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Constitutional Background

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911), but must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, §2. Appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and can raise them *sua sponte*, requiring dismissal where jurisdiction is lacking: "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101-02.

Under the Spending Clause, U.S. CONST. art. I, §8, cl. 1, courts analogize federal programs to contracts between the government and recipients (here, states), with the public as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. Indeed, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981).

As sovereigns, states are immune from suit in federal court. U.S. CONST. amend. XI; *Alden v. Maine,* 527 U.S. 706, 728-29 (1999). This immunity bars suits for both money damages and injunctive relief, unless the state has waived its

immunity or Congress has abrogated immunity under the Fourteenth Amendment. *Alden,* 527 U.S. at 712-16. The test for waiver is "a stringent one," and "consent … must be unequivocally expressed." *Sossamon v. Texas,* 131 S.Ct. 1651, 1658 (2011) (interior quotations and citations omitted). Moreover, the *ability* of administrative or executive officers to waive sovereign immunity is a question of state law, such that if they lack authority to waive immunity, their failure to raise the immunity as an affirmative *defense* early in the litigation does not preclude their later raising the defense, even for the first time on appeal. *Ford Motor Co. v. Dep't of Treasury of State of Indiana,* 323 U.S. 459, 468-69 (1945), *overruled in part on other grounds Lapides v. Bd. of Regents of Univ. System of Georgia,* 535 U.S. 613, 623 (2002).

Because states may consent to federal jurisdiction or waive their immunity via various means, immunity is not "jurisdictional in the sense that it must be raised and decided by [courts] on [their] own motion." *Patsy v. Board of Regents of State of Fla.,* 457 U.S. 496, 515 (1982). For example, immunity poses no jurisdictional barrier where the state simply declines to raise it, *id.,* or voluntarily invokes federal-court jurisdiction (*e.g.,* by removing to, intervening in, or filing suit in federal court). *Lapides,* 535 U.S. at 619-20 (distinguishing between cases where "a State … *voluntarily* invoked [federal] jurisdiction" and ones with "a State that a private plaintiff had *involuntarily* made [a federal] defendant") (emphasis in original). But non-consenting states may raise immunity at any time, even on appeal. *Edelman v.*

Jordan, 415 U.S. 651, 678 (1974); *Union Pacific Railroad Co. v. Louisiana Pub. Serv. Comm'n*, 662 F.3d 336, 342 (5th Cir. 2011).

Statutory and Regulatory Background

Established in 1965 and administered by the federal Department of Health & Human Services ("HHS"), Medicaid is a cooperative federal-state program that provides medical care to needy individuals. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 502 (1990). State participation is voluntary under the Spending Clause, but participating states agree to comply with Medicaid requirements.

To qualify for Medicaid funds, states must submit and HHS must approve "a plan for medical assistance" on the scope of that state's Medicaid program. 42 U.S.C. §1396a(a). After the initial approval, states may submit "State plan amendments" or "SPAs" to revise the state plan. 42 C.F.R. §430.12. When HHS denies approval for SPAs, states may seek reconsideration, which initiates an administrative process – with a formal hearing and opportunity for public participation – and the eventual opportunity for judicial review directly in the appropriate U.S. Court of Appeals. 42 U.S.C. §§1316(a)(3), 1396c.

Under its "free-choice" provision, Medicaid requires that "[a] State plan for medical assistance must – … provide that (A) any individual eligible for medical assistance … may obtain such assistance from any institution, agency, community pharmacy, or person, *qualified* to perform the service or services required … who

undertakes to provide him such services." 42 U.S.C. §1396a(a)(23)(A) (emphasis added).

Section 1396a(p)(1) defines the "[e]xclusion power of [a] State" as follows: "*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). Consistent with the foregoing, the legislative history indicates not only that states can exclude entities to avoid "fraud and abuse," "incompetent practitioners," and "inappropriate or inadequate care" (*i.e.,* the same bases on which HHS may exclude entities), S. REP. NO. 100-109, at 2 (1987), but also that Medicaid "is not intended to preclude a State from establishing, *under State law, any other bases* for excluding individuals or entities from its Medicaid program." *Id.* at 20 (emphasis added).

If, after reasonable notice and opportunity for hearing, HHS finds that an approved Medicaid plan has "so changed that it no longer complies with the provisions of [§1396a]" or that the plan's administration fails to comply with those provisions, HHS must either terminate Medicaid funding or "in [its] discretion, … limit[] [payments] to categories under or parts of the State plan not affected by such failure" until HHS determines "that there will no longer be any such failure to

comply." 42 U.S.C. §1396c. Medicaid does not include any authority for HHS to compel states to comply with §1396a's list of required plan elements.

