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 GULF COAST, INC.; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; 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; 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 25 UNITED STATES SENATORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

SONJA SCHILLER
155 N. Upper Wacker Dr. #2700
Chicago, IL 60606

CAROLINE VAN ZILE
1440 New York Ave. NW
Washington, DC 20005

CATHERINE THOMPSON
300 S. Grand Ave. #3400
Los Angeles, CA 90071

BORIS BERSHTEYN
JUSTIN RAND
DEEPA VANAMALI
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
(212) 735–3000
boris.bershteyn@skadden.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Table of Authorities iii

Interests of *Amici Curiae* vii

Statement of Compliance with Rule 29 ix

Summary of the Argument 1

Argument 3

I. Planned Parenthood Is a "Qualified" Provider Under the Plain Meaning of the Free-Choice-of-Provider Provision 3

A. Reflecting Congress's Clear Intent, the Term "Qualified" Is Unambiguously Tethered to Medical Qualifications 4

1. The Meaning of the Term "Qualified" Is Evident From the Text and Structure of the Medicaid Act 4

2. This Court, Along with Other Courts, Has Held That the Term "Qualified" Unambiguously Refers to Medical Qualifications 8

B. Legislative History Confirms That Congress Focused on the Quality and Availability of Medicaid Providers—Especially Providers of Family Planning Services 10

C. The Planned Parenthood Organizations Are Indisputably Qualified Providers 15

II. The Planned Parenthood Organizations Cannot Be Excluded from Medicaid for Reasons Unrelated to Their Medical or Professional Qualifications 18

III. This Case Illustrates the Importance of Enforcing the Free-Choice-of-Provider Provision as Congress Intended 23

Conclusion 28

Certificate of Service 29

Certificate of Electronic Compliance 30

Certificate of Compliance 31

TABLE OF AUTHORITIES

CASES

Does v. Gillespie,
867 F.3d 1034 (8th Cir. 2017) 9

Matal v. Tam,
137 S. Ct. 1744 (2017) 21

Patsy v. Board of Regents,
457 U.S. 496 (1982) 22

Pennhurst State School & Hospital v. Halderman,
451 U.S. 1 (1981) 5, 19

Planned Parenthood Arizona Inc. v. Betlach,
727 F.3d 960 (9th Cir. 2013) 5, 9, 17

Planned Parenthood of Gulf Coast, Inc. v. Gee,
862 F.3d 445 (5th Cir. 2017) ..... passim

Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health,
699 F.3d 962 (7th Cir. 2012) 10

Richards v. United States,
369 U.S. 1 (1962) 6

Romano v. Greenstein,
721 F.3d 373 (5th Cir. 2013) 22

S.D. ex rel. Dickson v. Hood,
391 F.3d 581 (5th Cir. 2004) 19

United Savings Association of Texas v. Timbers of Inwood Forest Associates,
484 U.S. 365 (1988) 5

United States ex rel. Attorney Gen. of the United States v. Delaware & Hudson Co.,
213 U.S. 366 (1909) 21

STATUTES

42 U.S.C. § 1396a(a)(23) ..... passim

42 U.S.C. § 1396a(p) 6

42 U.S.C. § 1396n(b) 8, 13, 14

42 U.S.C. § 1983 22

LEGISLATIVE AUTHORITIES

111 Cong. Rec. 505 (1965) 11

H.R. Rep. No. 89-213 (1965) 11

H.R. Rep. No. 90-1030 (1967) 13

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 13

President's Proposals for Revision in the Social Security System: Hearings Before the House Committee on Ways & Means on H.R. 5710, 90th Cong. 541 (1967) 11, 12

S. Rep. No. 90-744 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834 12

S. Res. 590, 114th Cong. (2016) 15

Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 ..... 10, 11

Social Security Amendments of 1967: Hearings on H.R. 12080 Before Senate Committee on Finance, 90th Cong. 1597 (1967) 11

Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 13

OTHER AUTHORITIES

Brief of National Health Law Program et al. as *Amici Curiae*, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (No. 15-30987), 2016 WL 929784 (5th Cir. Mar. 7, 2016) 20

Laurie McGinley, *HPV Researchers, Planned Parenthood Win Prestigious Lasker Medical Awards,* Washington Post, (Sept. 6, 2017), https://www.washingtonpost.com/news/to-your-health/wp/2017/09/06/hpv-researchers-planned-parenthood-win-prestigious-lasker-medical-awards/?utm_term=.eacd118af55b 16

Letter from Thirty-Seven U.S. Senators to the Honorable Paul Ryan (Jan. 6, 2017), https://www.help.senate.gov/download/pp-letter- 15

Memorandum from Center for Medicare & Medicaid Services to State Medicare Director, SMD # 16-005, Re: Clarifying "Free Choice of Provider" Requirement in Conjunction with State Authority to Take Action against Medicaid Providers (Apr. 19, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/smd16005.pdf 7, 22

