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; 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,
No. 1:15-cv-01058

APPELLANTS' PETITION FOR REHEARING EN BANC

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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; 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.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION AND RULE 35(B)(1) STATEMENT

This case presents a question of exceptional importance: whether the qualified-provider provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(23), allows private individuals to bring an action to challenge a state agency's determination that a service provider is not "qualified" under that statute. The panel decision held "yes," concluding it was bound by that same holding in *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018). The question *Gee* resolved carries enormous consequences for Medicaid recipients and state administrators alike. Under *Gee*, "a State faces the threat of a federal lawsuit—and its attendant costs and fees—whenever it changes providers of medical products or services for its Medicaid recipients." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of cert.). This weighty issue has spawned disagreement among the judges of this Court, other courts of appeals, and the justices of the Supreme Court.

Review is further warranted because the decision below conflicts with *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), which held that the Medicaid Act "clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified," *id.* at 785. *Gee* stands "directly at odds" with that holding. *Planned Parenthood of Gulf Coast, Inc., v. Gee*, 876 F.3d 699, 700 (5th Cir. 2017) (Elrod, J., dissenting from denial of rehearing en banc).

Because this case involves a question of exceptional importance, *see* Fed. R. App. P. 35(b)(1)(B), and because the panel decision conflicts with the Supreme Court's decision in *O'Bannon*, *see* Fed. R. App. P. 35(b)(1)(A), rehearing en banc is warranted.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Statement of the Issues Meriting Rehearing En Banc

1. Whether the qualified-provider provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(23), allows private individuals to bring an action to challenge a state agency's determination that a service provider is not "qualified" under that statute.

2. Whether *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), which held that section 1396a(a)(23) creates a private right of action, should be overruled.

STATEMENT OF THE CASE

I. Statutory Framework

The Medicaid Act provides federal funds for States to use, in addition to their own, to reimburse providers' costs in providing medical care to low-income individuals. 42 U.S.C. § 1396. The qualified-provider provision of the Medicaid Act declares that Medicaid recipients may obtain medical care from any entity or person who is "qualified to perform the service or services required." *Id.* § 1396a(a)(23).

Once a provider is approved as "qualified," it must maintain certain qualifications to remain in the program. *See id.* § 1320a-7. Otherwise, the U.S. Department of Health and Human Services (HHS) may exclude the provider from Medicaid participation, and so may the States. *Id.* Section 1002.2 of HHS's Medicaid regulations also recognized a State's authority to exclude a Medicaid provider as a state contractor "for any reason or period authorized by State law." *See* 42 C.F.R. § 1002.2(b) (effective through Feb. 2017); *see also Gee*, 862 F.3d at 462-63 (quoting same). And federal law authorizes HHS to exclude providers who have been excluded on state-law grounds. 42 U.S.C. § 1320a-7(b)(5).

All Texas Medicaid providers are required to execute a provider agreement, which describes the provider's obligations. *See* ROA.6544-48. The agreements state that providers must comply with all requirements in the

State's provider manual, plus state and federal Medicaid rules, and that providers are responsible for ensuring that all their employees and agents comply with these requirements. ROA.6553.

The Texas Health and Human Services Commission Office of the Inspector General (OIG) is tasked with preventing fraud, waste, and abuse in the delivery of health and human services—including Medicaid services—in Texas. ROA.4314-15. OIG may terminate a Texas Medicaid provider's agreement when it establishes "by prima facie evidence" that a provider has committed a "program violation"; is "affiliated" with a provider that commits a program violation; or commits "an act for which sanctions, damages, penalties, or liability could be or are assessed by the OIG." 1 Tex. Admin. Code § 371.1703(c)(6)-(8). Sanctions can be imposed where the provider "fails to provide an item or service to a recipient in accordance with accepted medical community standards or standards required by statute, regulation, or contract, including statutes and standards that govern occupations." *Id.* § 371.1659(2).