Federal Common Law

"[F]ederal law governs questions involving the rights of the United States arising under nationwide federal programs." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 726 (1979). Although "[f]ederal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract," *Boyle v. United Tech. Corp.,* 487 U.S. 500, 519 (1988), a uniform federal rule of decision is not required in *private enforcement* of a federal contract or program if the claim "will have *no direct effect upon the United States or its Treasury.*" *Id.* at 520 (*quoting Miree v. DeKalb County,* 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). "Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods,* 440 U.S. at 727-28. Instead, "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *Id.* at 728. Indeed, "[t]he prudent course … is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) (internal quotation omitted). For example, under *Miree,* 433 U.S. at 28, federal courts can look to state law for third-party beneficiaries' standing to enforce

obligations under federal contracts.

Factual Background

Amicus EFELDF adopts Texas's statement of the facts. Texas Br. at 4-17.

SUMMARY OF ARGUMENT

The result in *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), does not control here because Texas decertified Providers for cause under Medicaid, whereas Louisiana conceded that its decertification was unrelated to Medicaid reasons (Section I.A). Discussion in *Gee* of issues not presented there is non-binding *dicta* (Section I.B).

Neither the United States nor third-party beneficiaries can pursue Medicaid-based claims without meeting Medicaid's conditions precedent, which undermines Plaintiffs' standing and ability to state a claim for relief (Sections II.A-II.B, IV.A.3). Under both Texas and federal common law, third-party beneficiaries lack standing to enforce promisees' non-vested rights (Section II.B). Moreover, because Medicaid noncompliance is not an ongoing violation of federal law, *Ex parte Young* provides no exception to Texas' sovereign immunity (Section II.C, III.B). Similarly, Medicaid neither provides a private cause of action nor creates individual rights that support causes of action under 42 U.S.C. §1983, at least not where the provider is not qualified (Section III.A). Given the uncertainty both as to whether Texas violated §1396a(a)(23) and what an appropriate remedy would be, this Court should refer the

case to HHS under the primary-jurisdiction doctrine (Section II.D).

On the statutory merits, Spending Clause legislation requires clear notice of conditions imposed on recipients, and Medicaid operates within a field traditionally occupied by the states and thus is subject to the presumption against preemption, which Plaintiffs cannot surmount because Medicaid does not clearly and manifestly prohibit what Texas has done (Section IV.A.1). Without contradiction from *Gee*, the statute, legislative history, and implementing regulations all reinforce states' ability to provide state-law qualifications criteria, which Providers transgressed, resulting in valid, uncontested state-law decertification actions (Section IV.A.2).

If Providers are confident of prevailing, they could simply treat Individuals and collect reimbursement after Providers' reinstatement, but Individuals' harms (namely, searching for new in-plan physicians) are commonplace, even in private managed-care programs (Section IV.B). Whether irreparable or not, Plaintiffs' harms are dwarfed by the intrusion into Texas's sovereignty (Section IV.C). The public-interest factor collapses into the merits, especially for litigation that impairs governmental functions (Section IV.D).

ARGUMENT

I. *GEE* POSES NO BARRIER TO TEXAS'S PREVAILING.

Although the *Gee* majority decision includes language that could undercut the arguments that Texas raises here, *Gee* poses no barrier to Texas's prevailing. In *Gee*,

Louisiana concededly sought to disqualify the providers for reasons unrelated to Medicaid program concerns; here, by contrast, Texas has identified serious medical and ethical breaches well within Medicaid.

A. *Gee* did not involve unqualified providers.

Gee adopted the holdings of other circuits to define "qualified" as "performing the needed medical services in a professionally competent, safe, legal, and ethical manner," *Gee*, 862 F.3d at __ (slip op. at 29), but *Gee* determined that Louisiana's decertification did not concern the providers' qualifications. *Id.* (slip op. at 30). By contrast, Texas decertified Providers for breaching accepted medical and ethical standards. *See* Texas Br. at 6-12. The *Gee* majority's expansive reading of rights conferred by §1396a(a)(23) is inapposite to providers who are not "qualified."