Original Appellant Brief of Kathy Kliebert, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (No. 15-30987), 2016 WL 106447 (5th Cir. Jan. 8, 2016) 20

Our Mission, Planned Parenthood Greater Texas, https://www.plannedparenthood.org/planned-parenthood-greater-texas/who-we-are/our-mission (last visited Oct. 13, 2017) 17

Planned Parenthood South Texas, *2016 Service Delivery Report* (2016), https://issuu.com/ppsouthtexas/docs/english_2016-sdr 17

Sara Rosenbaum et al., *Medicaid Managed Care and the Family Planning Free-Choice Exemption: Beyond the Freedom to Choose*,
22 J. Health Pol. Pol'y & L. 1192 (1997) 14

Southeast Texas Impact Report Fiscal Year 2016,
Planned Parenthood Gulf Coast,
https://www.plannedparenthood.org/uploads/filer_public/2d/66/2d66728c-03cd-439d-9f21-7c7eef179afe/ppgc_tx_community_impact_sheet.pdf
(last visited Oct. 13, 2017) 17

INTERESTS OF *AMICI CURIAE*

This brief is submitted on behalf of 25 United States Senators. The Senators represent 20 different states that participate in the Medicaid program. The Senators have an interest in ensuring that the federal Medicaid Act is implemented in accordance with congressional intent and that states are not free to exclude providers for reasons unrelated to their competence to provide Medicaid services. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 470 (5th Cir. 2017). The *amici curiae* include:

Senator Ron Wyden (Oregon)

Senator Patty Murray (Washington)

Senator Tammy Baldwin (Wisconsin)

Senator Michael F. Bennet (Colorado)

Senator Richard Blumenthal (Connecticut)

Senator Cory A. Booker (New Jersey)

Senator Sherrod Brown (Ohio)

Senator Maria Cantwell (Washington)

Senator Robert P. Casey, Jr. (Pennsylvania)

Senator Tammy Duckworth (Illinois)

Senator Dianne Feinstein (California)

Senator Al Franken (Minnesota)

Senator Kirsten Gillibrand (New York)

Senator Kamala D. Harris (California)

Senator Margaret Wood Hassan (New Hampshire)

Senator Mazie K. Hirono (Hawaii)

Senator Chris Van Hollen (Maryland)

Senator Amy Klobuchar (Minnesota)

Senator Edward J. Markey (Massachusetts)

Senator Catherine Cortez Masto (Nevada)

Senator Bill Nelson (Florida)

Senator Jack Reed (Rhode Island)

Senator Bernard Sanders (Vermont)

Senator Jeanne Shaheen (New Hampshire)

Senator Sheldon Whitehouse (Rhode Island)

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* or their counsel contributed money that was intended to finance the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

As the language, structure, and legislative history of the Medicaid Act make clear, Congress intended to offer Medicaid patients their choice of medically qualified health care providers—particularly for family planning services. The statute explicitly prevents a state from interfering with a Medicaid patient's selection of provider, as long as the provider is "qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23). Yet, in violation of that unambiguous directive, Texas terminated the Medicaid provider agreements of three Planned Parenthood organizations for reasons unrelated to their medical or professional qualifications. Texas thereby threatened to withhold from low-income patients one of their highest quality family planning options (and sometimes their only such option). Its action contravenes Congress's intent to increase the availability of quality family planning options and provide patients with meaningful choices. This Court has consistently foreclosed—and must continue to foreclose—this manifest disregard of the plain meaning of, and legislative intent behind, the Medicaid Act.

The arguments to the contrary advanced by Texas and its *amici* fail for several reasons.

First, the legislative intent behind the phrase "qualified to perform the service or services required" in Medicaid's free-choice-of-provider provision lacks any ambiguity. 42 U.S.C. § 1396a(a)(23). The phrase clearly denotes that a patient may choose any participating provider capable of rendering services—here, family planning services—in a professionally competent, safe, legal, and ethical manner. This meaning is unmistakable from the text and structure of the statute, and it has been embraced by this Court as well as others. Legislative history fully accords with this understanding of the statute. Under that unambiguous construction of the Medicaid Act, Planned Parenthood is plainly "qualified."

Second, the alternative interpretations of "qualified" advanced by Texas and its *amici* defy established rules of statutory construction and disregard Congress's clear focus on granting Medicaid patients meaningful choices among qualified participating providers. *Amici*'s alternative definitions focus on ideology, trade names, and exhaustion of administrative appeals—topics unrelated to the quality and

availability of reproductive health care for women and therefore irrelevant to whether the three Planned Parenthood organizations are qualified providers under Medicaid.