When OIG finds grounds to terminate a provider, it sends an initial notice of termination based on the initial investigation, which begins the process. *Id.* § 371.1703(e); *see also* ROA.1202-06, 1239-43, 1310-14. The initial notice tells providers that they may either request to have an informal resolution meeting, or submit evidence and argument in their favor, or both, within 30 days of receipt of the notice. 1 Tex. Admin. Code § 371.1613(d); *see also, e.g.,* ROA.1205. If no response is made to the initial notice within 30 days, OIG will issue a final

notice of termination. ROA.1205. The final notice provides that an administrative hearing may be requested within 15 days of receipt, 1 Tex. Admin. Code § 371.1703(f)(2), otherwise the termination becomes unappealable, and it becomes effective 30 days after receipt, *id.* § 371.1703(g)(1); *see* ROA.1213-14.

II. Procedural Background

On April 9, 2015, over eight hours of undercover video was filmed at Planned Parenthood Gulf Coast (PPGC)'s facility in Houston, Texas. ROA.5846-6208 (video transcript); ROA at DX-2 (video footage). Two individuals posing as employees of a fictitious tissue-procurement company wore hidden cameras and met with PPGC's employees to discuss PPGC's fetal-tissue research activities and the possibility of entering into a business arrangement for PPGC to provide liver, thymus, and neural tissue from fetuses aborted in the second trimester of pregnancy. *See* ROA.5846-6208 (video transcript); ROA at DX-2 (video footage).

The unedited video footage was provided to OIG. ROA.4323. After extensive review of the video and its transcript, OIG determined that the Provider Plaintiffs—Texas Planned Parenthood affiliates—had violated accepted medical and ethical standards in numerous ways, and thus could no longer could serve as a qualified provider under the Texas Medicaid program. *See* ROA.1210-11 (citing 42 U.S.C. §§ 289g-1, 289g-2; 1 Tex. Admin. Code §§ 371.1603(g)(5)-(7), 371.1605(a), 371.1659(2), (6), 371.1661, 371.1703(c)(6)).

It explained all these violations—and others—first in an initial Notice of Termination, and then in a Final Notice of Termination. *See* ROA.1202-06, 1210-11, 1239-43, 1310-14. Provider Plaintiffs failed to request informal resolution, submit evidence or argument, or request a hearing, as outlined above. *See* pp. 3-4 *supra*. Instead, they sued in federal court. ROA.31-59.

Plaintiffs filed a motion for preliminary injunction in district court on January 4, 2017, and filed an amended complaint on January 17, 2017. ROA.1143-79, 3227-48. On January 17-19, 2017, the district court held an evidentiary hearing on plaintiffs' preliminary-injunction motion. ROA.22, 23. On January 19, 2017, the district court entered a temporary restraining order to prevent the terminations from becoming effective. ROA.3551-52. On February 21, 2017, the district court issued a preliminary injunction against the termination of Provider Plaintiffs' Medicaid agreements. ROA.3776-819.

On appeal, Texas argued that notwithstanding the Court's decision in *Gee*, the individual plaintiffs[1] had no private right of action because *Gee* did not involve a final decision on the merits, and this case does. Appellants' Br. 23-27. Texas also preserved the argument that there is no private right of action and *Gee* was wrongly decided, Appellants' Br. 24 n.6, and argued that *Gee* could not provide a right of action in this case because it would conflict with

[1] The providers themselves lack a cause of action. *Gee,* 862 F.3d at 460, 486. The district court's preliminary-injunction order discusses only the claims of the individual plaintiffs. ROA.3796, 3932.

O'Bannon, 447 U.S. at 786, Appellants' Br. 22-27; Reply Br. 2-5. Texas also argued that, even if there were a private right of action under the Medicaid Act, the district court abused its discretion by granting a preliminary injunction. Appellants' Br. 27-58; Reply Br. 7-21.

The panel determined that under *Gee*, the individual plaintiffs have a private right of action under 42 U.S.C. § 1396a(a)(23), and that it was "constrained" by *Gee*'s conclusion. App. 2. But the panel vacated the preliminary injunction, holding that the district court abused its discretion by reviewing OIG's termination decision de novo, rather than under arbitrary-and-capricious review, and by considering evidence outside of the administrative record. App. 17, 29.[2] The Court remanded the case to the district court for application of the correct standard to the evidence in the administrative record alone. App. 29. Judge Jones wrote a separate concurrence to outline the reasons that *Gee*'s holding was incorrect, and requested rehearing en banc to "reconsider whether Section 1396a(a)(23) creates a private right of action on behalf of Medicaid patients to challenge the termination of their providers' contracts by the States." App. 36.