B. *Dicta* does not bind future panels.

When a court discusses issues not presented by the case or controversy presented by the parties, that discussion is *dicta*, which does not bind either subsequent panels of this court as Circuit precedent, *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004), or even lower federal courts. *U.S. v. Mathena*, 23 F.3d 87, 93 n.12 (5th Cir. 1994). A court's discussion of an issue not presented by the case or controversy before the court is – as to that issue – an advisory opinion, which federal courts lack the jurisdiction to issue. *Muskrat*, 219 U.S. at 356-57. To the extent that *Gee* limited states' options under §1396a(a)(23),

Gee did so only with regard to state actions to disqualify providers for reasons wholly unrelated to their qualifications. *Gee*, 862 F.3d at __ (slip op. at 30).

II. SEVERAL THRESHOLD BARRIERS PRECLUDE INJUNCTIVE RELIEF AGAINST TEXAS.

Under Medicaid's express terms, HHS could terminate or curtail Texas's funding – *i.e.*, Medicaid's exclusive remedies – only after providing an opportunity for a hearing or, at least, notice from HHS that Texas is violating Medicaid. Whether jurisdictionally or on the merits, both the failure to meet the regulatory preconditions to an enforcement remedy and Plaintiffs' seeking a specific-performance remedy that Medicaid lacks should doom this challenge. Either way, Plaintiffs cannot prevail. Moreover, because Medicaid allows Texas to elect non-compliance – with the possible termination or curtailment of federal funding – whatever fault HHS could find in Texas's implementation of Medicaid nonetheless could not constitute an ongoing violation of federal law sufficient to overcome sovereign immunity.

A. Even HHS would lack a vested right to enforce Medicaid with unmet conditions precedent.

As indicated, courts analogize Spending-Clause programs to contracts struck between the government and recipients, with the public as third-party beneficiaries. *Gorman,* 536 U.S. at 186. When a statutory scheme under the Spending Clause defines recipients' obligations, the *entire* scheme constitutes the bargain that the United States (or its agencies or any third-party beneficiaries) can enforce.

Thompson v. Goetzmann, 337 F.3d 489, 501 (5th Cir. 2003) ("litigants cannot cherry-pick particular phrases out of statutory schemes simply to justify an exceptionally broad – and favorable – interpretation of a statute"); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000). Because not even the United States could bring this action as the promisee, *Centex Corp. v. Dalton,* 840 S.W.2d 952, 956 (Tex. 1992) ("[a] condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation"), Plaintiffs cannot bring this action as alleged beneficiaries.

Under "traditional principles of contract interpretation," third-party beneficiaries cannot "cherry-pick" the regulatory provisions that they wish to enforce. *Ingalls Shipbuilding v. Fed'l Ins. Co.,* 410 F.3d 214, 223 (5th Cir. 2005); *Goetzmann,* 337 F.3d at 501 (quoted *supra*). Moreover, third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of Am. v. Rawson,* 495 U.S. 362, 375 (1990); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.,* 933 F.2d 314, 318 (5th Cir. 1991) ("[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee's] rights"); *Waggoner v. Herring-Showers Lumber Co.,* 40 S.W.2d 1, 4 (Tex. 1931) ("beneficiaries for whose advantage the contract was made could not acquire a better standing to enforce such contract than that occupied by the contracting parties themselves"). Here, not even HHS could compel Texas to provide Medicaid funding

to Providers. *What agencies cannot do directly, plaintiffs cannot do indirectly as third-party-beneficiaries.*

B. Plaintiffs lack standing to enforce Texas's non-vested obligations.

As explained in Section II.A, *supra,* and Section IV.A.3, *infra,* lack of conditions precedent affects both constitutional standing under Rule 12(b)(1) and statutory standing under Rule 12(b)(6). But even if lack of conditions precedent implicated only Rule 12(b)(6) *for federal agencies,* it nonetheless implicates jurisdiction for third-party beneficiaries.

Texas law has a presumption *against* finding third-party beneficiaries to contracts and resolves all doubts against conferring third-party-beneficiary status. *Tawes v. Barnes,* 340 S.W.3d 419, 425 (Tex. 2011). Accordingly, to sue, a putative third-party beneficiary must seek to enforce only explicit obligations of the promisor, made for the third party's unmistakable benefit, where the parties contemplated that such third parties would be vested with the right to sue. *Id.; MCI Telecommunications Corp. v. Texas Utilities Elec. Co.,* 995 S.W.2d 647, 651-52 (Tex. 1999). Moreover, a right cannot vest when conditions precedent remain unmet. *Continental Oil Co. v. Lane Wood & Co.,* 443 S.W.2d 698, 702 (Tex. 1969). Under Texas contract law, Medicaid does not provide Plaintiffs a right to enforce.

