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 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.

DR. COURTNEY PHILLIPS, IN HER OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF HHSC; 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

CONSENT MOTION FOR LEAVE TO FILE *EN BANC* 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. Phillips*. Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the appellants' 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: March 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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. Phillips.

1. The accompanying motion for leave to file complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because the motion contains 940 words, excluding the parts of the document exempted from counting.

2. The foregoing document 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

Dated: March 14, 2019

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MOTION FOR LEAVE TO FILE

Pursuant to FED. R. APP. PROC. 27 and by analogy to FED. R. APP. PROC. 29(a), the Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully requests leave to file the accompanying *amicus curiae* brief in support of the Texas petitioners for rehearing *en banc* in the en banc phase of this litigation. The parties all have consented to the filing of the EFELDF *amicus* brief.

IDENTITY, INTEREST AND AUTHORITY TO FILE

Eagle Forum Education & Legal Defense Fund is a nonprofit Illinois corporation. 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.

AUTHORITY TO FILE EAGLE FORUM'S BRIEF

Although Rule 29 does not expressly address *amicus* briefs after a Court of Appeals has agreed to rehear a case *en banc* , the rule nonetheless can apply by analogy. *See* FED. R. APP. P. 29(a) Advisory Committee Note to 1998 Amendments ("court may grant permission to file an *amicus* brief in a context in which the party does not file a 'principal brief'; for example, an *amicus* may be permitted to file in support of a party's petition for rehearing"). Although it does not apply expressly,

Rule 29 counsels for making the recitals required by Rule 29(b), namely the movant's interest and "the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case." FED. R. APP. P. 29(b). The Advisory Committee Note to the 1998 amendments to Rule 29 explain that "[t]he amended rule [Rule 29(b)] … requires that the motion state the relevance of the matters asserted to the disposition of the case." The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court's attention to relevant matter not raised by the parties:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (*quoting* Sup. Ct. R. 37.1). "Because the relevance of the matters asserted by an *amicus* is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing." *Id.*

As now-Justice Samuel Alito wrote while serving on the U.S. Court of Appeals for the Third Circuit, "I think that our court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3rd Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals – Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L.

Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Now-Justice Alito quoted the Tigar treatise favorably for the statement that "[e]ven when the other side refuses to consent to an *amicus* filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned." 293 F.3d at 133. As explained in the next section, the Eagle Forum brief meets Rule 29's criteria.

FILING EFELDF'S BRIEF WILL SERVE THE COURT'S RESOLUTION OF THE ISSUES RAISED

This Court should grant EFELDF's motion for leave to file the accompanying *amicus* brief because the brief will aid the Court by addressing the following issues.

- The brief evaluates the implications of unmet conditions precedent to a federal enforcement action to terminate or curtail Texas's funding, including whether Texas has violated the Medicaid statute, s*ee Amicus* Br. at 8-9, and whether third-party beneficiaries therefore can have either constitutional or statutory standing to enforce perceived Medicaid violations if even the funding agency could not bring an enforcement action. *See id.* at 9-11 (constitutional standing), 26 (statutory standing).
- The brief then evaluates whether – in the absence of the conditions precedent to an enforcement action – a sufficient "violation" of federal law (as distinct from a potential breach of a federal contract) exists to overcome Texas's sovereign immunity or support an action under the *Ex parte Young* line of cases. *See id.* at 11-14 (sovereign immunity), 18-20 (*Ex parte Young*).

- The brief analyzes whether the Medicaid statute's vesting judicial review of Medicaid enforcement directly in the federal courts of appeals divests the district courts of subject-matter jurisdiction. *See id.* at 14-17.
- The brief analyzes Medicaid under both the clear-statement rule for Spending Clause legislation and the presumption against preemption for federal statutes that enter fields – such as health care – of traditional state and local concern. *See id.* at 19-20.
- The brief analyzes the extent to which plaintiffs' failure to exhaust state remedies undermines their challenge because – under the specific statute here – a disqualification under state law can justify expulsion from the Medicaid program. *See id.* at 20-22.
- The brief analyzes the extent to which Texas should prevail here, even assuming arguendo that the Supreme Court's recent private-right-of-action jurisprudence has not overruled *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). *See Amicus* Br. at 23-26.