Third, this case illustrates the importance of enforcing the Medicaid Act and its free-choice-of-provider provision as Congress intended. Were Texas permitted to terminate the three Planned Parenthood organizations' Medicaid provider agreements for purely ideological reasons unrelated to their ability to provide medical care as "qualified" providers, thousands of low-income women and families in Texas might be barred from their provider of choice, and many may have no family planning options at all. That is not the result Congress intended, and this Court must not countenance it.

ARGUMENT

I. PLANNED PARENTHOOD IS A "QUALIFIED" PROVIDER UNDER THE PLAIN MEANING OF THE FREE-CHOICE-OF-PROVIDER PROVISION

The meaning of the phrase "qualified to perform the service or services required" in the Medicaid Act's free-choice-of-provider provision is clear from the statute's text and structure. 42 U.S.C. § 1396a(a)(23). As this Court and others have held, "qualified" means "'capable of performing the needed medical services in a professionally competent,

safe, legal, and ethical manner.'" *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 462 (5th Cir. 2017) (citation omitted). Legislative history underscores the plain meaning of the statutory text and emphasizes the lengths to which Congress has gone to make quality family planning services available to women. Planned Parenthood is a nationally recognized provider; its Texas affiliates, which provide Medicaid services through licensed clinicians to thousands of patients, are plainly "qualified."

A. Reflecting Congress's Clear Intent, the Term "Qualified" Is Unambiguously Tethered to Medical Qualifications

1. The Meaning of the Term "Qualified" Is Evident From the Text and Structure of the Medicaid Act

Contrary to the contentions of Texas and its *amici*, the meaning of the phrase "qualified to perform the service or services required" in Medicaid's free-choice-of-provider provision is clear from the statutory text and is unambiguously tethered to medical qualifications. 42 U.S.C. § 1396a(a)(23). The provision as a whole states that "any individual eligible for medical assistance" from Medicaid "may obtain such assistance from any institution, agency, community pharmacy, or

person, qualified to perform the service or services required," as long as that provider accepts Medicaid patients. *Id.* (emphasis added).

Courts, of course, should not interpret the term "qualified" in isolation. Rather, as the Supreme Court acknowledged in *Pennhurst State School & Hospital v. Halderman* ("*Pennhurst*"), 451 U.S. 1 (1981), statutory interpretation "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* at 18 (citation omitted); *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."). That is true even if a court is searching for a clear statement on the part of Congress. *See Pennhurst*, 451 U.S. at 18.

In the free-choice-of-provider provision, Congress accompanied the term "qualified" with an unambiguous benchmark: The provider must be "qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23) (emphasis added); *see also Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 969 (9th Cir. 2013) ("[W]ere there any doubt as to how we should read the word 'qualified' in § 1396a(a)(23), Congress removed it by adding the further specification 'qualified to perform the

service or services required.'" (citation omitted)). Thus, Congress clearly intended that the term "qualified" relate to a provider's ability to furnish the required service.

Furthermore, the structure of the Medicaid Act makes clear that Congress intended the free-choice-of-provider provision to impose stringent limitations on excluding providers from state Medicaid plans. *See Richards v. United States*, 369 U.S. 1, 11 (1962) ("[A] section of a statute should not be read in isolation from the context of the whole Act . . . ."). As an initial matter, the free-choice-of-provider clause is included in a list of mandatory requirements that state Medicaid plans must satisfy. *See* 42 U.S.C. § 1396a(a)(23). Other sections of the Medicaid Act identify specific, narrow circumstances in which states have the authority to exclude providers, consistent with Congress's intent to ensure meaningful access to medically qualified providers. *See, e.g.*, *id.* § 1396a(p). One such provision allows states to exclude a provider based on crimes committed in the delivery of services, abuse or neglect of patients, submission of false claims, or acceptance of kick-backs. *See id.* § 1396a(p)(1) (cross-referencing 42 U.S.C. §§ 1320a-7, 1320a-7a, and 1395cc(b)(2), which list permitted exclusions). Another

allows states to hold providers to specific reimbursement, quality, and utilization standards, as long as these restrictions do "not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing those services." *Id.* § 1396n(b)(4) (emphasis added).

Congress thus expressly crafted only narrow and specific exceptions to the free-choice-of-provider provision, underscoring its intent to maximize a patient's choice and the overall availability of medically qualified providers. These exceptions do not permit a state to deem providers "unqualified" and thus excludable on a basis unrelated to the quality of medical services.[1]

Family planning services have been singled out for specific, additional protection by Congress. Although the federal Department of

[1] Recent guidance from the Center for Medicare & Medicaid Services has been in accord with this statutory command. *See* Memorandum from Ctr. for Medicare & Medicaid Servs. to State Medicare Dir., SMD # 16-005, Re: Clarifying "Free Choice of Provider" Requirement in Conjunction with State Authority to Take Action against Medicaid Providers 3 (Apr. 19, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/smd16005.pdf ("[S]tates may establish provider standards or take action against Medicaid providers that affects beneficiary access to those providers only (1) based on reasons relating to the fitness of the provider to perform covered medical services or to appropriately bill for those services, and (2) with supporting evidence of the provider's failure to meet the state's reasonable provider standards.").