If federal common law applied, the result would be the same. *Conoco, Inc. v. Republic Ins. Co.,* 819 F.2d 120, 123-24 (5th Cir. 1987); *Palma v. Verex Assur., Inc.,*

79 F.3d 1453, 1458 (5th Cir. 1996); *Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 822-24 (9th Cir. 1985). Without the conditions precedent to Medicaid enforcement, Plaintiffs lack a legally protected interest in that enforcement and thus lack standing.[2] Significantly, *plaintiffs* always bear the burden of proving jurisdiction, *Summers v. Earth Island Inst.,* 129 S.Ct. 1142, 1150 (2009), and their claim's non-vested nature goes to their standing to bring Medicaid-based claims.

To the extent other courts have assumed jurisdiction without addressing this issue, "drive-by jurisdictional rulings" that reach merits issues without considering a particular jurisdictional issue "have no precedential effect" on that jurisdictional issue. *Steel Co.,* 523 U.S. at 94-95; *Waters v. Churchill,* 511 U.S. 661, 678 (1994) ("cases [cited by Plaintiffs] cannot be read as foreclosing an argument that they never dealt with"). State law may have differed, or the parties there may have simply not raised these issues. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157, 170 (2004) (interior quotations omitted). Courts that never *considered*

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[2] Alternatively, as explained in Section IV.A.3, *infra*, failure to meet conditions precedent could render third-party beneficiaries unable to state a claim for relief. *See, e.g., Shaw Constructors v. ICF Kaiser Engineers, Inc.,* 395 F.3d 533, 540 & n.15 (5th Cir. 2004). Unlike with most merits issues, courts can dismiss for lack of statutory standing without reaching constitutional standing. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999).

a jurisdictional issue plainly never *decided* it.

C. This litigation is barred by Texas's sovereign immunity.

Texas may assert its immunity from suit both on appeal and as the district court case proceeds, which makes immunity relevant to Plaintiffs' likelihood of prevailing. *Ex parte Young* is a narrow exception to sovereign immunity for prospective declaratory and injunctive relief (not money damages), but that exception has two limitations that deny Plaintiffs a federal avenue to sue Texas.

First, *Young* applies only to ongoing *violations* of federal law. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002). Thus, for example, the *Young* exception was unavailable in *Green v. Mansour,* 474 U.S. 64 (1985), where, after "Respondent … brought state policy into compliance," the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Mansour,* 474 U.S. at 66-67. Here, Medicaid undisputedly *allows* Texas the option of electing to field a non-compliant Medicaid program, leaving to HHS the decision whether to curtail or eliminate Texas's Medicaid funding. This is the nature of the Medicaid contract that Texas and the United States entered. Texas's alleged breach of that contract is simply not a "violation" of "federal law" that triggers the *Young* exception to immunity. Further, as stated in Section IV.A.2, *infra*, Providers are not "qualified" (*i.e.*, even under *Gee*, there is no violation of federal law).

Second, the relief requested here falls outside the limited *Young* exception to sovereign immunity because "relief sought nominally against an officer is in fact against the sovereign" where "the decree would operate against the latter" by "expend[ing] itself on the public treasury or domain," "interfer[ing] with the public administration," or "restrain[ing] the Government from acting, or to compel[ling] it to act." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101-02 & n.11 (1984) (interior quotations omitted). Thus, even if Texas were presently "violating" §1396a(a)(23), the relief requested nonetheless would fall outside the *Young* exception to sovereign immunity. The path that Texas has chosen is simply not one that Medicaid *prohibits* as unlawful.

Although Texas did not assert sovereign immunity in its motion to dismiss, Texas is free to do so at any time, even on appeal. *Edelman,* 415 U.S. at 678.[3] As in *Ford Motor Company, supra,* the executive and administrative officers here lack authority to waive Texas's immunity from suit. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997) ("it is the Legislature's sole province to waive or abrogate sovereign immunity"). Because Plaintiffs have haled Texas involuntarily into federal court, *Lapides,* 535 U.S. at 623, and the officer defendants and their

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[3] Texas's immunity from suit in federal court does not bar Plaintiffs from asserting their claims in state court under the doctrine of concurrent jurisdiction. *Haywood v. Drown,* 556 U.S. 729, 735 (2009).

counsel lack the authority to waive Texas's immunity outside limited circumstances not present, *City of Galveston v. State*, 217 S.W.3d 466, 481 & n.47 (Tex. 2007),[4] Texas retains the ability to assert its sovereign immunity at any time in this litigation.

