

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2133

PLANNED PARENTHOOD SOUTH ATLANTIC; JULIE EDWARDS, on her
behalf and on behalf of all others similarly situated

Plaintiffs-Appellees

v.

JOSHUA BAKER, in his official capacity as Director, South Carolina Department
of Health and Human Services

Defendant-Appellant

**DEFENDANT-APPELLANT'S RESPONSE IN OPPOSITION
TO MOTIONS FOR
LEAVE TO FILE AMICUS CURIAE BRIEFS**

Pursuant to Federal Rule of Appellate Procedure 27, 29, and Fourth Circuit
Local Rule 29, Defendant-Appellant Joshua Baker, in his official capacity as
Director, South Carolina Department of Health and Human Services (“DHHS”),
hereby responds in opposition to the following motions for leave to file amicus
curiae briefs in support of Plaintiffs-Appellees, Planned Parenthood South Atlantic
(“PPSAT”) and Julie Edwards (“Edwards”) on her behalf and behalf of all others
similarly situated:

1. Access Reproductive Care – Southeast, Center for Reproductive Rights, In Our Own Voice, National Asian Pacific Women’s Forum, National Latina Institute for Reproductive Health, and Women’s Rights and Empowerment Network (collectively, “Reproductive Justice Advocates Amici”);
2. The National Health Law Program, Ipas, and Sexuality Information and Education Council of the United States (collectively, “Low Income Women Advocate Amici”); and
3. The American College of Obstetricians and Gynecologists (“ACOG”), the American Medical Association (the “AMA”), the Society of Maternal-Fetal Medicine Specialists (“SMFM”), the American Academy of Pediatrics (“AAP”), the American College of Physicians (“ACP”), and the Society for Adolescent Health and Medicine (“SAHM”) (collectively, “Medical Provider Amici”).

For ease of reference, all three (3) groups who have moved for leave to file amicus curiae briefs are collectively referred to herein as “Proposed Amici”. Because DHHS did not consent to the Proposed Amici briefs being filed, they may only be filed by leave of this Court pursuant to Federal Rule of Appellate Procedure 29(a)(2) and (3). DHHS respectfully requests that the Court deny leave as the movants’ stated interests are not relevant to the issue before the Court and the briefs of the Proposed

Amici are neither desirable nor are the matters asserted relevant to the disposition of the case.

I. Standard

Generally, an amicus curiae brief that does not serve the purpose of bringing to the court's attention relevant matters not already brought to its attention by the parties burdens the court and should not be favored. *See* Rule 37(1), *Rules of the Supreme Court of the U.S.* Leave to file is required, in part because "Amicus curiae briefs are often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal." *Nat'l Organization for Women et al. v. Scheidler et al.*, 223 F.3d 615, 617 (7th Cir., 2000). "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063 (7th Cir., 1997) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir., 1991)).

Motions for leave to file a Brief of an Amicus Curiae are required to "state: (A) the movant's interest; and (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." F.R. of App. P.

29(a)(3). “Although the Rule does not say expressly that a motion for leave to file should be denied if the movant does not meet the requirements of (a) an adequate interest, (b) desirability, and (c) relevance, this is implicit.” *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3rd Cir., 2002). The Proposed Amici have not met this burden, and leave should be denied.

II. Discussion

a. Leave to file of Reproductive Justice Advocates Amici and Low Income Women Advocate Amici should be denied.

Both the Reproductive Justice Advocates Amici and Low Income Women Advocate Amici are special interest groups seeking to pursue their respective political agendas through this case by restating the arguments of PPSAT and Edwards with a spin more focused on their respective advocacy focus. Therefore, leave should be denied pursuant to *Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062 (7th Cir., 1997) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir.1991)).

b. Leave to file of Medical Provider Amici should be denied.

i. The Medical Provider Amici’s motion and proposed brief are not relevant to the issues before this Court.