Health and Human Services ("HHS") may waive the free-choice-of-provider provision to allow states to implement primary care case-management and similar managed care systems, *see* 42 U.S.C. § 1396n(b)(1), those waivers may not encompass family planning services. *See id.* § 1396a(a)(23)(B) (mandating that the "enrollment of an individual . . . in a primary care case-management system[,] . . . a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services" for family planning (emphasis added)). Thus, the text of the statute clearly reflects Congress's intent to specifically protect a woman's ability to choose her own medically qualified provider of family planning services.

2. This Court, Along with Other Courts, Has Held That the Term "Qualified" Unambiguously Refers to Medical Qualifications

Indeed, this Court has already determined that the meaning of the term "qualified" is clear and unambiguously refers to the quality of medical care. In *Gee*, this Court held that "qualified" in the free-choice-of-provider provision means "'capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner.'"

Gee, 862 F.3d at 462 (citation omitted). That meaning, this Court determined, is unambiguous and therefore establishes a right that is enforceable by patients against the state. *Id.* at 457 ("[W]e conclude that § 1396a(a)(23) affords the Individual Plaintiffs a private right of action under § 1983."); *id.* at 459 (the free-choice of provider provision "'suppl[ies] concrete and objective standards for enforcement'" (citation omitted)).

The Ninth and Seventh Circuits are in accord.[2] Consistent with *Gee*, they have held that the term "qualified" in the Medicaid Act clearly and unambiguously refers to competence in providing the requested medical service. *See Betlach*, 727 F.3d at 969 ("We agree with the Seventh Circuit that '[r]ead in context, the term 'qualified' as used in § 1396a(a)(23) unambiguously relates to a provider's . . . capab[ility] of performing the needed medical services in a professionally competent, safe, legal, and ethical manner.'" (first, third, and fourth alterations in

[2] The Eighth Circuit did not reach a contrary conclusion as to the meaning of the term "qualified." *Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017). In holding that the free-choice-of-provider provision does not create an enforceable individual right, the Eighth Circuit did not consider whether the meaning of "qualified" is clear. *Id.*

original) (emphasis added) (quoting *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 978 (7th Cir. 2012)).

Accordingly, this Court, along with multiple other courts of appeals, has held that the Medicaid Act is clear: States may only exclude providers who have been shown to lack medical or professional competence.

B. Legislative History Confirms That Congress Focused on the Quality and Availability of Medicaid Providers—Especially Providers of Family Planning Services

The clear meaning of the term "qualified" also finds support in the legislative history of the free-choice-of-provider provision. That history confirms that the Medicaid Act was worded and structured to provide patients with a meaningful choice of medically qualified providers and to promote the availability of family planning providers in particular.

The Medicaid and Medicare programs were created by the Social Security Act of 1965. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, sec. 102, §§ 1801-1875, 79 Stat. 286, 291-332 (Medicare); *id.* sec. 121, §§ 1901-1905, 79 Stat. at 343-52 (Medicaid). Allowing participants to choose their own provider serves as a central tenet of Medicare, which was designed to aid the elderly. *See id.* sec. 102(a),

§ 1802, 79 Stat. at 291 (titling section "Free Choice by Patient Guaranteed"). It was likewise a goal of Medicaid, which both supplemented Medicare and provided additional medical care for the poor. *See* H.R. Rep. No. 89-213, at 2-3 (1965).

In 1967, the aspiration to provide low-income patients with meaningful choice among qualified providers became federal policy through the addition of the free-choice-of-provider provision. In the debates leading up to the enactment of the Social Security Act of 1965, certain advocacy groups and legislators questioned whether Medicaid would lead to excessive government control over medical choices and medical providers. *See, e.g.*, 111 Cong. Rec. 505 (1965) (statement of Rep. Pelley) ("[T]he doctors have been fearful—and rightly so—of steps that would eventually lead to government medicine. . . . I think the American people and most Members of Congress want free choice of hospital and doctor."). These concerns persisted after 1965.[3]

[3] *See, e.g.*, *President's Proposals for Revision in the Social Security System: Hearings Before the H. Comm. on Ways & Means on H.R. 5710*, 90th Cong. 2273 (1967) (Letter from Asociación de Hospitales de Puerto Rico); *Social Security Amendments of 1967: Hearings on H.R. 12080 Before S. Comm. on Fin.*, 90th Cong. 1597-1604 (1967) (Statement of E. J. Felderman, M.D., President of the Association of New York State Physicians and Dentists).