For the foregoing reasons, movant ELELDF respectfully submits that its brief will aid the Court's consideration of the issues presented here.

CONCLUSION

The Court should grant leave to file the EFELDF *amicus* brief.

Dated: March 14, 2019

Respectfully submitted,

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Counsel for Movant Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

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

I hereby certify that, on March 14, 2019, I electronically filed the foregoing motion for leave to file – together with the accompanying *amicus* brief – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit 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.

/s/ Lawrence J. Joseph
Lawrence J. Joseph

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 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,
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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion.[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.

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), 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.

§1983. Texas appealed the district court's preliminary injunction, and the panel affirmed based on this Court's prior decision in *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017). *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Smith*, 913 F.3d 551 (5th Cir. 2019). This Court then granted Texas's petition for rehearing *en banc*.

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,* 563 U.S. 277, 284 (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

EFELDF adopts Texas's statement of the facts. Texas Suppl. Br. at 6-12.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION.

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 Plaintiffs' case. 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. In other words, Medicaid allows Texas to *breach* – not *violate* – its obligations under §1396a(a)(23), subject to whatever

full or partial funding restrictions HHS elects to impose. And those breaches, in turn, can potentially result in HHS's terminating or curtailing Texas's Medicaid funding, subject to exclusive direct review in the applicable federal court of appeal.

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

As indicated, courts analogize Spending-Clause programs to contracts entered 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 I.A, *supra,* and Section II.B.2, *infra,* lack of conditions precedent to an enforcement action affects both constitutional standing under Rule 12(b)(1) and statutory standing under Rule 12(b)(6). But even if lack of the 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.,* 555 U.S. 488, 493 (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

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[2] Alternatively, as explained in Section II.B.2, *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).

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* 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. *Ex parte Young* is a narrow exception to sovereign immunity for prospective declaratory and injunctive relief (not money damages), but that exception has three 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 shown in Sections II.A.2-II.A.3, *infra*, Providers are not "qualified" (*i.e.*, there is no violation of federal law).

Second, and relatedly, Medicaid is an example of cooperative federalism, in which Congress sets criteria and the states provide a state-law plan to meet those criteria. *Harris v. McRae*, 448 U.S. 297, 308 (1980) (describing "system of 'cooperative federalism' [under which] a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX"); *accord Smith*, 913 F.3d at 560 ("Medicaid program exemplifies cooperative federalism") (panel decision). *Vis-à-vis* Plaintiffs, however, the applicable law is Texas's Medicaid plan, and Texas complied with Texas law in decertifying Providers. Federal courts lack jurisdiction to require states to comply with state law:

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of *Young* … disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not

> vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (emphasis in original); *Lelsz v. Kavanagh*, 807 F.2d 1243, 1247 (5th Cir. 1987) (district courts lack jurisdiction to enforce a state-law violation as either "legitimate enforcement … or as a court-created remedy for its violation"). Under Medicaid, only HHS may determine whether Texas's implementation of Medicaid falls short of Texas's Medicaid commitments, *see* Section I.D, *infra*, and *Young* does not authorize district courts to create remedies for perceived violations.

Third, 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. at 101-02 & n.11 (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 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 district court lacked statutory subject-matter jurisdiction.

The district court's attempt to police Texas's compliance with Medicaid falls outside that court's jurisdiction for two reasons: (1) the primary-jurisdiction doctrine

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

[4] By contrast, some 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).

puts that question to HHS, not a district court; and (2) judicial review of HHS's resolution of that question would fall squarely in this Court in the first instance, thus displacing the district court. 42 U.S.C. §1316(a)(3). This Court should therefore remand with instructions to dismiss for lack of subject-matter jurisdiction.[5]

Taking the judicial-review issue first, review of Medicaid defunding decisions is available directly in the applicable federal court of appeals. 42 U.S.C. §1316(a)(3); *see Louisiana v. U.S. Dep't. of Health & Human Servs.*, 905 F.2d 877, 878-79 (5th Cir. 1990). By placing review of states' Medicaid compliance in the applicable courts of appeals, Congress displaced district court jurisdiction:

> It is well settled that even where Congress has not expressly stated that statutory jurisdiction is "exclusive," as it has here with regard to final [agency] actions, a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.

Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984) (footnote omitted) ("*TRAC*"). This Circuit has adopted *TRAC*'s reasoning, *JTB Tools*

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[5] The fact that Plaintiffs here could not bring an action under §1316(a)(3) is not problematic because they lack of constitutional and statutory standing. *See* Sections I.B *supra*, II.B.2, *infra*. If HHS administratively denied the relief to which Plaintiffs were legitimately entitled, Plaintiffs could obtain that relief by mandamus. *Heckler v. Chaney,* 470 U.S. 821, 833 n.4 (1985); *accord id.* at 839 ("the Court … does not decide today that nonenforcement decisions are unreviewable in cases where … an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams v. Richardson*") (Brennan, J., concurring) (citations omitted).

& Oilfield Servs., LLC v. U.S., 831 F.3d 597, 600-01 (5th Cir. 2016); *Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998), and the *en banc* Court should apply it here. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (holding that "[l]itigants may not evade" a provision that vests the courts of appeals with exclusive jurisdiction by requesting a district court to enjoin agency "action as ultra vires").

Moreover, under Medicaid, Texas has agreed to have only HHS determine its Medicaid compliance: "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). Otherwise, district courts and private plaintiffs across the country could set Medicaid policy.

A court could either stay a 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). Before interjecting themselves into this dispute properly between Texas and HHS,

the federal courts should await resolution by HHS in the first instance. If that relief goes Plaintiffs' way, the district court would lack jurisdiction, 42 U.S.C. §1316(a)(3), and if it goes Texas's way, Plaintiffs would need to bring action against HHS, not Texas. *See* note 5, *supra*. Either way, *this case* should be dismissed for lack of subject-matter jurisdiction.

II. PLAINTIFFS LACK A CAUSE OF ACTION TO ENFORCE §1396a(a)(23) AGAINST TEXAS.

It is 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.,* 563 U.S. 110, 118 (2011) (interior quotations omitted). Nonetheless, Plaintiffs propose to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra,* 563 U.S. at 120. The states never agreed to that as part of Medicaid, and federal law does not allow it.

In general, a plaintiff without a statutory right of action who seeks to enforce federal law against a conflicting state law has 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 *Young*.

As signaled in Section I.C, *supra*, Plaintiffs – and the federal courts – lack an ongoing violation of federal law sufficient to trigger the *Young* exception to a state's 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, the relief that Plaintiffs seek falls outside the *Young* exception to sovereign immunity. *Pennhurst*, 465 U.S. at 101-02 & n.11 (quoted *supra*). Accordingly, Plaintiffs cannot bring this action under *Young*.

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 based on state law beyond the bases on which HHS may exclude entities. *See* Section II.A.2, *infra* (*discussing* 42 U.S.C. §1396a(p)(1)). Provided that Texas lawfully disqualified Providers, *see* Section II.A.3, *infra*, 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 suggest 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. Notwithstanding *Gee*, no clarity exists to guide this Court to excuse Providers' 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 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). 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,* 563 U.S. 582, 605 (2011). As such, §1396a(p)(1) – together with its history and implementing regulations – makes Plaintiffs' preemption claims untenable.

3. Texas lawfully decertified Providers.

Instead of contesting their decertification from Texas's Medicaid program,

Providers filed this litigation, including a few of their patients as co-plaintiffs. 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). 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. If Providers are unqualified under state law, there is no federal "violation" of §1396a(a)(23) and thus no federal action under *Young*.