[2] Regardless of whether there is a private right of action for the individual plaintiffs under the qualified-provider provision, this portion of the panel's opinion is correct and should not be revisited en banc. *See* App. 36 (Jones, J., concurring) (requesting rehearing en banc to consider the private-right-of-action issue).

ARGUMENT

I. The Question of Whether There Is a Private Right of Action Under the Qualified-Provider Provision Is Exceptionally Important and Has Divided the Judges of This Court, Its Sister Circuits, and the Supreme Court.

There is no serious dispute that the question of whether section 1396a(a)(23) creates a private right of action is exceptionally important. Medicaid programs assist millions of individuals via vast public expenditures—and these programs are "ever-expanding." *Gee*, 876 F.3d at 702 (Elrod, J., dissenting from denial of rehearing en banc). Texas, as it is required to do by federal Medicaid statutes and regulations, has crafted a system by which individuals may challenge its administrative decisions, but *Gee* upends those procedures. It is no wonder that *Gee*'s holding has sparked extensive disagreement within this Court and around the nation.

A. *Gee* Implicates Millions of Medicaid Recipients and Billions of Dollars in Funding.

1. Whether the Medicaid Act creates a private right of action carries "significant implications" for Medicaid recipients and state agencies alike. *Gee*, 139 S. Ct. at 408-09 (Thomas, J., dissenting from denial of cert.). About "70 million Americans are on Medicaid, and the question presented directly affects their rights." *Id.* Texas spends approximately $29 billion dollars (or 28% of the State's annual budget) on the federal Medicaid program, which covers approximately 4.3 million people in Texas. ROA.4510. *Gee* confers on those 4.3 million individuals—in addition to the millions of Medicaid recipients in

Louisiana and Mississippi—the power to challenge in federal court a broad array of state decisions.

Under *Gee*'s reasoning, any of those millions of patients "could sue when, for example, a State removes their doctor as a Medicaid provider or inadequately reimburses their provider." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of cert.); *see also Harris v. Olszewski*, 442 F.3d 456, 469 (6th Cir. 2006) (challenge by Medicaid recipients to state decision to switch to exclusive provider of incontinence products). The *Gee* rule might even "enable Medicaid recipients to challenge the *failure* to list particular providers, not just the removal of former providers." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of cert.) (citing *Kapable Kids Learning Ctr., Inc. v. Ark. Dep't of Human Servs.*, 420 F. Supp. 2d 956 (E.D. Ark. 2005); *Martin v. Taft*, 222 F. Supp. 2d 940 (S.D. Ohio 2002)).

That broad conferral of power on Medicaid recipients brings with it enormous consequences for state agencies. Under *Gee*, "a State faces the threat of a federal lawsuit—and its attendant costs and fees—whenever it changes providers of medical products or services for its Medicaid recipients." *Id.* at 409. Such lawsuits impose a financial burden on the States and, as a result, "dissuade state officials from making decisions that they believe to be in the public interest." *Id.*

2. *Gee* subverts States' carefully delineated administrative procedures for challenging agency decisions such as the decision to remove a provider from

the Medicaid program. As set out above, any notice of termination can be challenged through informal and formal procedures set out in Texas law. *See* pp. 3-4, *supra*. Among other things, termination decisions can be challenged in an administration hearing. *See* ROA.1213.

But under *Gee*, a Medicaid provider can forgo an administrative challenge and "make an end run around the administrative exhaustion requirements in a state's statutory scheme." 876 F.3d at 702 (Elrod, J., dissenting from denial of rehearing en banc). That is, under *Gee*, "[d]isqualified providers can now circumvent state law" simply because *Gee* "deems it unnecessary to have a final administrative determination so long as there are patients to join a lawsuit filed in federal court." *Id*. This distortion of the normal legal course further undermines *Gee*'s reasoning.

B. *Gee*'s Holding Has Generated Nationwide Disagreement.

Whether Medicaid recipients have a private right of action to challenge actions like the one in this case has spawned a circuit split. Before *Gee*, the Sixth, Seventh, and Ninth Circuits had held that Medicaid recipients have such a right. *See Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960, 966-68 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974-77 (7th Cir. 2012); *Harris*, 442 F.3d at 461-65. Since *Gee* was decided, the Tenth Circuit also has found such a right. *See Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1225-29 (10th Cir. 2018). But the Eighth Circuit has reached the opposite conclusion, holding

that no such right exists. *See Does v. Gillespie*, 867 F.3d 1034, 1041-46 (8th Cir. 2017).

