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VIA CM/ECF

Mr. Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: No. 17-50282; *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc., et al., v. Phillips, et al.*

Dear Mr. Cayce:

This letter responds to Appellees' November 4, 2019 Rule 28(j) letter.

Planned Parenthood South Atlantic v. Baker, 18-2133, 2019 WL 5555641 (4th Cir. Oct. 29, 2019), is both irrelevant and wrong. The Fourth Circuit held only that 42 U.S.C. § 1396a(a)(23) creates a private right of action to challenge the exclusion of a provider when the exclusion is not based on the provider's professional integrity and competency. *Id.* at *13. South Carolina excluded Planned Parenthood "solely because it performed abortions outside of the Medicaid program." *Id.* at *3. *Baker* thus has no relevance where, as here, Texas has excluded Planned Parenthood because it failed to meet medical and ethical standards. *See* Appellants' En Banc Br. 6-12. *Baker* does not support Planned Parenthood's attempt to challenge the merits of that decision.

In any event, *Baker* is wrong because it turns on the repudiated framework of *Blessing v. Freestone*, 520 U.S. 329 (1997). Relying on *Blessing*, *Baker* presumed that Congress created a private right of action in section 1396a(a)(23) because "nowhere in the Medicaid Act did Congress declare an express intent to 'specifically foreclose[] a remedy under § 1983.'" 2019 WL 5555641, at *7. But that

analysis is exactly backwards. The Supreme Court has held that nothing "short of an unambiguously conferred right [may] support a cause of action brought under § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). And a right is not "unambiguously conferred" when it is phrased as a directive to the Secretary, has an aggregate focus, and is enforceable through other means. *See* Appellants' En Banc Br. 21-28.

The Fourth Circuit disregarded that authority. Its *Blessing*-style analysis has been "reject[ed]" by *Gonzaga*, 536 U.S. at 282-83, and by the plurality in *Armstrong v. Exceptional Child Center, Inc.,* 135 S. Ct. 1378, 1387-88 (2015). And *Blessing*'s foundation, *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), was itself "repudiate[d]" by later opinions, as the *Armstrong* majority recognized. 135 S. Ct. at 1386 n.*. *Baker* is thus grounded in an outdated understanding of the law, and its result is contrary to Supreme Court authority.

Sincerely,

/s/ Kyle D. Hawkins
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Solicitor General of Texas
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cc: All counsel of record (via CM/ECF)