B. 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*)). "In 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). As explained in Section II.A, *supra*, Plaintiffs cannot show even a violation of *federal law*. But even assuming a violation of federal law, Plaintiffs still lack a *federal right* sufficient to

enforce §1396a(a)(23).[6]

As Texas explains well, Texas Suppl. Br., *passim*, Plaintiffs cannot establish that right under §1396a(a)(23) because that provision 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 amicus EFELDF agrees entirely with Texas's analysis of the §1983 issue, Plaintiffs cannot prevail even if this Court does not agree with Texas.

1. Even if *Wilder* remained good law, it would not aid Plaintiffs.

Texas joins Justice Stevens in arguing that the Supreme Court's decisions in *Gonzaga* and *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378 (2015) have overruled *Wilder*. *See* Texas Suppl. Br. at 28-33; *Gonzaga*, 536 U.S. at 300 n.8 (Stevens, J., dissenting). If this action arose under 42 U.S.C. §1396a(a)(13) – *i.e.*,

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[6] The differences between *Young* and §1983 are important. *See*, *e.g.*, 42 U.S.C. §1988(b) (providing attorney-fee awards for actions under §1983 but not for those under *Young*). Thus, this Court should evaluate §1983, even if the Court finds that an action would lie under *Young*.

the Medicaid provision at issue in *Wilder* – this Court would need to resolve that question. But even if *Wilder* remained good law as applied to §1396a(a)(13), that would not warrant extending *Wilder* to §1396a(a)(23). Certainly, we know that *Wilder* does not extend to all the Medicaid program criteria in §1396a(a): *Armstrong* held that *Wilder* does not extend to §1396a(a)(30). *Amicus* EFELDF respectfully submits that *Wilder* would not apply here as applied to §1396a(a)(23), even if *Wilder* remained good law as applied to §1396a(a)(13).

Several aspects of §1396a(a)(13) distinguish it from §1396a(a)(23). First, unlike here, Medicaid had allowed for provider reimbursement suits *before* the Medicaid 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); *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) ("this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available") (internal quotations omitted). 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). Third, the providers who sought reimbursement in Wilder had performed under the Spending-Clause contract, so their claims were at least in part grounded in contract or quasi-contract; by contrast, here, Plaintiffs are claiming an entitlement without any connection to the Spending-

Clause contract other than their rival, third-party interpretation of the contract.

Under this alternate reading, *Gonzaga* – consistent with *Sandoval* – merely moored *Wilder* to its narrow facts, including that the "statutory provisions explicitly conferred specific monetary entitlements upon the plaintiffs." *Gonzaga,* 536 U.S. at 274. Unlike in *Wilder*, §1396a(a)(23) 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 these 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 in *Wilder* would authorize §1983's circumventing Medicaid's exclusive review procedures and remedies as applied here. *Rancho Palos Verdes,* 544 U.S. at 122-23.

Simply put, *Wilder* and the private enforceability of §1396a(a)(13) are not good predictors for the private enforceability of the rest of the list of 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*, 135 S.Ct. at 1387 (plurality). Given the differences between this

case and *Wilder*, Texas should prevail even if *Wilder* remains good law as applied to its facts and the specific Medicaid provision at issue in *Wilder*.

2. Plaintiffs lack the conditions precedent to a claim and thus lack statutory standing for this action.

Neither Providers nor the Individuals have statutory standing to assert a violation of Medicaid. Congress could not have intended §1396a(a)(23) to benefit Providers as entities because – unlike Individuals – Providers are not Medicaid beneficiaries. But even the Individuals cannot establish a Medicaid violation that could serve as the basis for an action: 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.

As indicated in Section I.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 I.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.

CONCLUSION

The *en banc* Court should overrule *Gee* and remand this case with instructions to dismiss.

Dated: March 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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 6,283 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 365, and I have relied on that software's word-count feature to calculate the word count.

Dated: March 14, 2019

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

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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 the additional Certificate of Service for service of paper copies; 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. Phillips.

I hereby certify that, on March 14, 2019, I electronically filed the foregoing brief – as an exhibit to the motion for leave to file – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit 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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