D. The primary-jurisdiction doctrine counsels for dismissal.

As relevant as *Gee* appears, *Wilder* is the primary precedent on which *Gee* relies, and several aspects of the *Wilder* provision – 42 U.S.C. §1396a(a)(13) – distinguish it from §1396a(a)(23) as applied here.[5] Thus, *Wilder* and the private enforceability of §1396a(a)(13) is not a good predictor for the private enforceability of the rest of the list of plan requirements that §1396a(a) enumerates for state plans' contents. 42 U.S.C. §1396a(a). As Justice Scalia explained, that type of agency-directed command generally does not create rights. *Armstrong v. Exceptional Child*

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[4] By contrast, other states allow attorneys to waive sovereign immunity, and the issue is one of state law. *Katz v. Regents of the University of California,* 229 F.3d 831, 834-35 (9th Cir. 2000) (California); *Sosna v. Iowa,* 419 U.S. 393, 396 n.2 (1975) (Iowa). General language in decisions rendered for such permissive-waiver states like California and Iowa is therefore inapposite to evaluating sovereign immunity in restrictive-waiver states like Texas. *Compare Texas by & through Bd. of Regents of the Univ. of Texas Sys. v. Walker*, 142 F.3d 813, 819 n.7 (5th Cir. 1998) (Texas can raise immunity for the first time on appeal) *with Hill v. Blind Industries & Services of Maryland,* 179 F.3d 754, 762-63 (9th Cir. 1999) (California cannot raise immunity for the first time on appeal).

[5] First, unlike here, Medicaid had allowed for provider reimbursement suits before the amendment in question, *Wilder*, 496 U.S. at 516, thus invoking the canon against repeals by implication. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007). Second, in addition to that history of private actions, the *Wilder* amendment spoke in "detail" about the payments. *Id.* at 519 n.17. That history and detail for §1396a(a)(13) are lacking here for §1396a(a)(23).

Ctr., Inc., 135 S.Ct. 1378, 1387 (2015) (plurality). Given the differences between this case and *Gee* and also between *Gee* and *Wilder*, it is entirely unclear how HHS would regard Texas's compliance with §1396a(a)(23). Before ruling on that complicated legal and factual question, therefore, this Court could refer the issue to HHS under the doctrine of primary jurisdiction.

"The doctrine of primary jurisdiction [is one] of judicial abstention whereby a court which has jurisdiction over a matter, nonetheless defers to an administrative agency for an initial decision on questions of fact or law within the peculiar competence of the agency." *Occidental Chem. Corp. v. Louisiana Pub. Serv. Comm'n*, 810 F.3d 299, 309 (5th Cir. 2016) (interior quotations omitted). Doing so achieves uniformity of decisions and defers to "expert and specialized knowledge of the agencies." *U.S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 919 (5th Cir. 1983). The court can either stay the case pending the agency's resolution or dismiss, but where (as here) the reviewing court would depend on what action HHS takes, dismissal is appropriate. *Far E. Conference v. U.S.*, 342 U.S. 570, 576-77 (1952). Having HHS decide the scope of its implementing regulations and the importance of issues raised by the Texas proceedings would improve both the quality and uniformity of decisions under Medicaid's free-choice provision.

III. PLAINTIFFS LACK A CAUSE OF ACTION TO ENFORCE THE RELEVANT STATUTES AGAINST TEXAS.

It is both clear and undisputed that Medicaid itself does not provide a private right of action for recipients to enforce Medicaid's perceived requirements. *Wilder,* 496 U.S. at 521. To regulate recipients like Texas based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. Medicaid says nothing about private causes of action, and – with government programs – "an intention to benefit a third party" is not "an intention that the third party should have the right to enforce that intention." *Astra USA, Inc. v. Santa Clara County, Cal.,* 131 S.Ct. 1342, 1347-48 (2011) (interior quotations omitted). Nonetheless, Plaintiffs propose to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra,* 131 S.Ct. at 1349. Notwithstanding *Gee*, the states never agreed to that as part of Medicaid, and federal law does not sanction it.