In response, Congress passed the free-choice-of-provider provision, which placed an unequivocal limitation on states' ability to interfere with the relationship between a Medicaid patient and his or her doctor. *See, e.g.*, *President's Proposals for Revision in the Social Security System: Hearings Before the H. Comm. on Ways & Means on H.R. 5710*, 90th Cong. 541 (1967) (statement of Carl Ackerman, Chairman of the Board of Directors, National Association of Blue Shield Plans) ("Members of Congress and staff members of the Department of Health, Education, and Welfare have stated repeatedly that the major purpose of title XIX [Medicaid] is to integrate the medically indigent individual into the community in terms of his access to sources of medical care. In other words, we endorse the principle . . . permitting the individual eligible for medical assistance free choice of physician or hospital."); *see also* S. Rep. No. 90-744, at 183 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 3021 ("Under the current provisions of law, there is no requirement on the State that recipients of medical assistance under a State title XIX program shall have freedom in their choice of medical institution or medical practitioner. In order to provide this freedom, a new provision is included in the law to require States to offer this

choice."); H.R. Rep. No. 90-1030, at 64 (1967) (Conf. Rep.) (adopting language from Senate bill to "assure that any individual eligible for medical assistance will be free to obtain such assistance from the qualified institution, agency, or person of his choice").

In 1972, family planning services were added to Medicaid as a required benefit. States receiving Medicaid funding thus became obligated to cover family planning services, which, as a required benefit, were subject to Medicaid's free-choice-of-provider provision. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 299E, 86 Stat. 1329, 1462 (titling section "Family Planning Services Mandatory Under Medicaid").

Since 1972, the free-choice-of-provider provision itself and the Medicaid Act in general have been amended several times. Over the years, Congress has allowed for limited exceptions to the free-choice-of-provider provision. In doing so, however, Congress has expressly preserved free choice in the context of family planning. For example, Congress amended the Medicaid Act in 1981 to allow waivers of the free-choice-of-provider provision for managed care plans mandated by states. *See* 42 U.S.C. § 1396n(b); Omnibus Budget Reconciliation Act of

1981, Pub. L. No. 97-35, § 2174, 95 Stat. 357, 809-11. But Congress promptly and expressly clarified in 1986 that family planning services were exempted from those waivers. *See, e.g.*, Sara Rosenbaum et al., *Medicaid Managed Care and the Family Planning Free-Choice Exemption: Beyond the Freedom to Choose*, 22 J. Health Pol. Pol'y & L. 1192, 1196 (1997) (reviewing the legislative history); 42 U.S.C. § 1396n(b) ("No waiver under this subsection may restrict the choice of the individual in receiving services under section 1396d(a)(4)(C) of this title[, which governs family planning]."). A year later, Congress went even further, specifically preserving freedom of choice among family planning providers even when patients elected to opt into managed care organizations. *See* Rosenbaum et al., *supra*, at 1196; 42 U.S.C. § 1396a(a)(23)(B) (exempting the family planning services outlined in § 1396d(a)(4)(C) from abridgment of choice in the managed care setting).

This legislative trajectory evinces Congress's clear and consistent intent—from the 1960's to today—to preserve the right of women to choose a quality family planning provider without state interference. Put simply, the purpose of the 1965, 1972, 1986, and 1987 amendments

was to take politics out of this deeply personal medical decision and to limit states' control over a patient's choice of a qualified provider. Congress plainly meant what it said in the Medicaid Act: Patients must have meaningful access to medically qualified family planning providers, and that access must be protected from ideological swings in state governments.

C. The Planned Parenthood Organizations Are Indisputably Qualified Providers

Under the plain definition of "qualified" set forth by this Court and Congress—namely, "'capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner'"—the Planned Parenthood organizations are unquestionably "qualified" providers. *Gee*, 862 F.3d at 462 (citation omitted).

Planned Parenthood has provided health care services in the United States for over one hundred years. *See* S. Res. 590, 114th Cong. (2016) (Senate Resolution introduced to commemorate Planned Parenthood's one hundred years of providing health care services). It provides services in all fifty states and the District of Columbia, serving approximately 2.5 million patients in the United States each year. *See* Letter from Thirty-Seven U.S. Senators to the Honorable Paul Ryan 1

(Jan. 6, 2017), https://www.help.senate.gov/download/pp-letter-. Indeed, "[o]ne in five women uses Planned Parenthood as her primary means of health care," *id.*, because Planned Parenthood is recognized for the quality of its care, the contributions of its research, and the cutting-edge manner in which it employs technology. *See, e.g.*, Laurie McGinley, *HPV Researchers, Planned Parenthood Win Prestigious Lasker Medical Awards*, Wash. Post, Sept. 6, 2017, https://www.washingtonpost.com/news/to-your-health/wp/2017/09/06/hpv-researchers-planned-parenthood-win-prestigious-lasker-medical-awards/ (explaining that Planned Parenthood received the Lasker Award, often referred to as "America's Nobels," "for providing 'essential health services and reproductive care' to millions of women" (quoting the award announcement)).