When it was asked recently to resolve this plain circuit split, the Supreme Court, by a one-vote margin, declined. Three Justices dissented. *See Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of cert.). Justice Thomas, joined by Justices Alito and Gorsuch, faulted the Court for "refus[ing] to do its job" and resolve this disagreement. *Id.* at 410. He highlighted that *Gee*'s sweeping holding "may enable Medicaid recipients to challenge the *failure* to list particular providers, not just the removal of former providers." *Id.* at 409.

Gee has divided not only the circuits, but the Judges of this Court. At least five currently active Judges on this Court have called for *Gee* to be reconsidered. *See Gee*, 862 F.3d at 473 (Owen, J., dissenting); 876 F.3d at 700 (Elrod, J., dissenting from denial of rehearing en banc, joined by Jolly, Jones, Smith, Clement, Owen, and Southwick, JJ.); App. 30-36 (Jones, J., concurring and calling for *Gee* to be overruled).

Such widespread and entrenched disagreement underscores the importance of this case and counsels en banc review. *See, e.g.*, *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211, 213 (5th Cir. 2017) (Elrod, J., dissenting from denial of rehearing en banc) (circuit split merits rehearing en banc); *United States v. Escalante-Reyes*, 689 F.3d 415, 418 (5th Cir. 2012) (Haynes, J.) (existence of "intra- and inter-circuit split" merits en banc consideration); *United*

States v. Garcia-Espinoza, 325 F. App'x 380, 382 (5th Cir. 2009) (Owen, J., concurring) (en banc rehearing warranted "[i]n light of the circuit split").

And it is all the more important in light of the Supreme Court's refusal to intervene. That "avoidance indicates considerable uncertainty about the statutory issue." App. 31 (Jones, J., concurring). And in the face of that uncertainty, "lower courts remain obliged to undertake careful statutory review while the issue is undecided." App. 32 (Jones, J., concurring). As Judge Jones demonstrated in her panel concurrence, the Supreme Court's denial of certiorari "strengthens the propriety of this [C]ourt's reconsidering *Gee* en banc." App. 32.

II. En Banc Review Is Necessary to Correct *Gee*'s Departure from the Text of the Medicaid Act and the Supreme Court's Decision in *O'Bannon*.

Gee adds language to the qualified-provider provision and stands "directly at odds" with *O'Bannon*. *Gee*, 876 F.3d at 700 (Elrod, J., dissenting from denial of rehearing en banc). Those errors are reason enough to rehear this case en banc and overrule *Gee*.

A. The Text of the Qualified-Provider Provision Does Not Contemplate a Private Right of Action.

Section 1396a provides certain requirements State Medicaid plans must meet, and it establishes certain procedures for administering those plans. *E.g.*, 42 U.S.C. § 1396a(a)(1)-(4). One of those requirements, set out in subsection (a)(23), requires a State Medicaid plan to provide that "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," and also that "an enrollment of an individual eligible for medical assistance . . . shall not restrict the choice of the qualified person from whom the individual may receive services," subject to some exceptions. *Id.* § 1396a(a)(23). Nothing in that statutory text alludes to—much less creates—a private right of action.

The Supreme Court has held that spending-clause statutes give rise to a private right of action enforceable through section 1983 only where Congress's intent to do so is made clear in the text of the statute. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (unless Congress "'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983" (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 & n.21 (1981)); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387–88 (2015) (plurality op.) ("Our precedents establish that a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred.'" (quoting *Gonzaga*, 536 U.S. at 283)); *Gillespie*, 867 F.3d at 1041-46 (concluding in light of precedent that section 1396a(a)(23) does not provide a private right of action).

But contrary to that rule, the *Gee* Court found such a right implicit in the text. The *Gee* Court reasoned that "[t]o be 'qualified' in the relevant sense is

to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." 862 F.3d at 462. *Gee* explained that because the termination decision "might well relate to a provider's qualifications," private individuals should have the ability to challenge in federal court such termination decisions. *See id.* at 469; *see also id.* at 477 (Owen, J., dissenting).