But even if *Gee* held that individual beneficiaries can enforce Medicaid's free-choice provision, that holding would be inapposite here because of differences between this case and *Gee*. *See* Section I, *supra*. In general, a plaintiff without a statutory right of action who seeks to enforce federal law against a conflicting state law can consider two alternate paths, 42 U.S.C. §1983 and the *Young* exception to sovereign immunity. *Perez v. Ledesma,* 401 U.S. 82, 106-07 (1971). Neither path helps Plaintiffs, who lack the federal right needed to sue under §1983 and lack an

ongoing violation of federal law needed to sue under *Young*.

A. Plaintiffs cannot sue under §1983.

By its terms, "§1983 permits the enforcement of '*rights,* not the broader or vaguer 'benefits' or 'interests.'" *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) (*quoting Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (emphasis in *Gonzaga*)). As such, "[i]n order to seek redress through §1983, [plaintiffs] must assert the violation of a federal *right,* not merely a violation of federal *law.*" *Blessing v. Freestone,* 520 U.S. 337, 340 (1997) (emphasis in original). To meet this test, §1983 plaintiffs must establish an enforceable federal right under a three-part test: (1) Congress must have intended the provision in question to benefit the plaintiff; (2) the alleged right is not so "vague and amorphous" that enforcing it would "strain judicial competence;" and (3) the rights-creating provision is stated in mandatory, rather than precatory, terms. *Blessing,* 520 U.S. at 340-41. Plaintiffs cannot establish any of these prerequisites to enforcing Medicaid under §1983, but the bigger issue is that – given Providers' failure to contest disqualification – Plaintiffs lack statutory standing because Providers are not *qualified* under state law.

First, Congress could not have intended §1396a(a)(23) to benefit Providers as entities because – unlike Individuals – Providers are not Medicaid beneficiaries and Medicaid allows Texas to adopt a Medicaid non-compliant program, hampered only by the potential to lose some or even all Medicaid funding. 42 U.S.C. §1396c.

Indeed, §1396a(a) itself regulates *states* on the content of their Medicaid plans, not on the services (or rights) that third-party beneficiaries must receive: "Statutes that focus on the person regulated rather than the individuals protected create *no implication* of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval,* 532 U.S. 275, 289 (2001) (interior quotations omitted, emphasis added); *accord Gonzaga,* 536 U.S. at 286 (applying *Sandoval* to §1983 actions).

Although *Wilder,* 496 U.S. at 522-23, held that §1396a(a)(13) constituted rights-creating language that enabled the plaintiff there to avoid Medicaid's enforcement remedies, *Gonzaga* – consistent with *Sandoval* – narrowed *Wilder* by mooring it to its facts, including that the "statutory provisions explicitly conferred specific monetary entitlements upon the plaintiffs." *Gonzaga,* 536 U.S. at 274; *cf.* note 5, *supra* (distinguishing §1396a(a)(23) and *Wilder*). Here, by contrast, the statute neither focuses on the individuals ostensibly protected (*i.e.,* Medicaid patients) nor explicitly entitles providers to *anything,* monetary or otherwise.

Under *Sandoval* and *Gonzaga,* such group-based *benefits* and *systemic* requirements do not create *rights.* Similarly, *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 786-88 (1980), distinguished between direct Medicaid benefits like financial assistance and indirect benefits like freedom of choice, finding that the Due Process Clause protected only direct benefits. Given those differences with *Wilder* (*i.e.,* §1396a(a)(23)'s not explicitly conferring benefits on providers and

its conferring only indirect benefits on Medicaid patients), nothing authorizes §1983's circumventing Medicaid's exclusive review procedures and remedies. *Rancho Palos Verdes,* 544 U.S. at 122-23.

Second, the only Medicaid remedies that Texas agreed to under the Spending Clause and the relevant statutes are fund termination and fund curtailment, and even then only *after* an administrative process. 42 U.S.C. §1396c. Accordingly, it would "strain judicial competence" to circumvent that administrative process before HHS acts. *See* Section II.D, *infra* (discussing HHS's primary jurisdiction).

Third, and notwithstanding that §1396a(a) uses the word "must," §1396a(a)(23) is not mandatory as *Blessing* uses the term. The answer to Medicaid's critical "*or what?*" question is not sufficiently concrete for §1396a(a) to qualify as mandatory for purposes of creating a federal right. Assuming *arguendo* that Texas's actions violated §1396a(a)(23), Texas's Medicaid plan would be noncompliant, and HHS could terminate or curtail the Medicaid funding. 42 U.S.C. §1396c. Because not even the United States could compel Texas to comply with §1396a(a)(23), that provision cannot be considered "mandatory" for purposes of creating an individual right to specific performance of that provision. Neither the United States as promisee nor any plaintiff as third-party beneficiary can obtain that relief.