And Texas has not taken any action against the three Planned Parenthood organizations, or suggested any action should be taken, that would prevent them from providing services to patients other than those insured through Medicaid. ROA.3789 ("Aside from HHSC's allegations with respect to the Texas Medicaid program, the record includes no additional findings of wrongdoing from the investigations

and no efforts to revoke any license or qualification of the Plaintiff Providers."). It would be puzzling indeed if the Planned Parenthood organizations were qualified to provide services for tens of thousands of Texans every year through private insurance,[4] but somehow "unqualified" to provide these same services to low-income Medicaid patients. This Court made a similar observation in *Gee*, noting that "we are not aware of any case that holds a state may [exclude a provider from Medicaid] while continuing to license a provider's authorization to offer those same services to non-Medicaid patients." *Gee*, 862 F.3d at 465. The Ninth Circuit has gone further, holding that a state cannot "determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider is otherwise legally qualified, through training and licensure, to provide the requisite medical services within the state." *Betlach*, 727 F.3d at 970. That holding is in accord with common sense and Congress's intent: If a provider is available to

[4] *See, e.g.*, *Our Mission*, Planned Parenthood Greater Tex., https://www.plannedparenthood.org/planned-parenthood-greater-texas/who-we-are/our-mission (last visited Oct. 13, 2017); *Southeast Texas Impact Report Fiscal Year 2016*, Planned Parenthood Gulf Coast, https://www.plannedparenthood.org/uploads/filer_public/2d/66/2d66728c-03cd-439d-9f21-7c7eef179afe/ppgc_tx_community_impact_sheet.pdf (last visited Oct. 13, 2017); Planned Parenthood S. Tex., *2016 Service Delivery Report* (2016), https://issuu.com/ppsouthtexas/docs/english_2016-sdr.

patients with private insurance, a state cannot bar Medicaid patients from choosing that same qualified participating provider.

Through the free-choice-of-provider provision, Congress sought to guarantee Medicaid patients access to "qualified" family planning providers like Planned Parenthood. Texas's unlawful disqualification of the three Planned Parenthood organizations frustrates that plain congressional intent.

II. THE PLANNED PARENTHOOD ORGANIZATIONS CANNOT BE EXCLUDED FROM MEDICAID FOR REASONS UNRELATED TO THEIR MEDICAL OR PROFESSIONAL QUALIFICATIONS

Contrary to the contentions of Texas and its *amici*, Texas cannot disqualify the three Planned Parenthood organizations based on criteria unrelated to their medical and professional qualifications. Texas and its *amici* advance various alternative interpretations of "qualified" that contravene Congress's clear focus on ensuring access to medically qualified providers. For example, an *amicus* brief filed by 42 Members of Congress advocates disqualification of a provider based on the provider's ideology, trade name, or failure to exhaust administrative

appeals—criteria entirely unconnected to the availability or quality of healthcare for women. These alternative interpretations are wrong.[5]

First, Texas and its *amici* seek to avoid the obvious meaning of the term "qualified" by mischaracterizing the clear-statement rule the Supreme Court set forth in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981). They suggest that, under *Pennhurst*, any conceivable alternative interpretation of statutory language—no matter how implausible or untethered from congressional intent—would give states unbounded authority to redefine a phrase as clear as "qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23). Not so. *Pennhurst* simply requires that Congress speak clearly enough that, when a state accepts federal funding with certain conditions, the state knows what it is signing up for. *See Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and

[5] In its final letter of termination, Texas did not invoke the reasons for disqualification advanced by *amici*—namely, its trade name, association with an ideology, or its failure to exhaust administrative remedies. As the District Court explained, courts "will not consider reasons for termination not included in the Final Notice and not part of the Inspector General's termination decision." ROA.3799; *see also S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 600-02 (5th Cir. 2004).

knowingly accepts the terms of the 'contract.'"). And Congress spoke clearly here. Indeed, *Gee* forecloses any possibility that the states unwittingly agreed to fund any provider "qualified to perform the service or services required" in a safe, competent, and ethical manner, by holding that the term "qualified" unambiguously means exactly this. 42 U.S.C. § 1396a(a)(23).[6]

Second, Texas and its *amici* argue or imply that a provider may be excluded from Medicaid based on ideological associations with the provider's purportedly "offensive" trade name. 42 Members of Congress Br. at 6-12. As an initial matter, this argument plainly misconstrues the free-choice-of-provider provision, which seeks to make quality medical care available to families in need of insurance—not to expose