That reasoning is untethered to the text of section 1396a(a)(23). As Judge Elrod observed, the *Gee* majority "reads extratextual requirements into the statute and relies on an overbroad interpretation of the term 'qualified.'" 876 F.3d at 702. Judge Owen faulted that "plainly mistaken" view for having "no support in [section 1396a(a)(23)]'s text." 862 F.3d at 476. Such a deviation from the language Congress adopted—and from Supreme Court precedent—merits the full Court's consideration.

B. *O'Bannon* Rejected the Conclusion that *Gee* Adopts.

Gee contradicts *O'Bannon*. As Judge Owen explained in dissent, *O'Bannon* "held that § 1396a(a)(23) did not give Medicaid patients a right to litigate whether a provider was 'qualified' within the meaning of that statute." *Id.* at 473. The *Gee* majority "h[eld] just the opposite, and none of the bases on which it attempt[ed] to distinguish *O'Bannon* withstands scrutiny." *Id.* As a result, the law of this Circuit, which controlled the panel decision in this case, is further at odds with Supreme Court authority.

O'Bannon involved a state agency's decision to terminate a nursing facility's Medicaid and Medicare provider agreements because the facility no longer met statutory and regulatory standards. 447 U.S. at 775-76. The Supreme Court held that patients lacked a private right of action to challenge the state agency's termination decision, because the Medicaid Act does not confer any right to continued services in the facility of one's choice. *Id.* at 784-85. The Court expressly construed the Medicaid Act's qualified-provider provision, 42 U.S.C. § 1396a(a)(23), explaining that it "gives recipients the right to choose among a range of *qualified* providers." 447 U.S. at 785. This provision, the Court held, "clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." *Id. O'Bannon* clarified that a patient "has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified." *Id.* at 786.

The *Gee* Court "disregard[ed]" that holding and reasoning. 876 F.3d at 700 (Elrod, J., dissenting from the denial of rehearing en banc). It claimed that *O'Bannon* was distinguishable because "the institution in *O'Bannon* was decertified for reasons having to do with the quality of care provided to patients." 862 F.3d at 472. The *Gee* majority found that Louisiana "ha[d] not impugned the quality" of the particular provider's care, because it allowed it to "continue in business." *Id.* Thus, *Gee* concluded that *O'Bannon* did not

apply because *Gee* did not involve the merits of a state's decision to decertify a Medicaid provider. *See id.* at 461 & n.53.

But as Judge Owen explained, that purported distinction should not matter, because "*O'Bannon*'s analysis . . . did not turn on whether the State revoked the nursing home's authorization to continue functioning as a nursing home." *Id.* at 476 (Owen, J., dissenting). Judge Owen also noted that *O'Bannon* never even specified that the nursing home had been totally decertified by the state. *Id.* at 483. Instead, *O'Bannon* stands for the proposition that "Medicaid patients do not have rights under 42 U.S.C. § 1396a(a)(23) that permit them to sue, under § 1983, to contest *the merits* of [Louisiana]'s allegations supporting the proposed termination of PPGC's Medicaid provider agreements." *Id.* at 475. By permitting individual recipients to "challenge [Louisiana]'s determination that PPGC is not a 'qualified' provider under the Medicaid statutes and regulations," the Court "failed to adhere to *O'Bannon*, which held that when a State concludes that a provider is not qualified, even if that determination is erroneous, a Medicaid recipient does not have a right by virtue of 42 U.S.C. § 1396a(a)(23) that can be vindicated by a § 1983 suit." *Id.* at 481. The *Gee* majority's "reasoning is not only at odds with *O'Bannon* but also with the entirety of the statutory framework in 42 U.S.C. § 1396a." 876 F.3d at 701 (Elrod, J., dissenting from denial of rehearing en banc).

Conclusion

The Court should grant the petition for rehearing en banc and limit its consideration to the two issues presented in this petition. Likewise, if the Court grants rehearing en banc, it should vacate only the portion of the panel opinion that pertains to the issues presented in this en banc petition. *See* 5th Cir. R. 41.3; *see also San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 760 F.2d 1320, 1320-21 (D.C. Cir. 1985) (per curiam) (granting rehearing en banc but vacating the underlying panel decision only in part).

Respectfully submitted.

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Certificate of Service

On January 31, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,864 words, and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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