B. Plaintiffs cannot sue under *Young*.

As signaled in the prior paragraph and as indicated in Section II.C, *supra,*

Plaintiffs – and the federal courts – lack an ongoing violation of federal law sufficient to trigger the *Young* exception to sovereign immunity. Indeed, the process under which Texas decertified Providers is not inconsistent with federal law (*i.e.*, Texas's actual *obligations* under Medicaid). Instead, that process represents an entirely permissible exercise of Texas's sovereignty, regardless of whether HHS elects to eliminate or curtail Texas's Medicaid funding. For that reason, moreover, the relief that Plaintiffs seek falls outside the *Young* exception to sovereign immunity. *Pennhurst,* 465 U.S. 89, 101-02 & n.11 (quoted *supra*). Accordingly, Plaintiffs cannot surmount Texas's sovereign immunity in this litigation.

IV. PLAINTIFFS' CLAIMS DO NOT SATISFY THE INJUNCTION CRITERIA.

Assuming *arguendo* that federal courts have jurisdiction over Texas and that Plaintiffs have a cause of action, Plaintiffs nonetheless do not qualify for injunctive relief under the four-factor test. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008).

A. Plaintiffs cannot prevail on the merits.

Plaintiffs can prevail on their Medicaid-based claims only if Texas's actions violated Medicaid's free-choice provision. By its own terms, the free-choice provision expressly allows states to limit Medicaid access to *qualified* entities. 42 U.S.C. §1396a(a)(23). Although it does not expressly define the contours of provider qualification, Medicaid does recognize states' right to exclude entities on the basis

of state law beyond the bases on which HHS may exclude entities. *See* Section IV.A.2, *infra* (*discussing* 42 U.S.C. §1396a(p)(1)). Thus, provided that Texas lawfully disqualified Providers, Texas did not violate §1396a(a)(23) by that section's express terms.

1. The canons of statutory construction favor Texas.

This Court must address two canons of statutory interpretation before it addresses the merits. Both canons favor Texas and therefore counsel for reversal.

First, as Spending Clause legislation, Medicaid must express its requirements unambiguously. *Gorman,* 536 U.S. at 186. With the required notice, recipients *potentially* can face enforcement for violating the conditions of federal spending. *Gorman,* 536 U.S. at 187-89. But absent rights-creating statutory language, "[i]n legislation enacted pursuant to the spending power, 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." *Pennhurst,* 451 U.S. at 28. While the *Gee* majority saw no ambiguity in §1396a(a)(23) when Louisiana disqualified providers for reasons beyond relevant qualifications, no clarity exists to guide this Court to excuse the serious medical and ethical breaches here.

Second, because this action concerns a field of traditional state regulation (public health) into which the federal government only recently appeared, this Court

must apply the presumption that Congress would not have preempted Texas law without a "clear and manifest" intent to do so. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Even if a court finds that Congress expressly preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text … is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotation omitted)). Here, "clear and manifest" evidence of preemptive intent is lacking. In essence, Plaintiffs must establish that no plausible reading of Medicaid supports Texas, and Judge Owen's *Gee* dissent presents a plausible non-preemptive reading.

2. Texas lawfully defined a "qualified" provider.

Medicaid provides states the authority to exclude entities not only based on HHS criteria but also based on "any other authority." 42 U.S.C. §1396a(p)(1); *see also* 42 C.F.R. §1002.2 ("[n]othing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law"). The legislative history provides that Medicaid "is not intended to preclude a State from establishing, *under State law, any*

other bases for excluding individuals or entities from its Medicaid program." S. REP. NO. 100-109, at 20 (emphasis added).