[6] *Gee* made this holding in the context of determining that the free-choice-of-provider provision created a private right of action enforceable under §1983, which requires a determination that the statute is sufficiently clear. In so holding, this Court determined that "'the statute unambiguously imposes a binding obligation on the states,'" *Gee*, 862 F.3d at 458 (citation omitted), and "suppl[ied] concrete and objective standards for enforcement," *id*. at 459 (citation omitted). Moreover, *amici* are plainly incorrect that *Pennhurst* was not brought to the Court's attention in *Gee*. *Pennhurst* was expressly cited in two briefs before the Court, including the brief of the appellant, Louisiana Department of Health and Hospitals. *See* Original Appellant Brief of Kathy Kliebert at 30, 35, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (No. 15-30987), 2016 WL 106447, at *30, *35 (5th Cir. Jan. 8, 2016); *see also* Brief of Nat'l Health Law Program et al. as *Amici Curiae* at 12, 15, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (No. 15-30987), 2016 WL 929784, at *12, *15 (5th Cir. Mar. 7, 2016) (citing *Pennhurst*).

that care to the vagaries of culture wars. Furthermore, a standard that permits ideological exclusion based on a providers' trade name would raise serious First Amendment questions. Just a few months ago, the Supreme Court held that the government could not deny a benefit, such as a trademark, to a party merely because the mark could be considered disparaging or offensive. *See Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (holding that speech may not be banned or burdened "on the ground that it expresses ideas that offend"). Established canons of statutory construction require this Court to reject an interpretation of "qualified" that might abridge providers' freedom of speech. *See United States ex rel. Attorney Gen. of the United States v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[If] a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."). It would be particularly troubling to allow the fig leaf of "ideology" to justify exclusion of a medical provider simply because it offers specific, medically appropriate family planning services that women are constitutionally empowered to choose.[7]

[7] *See, e.g.*, Memorandum from Ctr. for Medicare & Medicaid Servs. to State

(cont'd)

Third, the three Planned Parenthood organizations cannot be excluded on the basis that they did not exhaust administrative remedies. This rationale is entirely unmoored from the statutory text or congressional intent; it has nothing to do with the quality of medical care. In addition, this Court and others have repeatedly rejected an exhaustion requirement for claims under 42 U.S.C. § 1983. *See, e.g.*, *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982) (holding "that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983"); *Romano v. Greenstein*, 721 F.3d 373, 376 (5th Cir. 2013) ("There is no general requirement that a plaintiff exhaust state administrative or judicial remedies before she can pursue a claim under § 1983, nor does the Medicaid Act . . . create an exhaustion requirement for Medicaid claimants." (footnote omitted)).

(cont'd from previous page)

Medicare Dir., SMD # 16-005, Re: Clarifying "Free Choice of Provider" Requirement in Conjunction with State Authority to Take Action against Medicaid Providers 2 (Apr. 19, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/smd16005.pdf ("[S]tates may not deny qualification to family planning providers . . . solely because they separately provide family planning services or the full range of legally permissible gynecological and obstetric care, including abortion services (not funded by federal Medicaid dollars, consistent with the federal prohibition), as part of their scope of practice." (footnote omitted)).

Furthermore, an exhaustion requirement would be unworkable here, where patients like the Jane Doe plaintiffs are incapable of exhausting the provider's administrative remedies. *Gee*, 862 F.3d at 455 ("[T]he Individual Plaintiffs have no administrative appeal rights, and they are not subject to (nor could they be) any administrative exhaustion requirement under 42 U.S.C. § 1983."). The free-choice-of-provider provision empowers patients to choose their doctor or family planning provider. Creating a procedural hurdle that patients are powerless to overcome would be contrary to the plain intent behind this important statutory protection.

III. THIS CASE ILLUSTRATES THE IMPORTANCE OF ENFORCING THE FREE-CHOICE-OF-PROVIDER PROVISION AS CONGRESS INTENDED

Finally, the circumstances facing Planned Parenthood patients in Texas only reinforce the importance of the free-choice-of-provider provision to the structure of the Medicaid Act. They also highlight why enforcement of this provision is necessary to accomplish Congress's intent: providing patients with access to quality medical options.

The free-choice-of-provider provision protects vulnerable women and families in Texas by guaranteeing their access to the qualified

provider of their choice. Unfortunately, it now stands as the last bulwark protecting Texas patients. In a state where only "30 percent of eligible providers . . . actually participate in Medicaid," ROA.4113, ROA.4923, it is vital for the Medicaid program—and this Court—to put the needs and choices of patients first, as Congress intended.

The record of this case shows that the three Planned Parenthood organizations serve thousands of Medicaid patients each year in Texas. ROA.4912-13, ROA.4947-48, ROA.4984-85. Their services include physical exams, contraception and contraceptive counseling, screening for breast cancer and sexually transmitted infections, pregnancy testing and counseling, and certain procedures including biopsies and colonoscopies. ROA.4985. In addition to these services, they employ evidence-based practices and up-to-date technology, allowing Medicaid patients to receive advanced treatment in a non-judgmental, culturally sensitive setting. ROA.4914. Moreover, they seek to accommodate the particular circumstances of their patient population by maintaining regular evening and weekend hours, permitting walk-in appointments, and hiring a bilingual staff. ROA.4915, ROA.4991.