The brief of the Medical Provider Amici does not make any arguments relevant to the primary issue before this Court, namely, whether or not 42 U.S.C. §1396a(a)(23) authorizes a private right of action by a Medicaid beneficiary, or any

other issues actually pending before this Court. A determination of the rights of Edwards is before this Court, not the rights of PPSAT. Additionally, Medical Provider Amici argues that there is no public health justification for DHHS's decision. ECF No. 26, ¶ 4. Whether or not a public health justification for DHHS's decision exists is not relevant to any issue pending before this Court.

ii. The Medical Provider Amici's motion and proposed brief are not relevant and confuse PPSAT with its National Affiliate.

The brief of the Medical Provider Amici relies upon information and data about Planned Parenthood nationally, rather than PPSAT specifically. Upon information and belief, PPSAT is a not-for-profit corporation, headquartered in North Carolina. App. 46. Also, upon information and belief, none of the authorities listed on the Medical Provider Amici's Table of Authorities and cited in the proposed brief relate to PPSAT; rather, some relate to an affiliated national entity. ECF No. 26, pp.13-19.

iii. The Medical Provider Amici's purported concern is overdrawn and based upon errors of fact.

The Medical Provider Amici state that the reason for filing is out of concern that DHHS's decision "to terminate Planned Parenthood's status as a qualified Medicaid provider will significantly impede South Carolinians' access to critical health care services, leading to poor health outcomes." ECF No. 26, ¶ 4. Their brief further elaborates that "Medicaid providers in the state will not be able to fill the

void left by Planned Parenthood” leading South Carolinian women forgoing critical health care services. ECF No. 26, ¶ 4, pp. 6-7. This hyperbolic language is not supported by the facts in the record. The Medical Provider Amici fail to acknowledge the relative low volume of South Carolina Medicaid patients treated by PPSAT. For example, in fiscal year 2017 there were approximately 1,200,000 individuals enrolled in the South Carolina Medicaid Program. App. 150, ¶15. Of these approximately 1.2 Million individuals, only 257 individual patients were provided pharmacy and/or physician services at PPSAT. App. 149, ¶10. As such, PPSAT has a 0.02% market share for pharmacy and physician services which can easily be absorbed by other Medicaid providers.

Another example of the misleading nature of the brief of Medical Provider Amici that borders on propaganda follows:

In South Carolina, there would be a 381% increase in FQHCs’ contraceptive client case load should [Federally Qualified Health Clinics] be required to serve all federally funded family planning program clients. See Letter from Rachel Benson Gold, Vice President for Public Policy, The Guttmacher Institute, to the Office of Population Affairs, U.S. Dep’t of Health & Human Services, Guttmacher Institute, Table 2 (July 31, 2018), <https://www.guttmacher.org/sites/default/files/letters/Guttmacher-Institute-comments-RIN-0973ZA00.pdf>.

ECF No. 26, p. 19. The assertion presents a false choice and is preposterous on its face. This would be analogous to stating the consequence of a single independent pharmacy closing in an urban area would leave only other rural independent

pharmacies to service the need, when in fact the majority of citizens are served by multi-store chains and hospital-based entities. Likewise, the loss of PPSAT as a Medicaid Provider would essentially be a non-event for the Medicaid beneficiary population in South Carolina given PPSAT's approximate 0.02% market share.

iv. The authorities cited by the Medical Provider Amici are not credible and therefore neither desirable nor relevant.

The Medical Provider Amici cites to authorities that should not be relied upon by this Court. The vast majority of the "Other Authorities" cited by the Medical Provider Amici are either published by the amici entities themselves or published by entities affiliated with Planned Parenthood. Over a dozen cited authorities are attributable to the Guttmacher Institute, which was founded in 1968 as the Center for Family Planning Program Development within Planned Parenthood Federation of America ("PPFA") and remained a "special affiliate" of PPFA until 2007. See *The History of the Guttmacher Institute* (January 30, 2019) <https://www.guttmacher.org/about/history>. Therefore, leave should be denied as the Medical Provider Amici would serve as a friend of the Plaintiff-Appellee rather than a friend of the court.

III. Conclusion

For the reasons set forth herein DHHS respectfully requests that leave be denied.

Respectfully submitted,

Date: February 4, 2019

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This response complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or Fed. R. App. P. 32(a)(7)(B) because this response contains 1,420 words, excluding the parts of the response exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This response 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I certify that on February 4, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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