Citing that history, the First Circuit held that "this 'any other authority' language was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law." *First Medical Health Plan, Inc. v. Vega-Ramos,* 479 F.3d 46, 53 (1st Cir. 2007) (emphasis in original); *Kelly Kare, Ltd. v. O'Rourke,* 930 F.2d 170, 178 (2d Cir. 1991) (freedom-of-choice provision does not apply to providers where government has properly cancelled a provider's contract). By their own terms, *Gee* and the decisions on which it relies concern providers disqualified for reasons wholly unrelated to their qualifications, *Gee*, 862 F.3d at __ (slip op. at 30), which is inapposite here. Indeed, Texas appears to accept the *Gee* formulation of "professionally competent, safe, legal, and ethical" providers. *Gee*, 862 F.3d at __ (slip op. at 29). Even without resort to canons of statutory interpretation under the Spending and Supremacy Clauses, Texas has the better *textual* reading of the free-choice and entity-exclusion provisions.

But the Spending and Supremacy Clauses make it *contextually* impossible for Plaintiffs to prevail. First, courts must construe Spending-Clause agreements to provide clear notice before finding recipients like Texas to have violated them. Second, Medicaid regulates in the field of public health –traditionally occupied by the states – and Plaintiffs cannot overcome the presumption against preemption,

which requires only a plausible non-preemptive interpretation to support Texas. By preserving state authority to regulate alongside the federal act, clauses like §1396a(p)(1) undermine Plaintiffs' preemption claims by negating congressional intent to preempt, thus precluding Plaintiffs from making the required showing of a clear and manifest congressional intent *to preempt. Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1978 (2011). As such, §1396a(p)(1) – together with its history and implementing regulations – makes Plaintiffs' preemption claims untenable.

3. Plaintiffs lack the conditions precedent to a claim.

As indicated in Section II.A, *supra,* Medicaid imposes conditions precedent on Medicaid enforcement – namely, the 42 U.S.C. §1396c process – that remain unmet here. Failure to meet conditions precedent can render third-party beneficiaries unable to state a claim for relief. *See, e.g., Shaw Constructors,* 395 F.3d at 540 & n.15; *Kane Enterprises v. MacGregor (USA) Inc.,* 322 F.3d 371, 375 (5th Cir. 2003). Alternatively, Plaintiffs lack standing as third-party beneficiaries to the federal contracts because Medicaid's enforceability has not vested. *See* Section II.B, *supra.* This lack of a vested, enforceable interest either presents a jurisdictional defect under Article III or a lack of statutory standing on the merits. Either way, this litigation must be dismissed.

B. Plaintiffs do not suffer irreparable harm.

Collectively, Plaintiffs do not suffer irreparable harm. If Providers believe that they will prevail, Providers can simply treat Individuals and bill Medicaid when Providers are reinstated. Of course, if Providers decline that option, Individuals would need to make other Medicaid arrangements, which might be some small quantum of harm.

For their part, Providers have abandoned the argument that the decertification was improper under state law: "exhaustion of remedies is a prerequisite to the trial court's jurisdiction in a case like this involving disputed fact issues," *Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294 (Tex. 2001), and Providers are now time-barred from contesting the state-law basis for their decertification. Although *state-law* exhaustion is typically not required for *federal* remedies, *McNeese v. Bd. of Educ.*, 373 U.S. 668, 671 (1963), the right that Plaintiffs assert is contingent on the absence of a state-law basis to decertify Providers. *See* 42 U.S.C. §1396a(a)(23). If Providers are unqualified under state law, there is no federal right and thus no federal action.

C. The balance of equities tips to Texas.

Assuming *arguendo* that Providers will not treat Individuals and that finding new, qualified Medicaid providers qualifies as irreparable harm, that minor imposition – finding new in-plan physicians is commonplace, albeit annoying, in the

private-insurance market – does not approach the gravity of federal courts' intruding into Texas's Medicaid program.

D. The public interest favors Texas.

The public-interest factor favors Texas because the requested relief intrudes upon governmental authority. In such litigation, the public-interest factor collapses into the merits, 11A WRIGHT & MILLER, FED. PRAC. & PROC. Civ.2d §2948.4 (2d ed. 1995 & Supp.), which favor Texas. "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Accordingly, the public-interest factor can deny plaintiffs relief that otherwise might issue in purely private litigation.

CONCLUSION

This Court should vacate the injunction and remand with instructions to dismiss.

Dated: August 14, 2017

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CERTIFICATE OF COMPLIANCE

No. 17-50282, *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. v. Smith*.

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,500 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: August 14, 2017

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

No. 17-50282, *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. v. Smith*.

I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper documents, except for the date of this Certificate Regarding Electronic Submission; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF SERVICE

No. 17-50282, *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. v. Smith*.

I hereby certify that, on August 14, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit – as an exhibit to the accompanying motion for leave to file – by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

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