The record also shows that Texas's wrongful termination of the three Planned Parenthood organizations would devastate their patients. First, the three Planned Parenthood organizations may be forced to "lay off staff members, reduce hours, or even close . . . health centers," ROA.4993-94, undermining patient access to vital services like cancer screening. Second, these three Planned Parenthood organizations are located in areas already designated as medically underserved or suffering from a primary care shortage. ROA.4926-27, ROA.4992-93. In these areas especially, the closure of a Planned Parenthood health center, or a reduction in a health center's services, would leave Medicaid patients with no alternative options. ROA.4926-27, ROA.4991-92.

Third, the record demonstrates that wrongful termination of the three Planned Parenthood organizations would harm many of the most vulnerable Texans. The individuals eligible for Texas's Medicaid program are "the poorest of the poor," many of whom live below eighteen percent of the federal poverty level. ROA.4298-99. The termination of the three Planned Parenthood organizations' Medicaid provider agreements would likely force many Texas Medicaid patients

to forgo services that Congress mandated to be made available. ROA.4923. As Planned Parenthood South Texas President Jeffrey Hons explained, "[t]he clients who come to [Planned Parenthood] live in very economically vulnerable lives[,] . . . . [so] com[ing] up with what will necessarily be the sorts of co-pays and fees that they'll have to be charged [in the absence of Medicaid reimbursement], . . . would be . . . a big problem" for them. ROA.4299.

Finally, the record reveals that wrongful termination would severely harm women and families in Texas. Texas already suffers from an overall shortage of Medicaid providers because of its low reimbursement rates and strict reimbursement policies. ROA.4923. "This shortage is a particular problem for family planning services" in a state "which regularly ranks among the worst" for reproductive care. ROA.4923. Under these circumstances, terminating the three Planned Parenthood organizations' Medicaid provider agreements will contribute to Texas's already elevated rates of unplanned and teenage pregnancies, pregnancy-related deaths, and sexually transmitted infections. ROA.4923-26.

These are among the outcomes Congress sought to avoid when it enacted the free-choice-of-provider provision. That provision was intended to grant Medicaid patients a choice among qualified medical professionals and to promote access to care—not to endow states with unfettered discretion to deprive economically vulnerable women of qualified medical options on ideological grounds. Texas's exclusion of the three Planned Parenthood organizations contravenes the clear language of the Medicaid Act and harms the very patients Congress intended to protect. This Court should not countenance such a plain violation of unambiguous federal law.

CONCLUSION

For the foregoing reasons, the district court's order granting Plaintiffs' request for a preliminary injunction should be affirmed.

Respectfully submitted,

SONJA SCHILLER
155 N. Upper Wacker Dr. #2700
Chicago, IL 60606

CAROLINE VAN ZILE
1440 New York Ave. NW
Washington, DC 20005

CATHERINE THOMPSON
300 S. Grand Ave. #3400
Los Angeles, CA 90071

BORIS BERSHTEYN
JUSTIN RAND
DEEPA VANAMALI
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
(212) 735–3000
boris.bershteyn@skadden.com

Counsel for Amici Curiae

Dated: October 13, 2017

CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served by ECF or e-mail on October 13, 2017, upon:

Scott A. Keller
Heather Gebelin Hacker
Andrew B. Stephens
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700 (phone)
(512) 474-2697 (fax)

Counsel for Defendants-Appellants

Jennifer Sandman
Roger K. Evans
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William Street
New York, NY 10038
jennifer.sandman@ppfa.org
(212) 261-4584 (phone)

Alice J. Clapman
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Avenue, N.W., Suite 300
Washington, DC 20005
alice.clapman@ppfa.org
(202) 973-4862 (phone)
(202) 296-4800 (fax)

Counsel for Plaintiffs-Appellees

/s/ Boris Bershteyn
BORIS BERSHTEYN
Counsel for Amici Curiae

Dated: October 13, 2017

CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that on October 13, 2017, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the U.S. Court of Appeals for the Fifth Circuit, through the court's CM/ECF document-filing system, https://efc.ca5.uscourts.gov/.

I further certify that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Boris Bershteyn
BORIS BERSHTEYN
Counsel for Amici Curiae

Dated: October 13, 2017

CERTIFICATE OF COMPLIANCE
with type-volume limitation, typeface requirements,
and type-style requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 5,394 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), or

[ ] this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2010 in Century Schoolbook 14-point type face, or

[ ] this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ Boris Bershteyn
BORIS BERSHTEYN
Counsel for Amici Curiae

Dated: October 13, 2017