No. 17-1492

In The
Supreme Court of the United States

REBECCA GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Petitioner,
v.
PLANNED PARENTHOOD OF GULF COAST, INC., JANE DOE #1; JANE DOE #2; JANE DOE #3,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave. NE
Washington, DC 20002
(202) 546-8890
Sekulow@aclj.org

Attorneys for Amicus Curiae

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). The ACLJ is committed to the constitutional principles of federalism and state sovereignty, both of which are threatened by the Fifth Circuit's decision holding that individual Medicaid recipients have a private right of action under 42 U.S.C. § 1396a(a)(23) (2010) to challenge a state's disqualification of a Medicaid provider.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision constitutes a frontal assault on the states' power, as independent sovereigns, to implement legitimate policy choices reflecting the values of their citizens. The lower court failed to approach the statutory interpretation issues presented in this case through the lens of federalism as this Court's decisions require. Ambiguities in

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*Counsel of record for the parties received notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

federal statutes must be resolved in a way that least invades state sovereignty. The same principle is reflected in Spending Clause decisions holding that federally imposed conditions upon the states are not enforceable if they are not unambiguously communicated to the states.

Nothing in sections 1396a(a)23 and 1396a(p)(1) of the Medicaid Act can be read as unambiguously authorizing Medicaid service providers and their patients to bring a § 1983 action challenging Louisiana's decision to disqualify Planned Parenthood of Gulf Coast (PPGC). The Fifth Circuit's misreading of the two statutory provisions stripped state authority over Medicaid provider disqualification decisions, and effectively coerced policy in a sensitive area of state concern.

Review of the opinion below is particularly timely and appropriate given the federal government's recent policies supporting the states' prerogative to decide whether or not to fund Planned Parenthood and the consensus among federal and state officials that Planned Parenthood's questionable practices and procedures warrant defunding the organization.

This Court should grant review and reverse the judgment of the Fifth Circuit.

ARGUMENT

I. This Court Should Grant Review to Resolve the Circuit Split and Because this Case Presents Significant Federalism Concerns Overlooked Below.

Aside from the statutory interpretation questions presented, this case involves the broader question of whether provisions of the Medicaid Act should be read to divest state authority over a sensitive policy choice about allocation of state taxpayer funds. The Fifth Circuit trespassed on Louisiana's power to make policy decisions about allocation of taxpayer funds by misreading the free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), and the exclusion-power-of-the-state provision, 42 U.S.C. § 1396a(p)(1) (2010), neither of which clearly and unambiguously bans the states from setting policy in this sensitive area of state concern. The Fifth Circuit did not merely misread the Medicaid Act; its foundational error was analyzing the statutory issues apart from any consideration of the federalism concerns raised when the federal government tells a sovereign state how it must allocate its taxpayer funds.

There is no question that states opting out of Medicaid by establishing their own healthcare programs can refuse to funnel taxpayer dollars to abortion providers. States enjoy wide latitude in choosing among competing demands for limited public funds. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

> The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487.

This Court's abortion funding precedents establish that both the state and federal governments are free to discourage abortion, including through allocation of taxpayer dollars. *Rust v. Sullivan*, 500 U.S. 173, 200–01 (1991) (upholding federal regulations prohibiting federal funds recipients from engaging in activities that directly or indirectly promoted abortion); *Maher v. Roe*, 432 U.S. 464, 465–66 (1977) (upholding state regulation denying payments for non-therapeutic abortions to Medicaid recipients). "When an issue involves sensitive policy choices . . . the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" *Id.* at 479–80 (quoting *Mo., K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904)).

Louisiana's sovereign authority to ensure that taxpayer funds do not subsidize PPGC can only be deemed abrogated under the Medicaid Act if Congress unambiguously intended to restrict the states' authority over Medicaid service providers. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). As discussed more fully infra at pp 9-14, there is no language in either of the Medicaid provisions at issue here which can be read as clearly limiting the states' authority in this area.

This Court's Tenth Amendment and Spending Clause cases required the lower court to analyze the statutory issues through the lens of federalism, especially since the court's decision resulted in nullification of a sovereign state's policy choice in a sensitive area of state concern.

A. The Fifth Circuit's Decision Cannot Be Reconciled With This Court's Recent Precedents Re-Establishing the Preeminence Of Federalism Principles in Statutory Interpretation Cases.

This Court's recent case law reflects a heightened concern for federalism principles. Just this Term, in *Murphy v. National Collegiate Athletic Association*, No. 16-476, 2018 U.S. LEXIS 2805, at *46 (May 14, 2018), the Court held that a federal law banning states from authorizing sports gambling was unconstitutional under the anti-commandeering doctrine of the Tenth Amendment. The law at issue "dictate[d] what a state legislature may and may not do." *Id.* at *5. "It is as if federal officers were

installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Id*. at *30.

Preserving the balance of power between the states and the federal government is essential to promote political accountability. "If a state imposes regulations only because Congress has commanded it to do so, responsibility is blurred." *Id.* at *29. In other words, when states take unpopular actions, such as allocating taxpayer funds to abortion providers, at the federal government's insistence, the state's citizens may blame state officials, while the federal officials who devised the regulatory program escape responsibility. *See id*. (citing *New York v. United States*, 505 U.S. 144, 169 (1992)).

Federalism principles have also been at the forefront of most of this Court's cases interpreting Spending Clause legislation. Most recently, in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 522–23 (2012) ("*NFIB*"), this Court indicated that state sovereignty concerns are at their zenith where the states' option to decline participation in massive Spending Clause programs, like Medicaid, is more theoretical than real. Because Medicaid spending accounts for over a fifth of the average state's total budget, and federal funds supply anywhere from half to four-fifths of those costs, this Court held that the requirement that states lose all their federal Medicaid funding if they did not accept the Medicaid Expansion was unconstitutionally coercive. *Id.* at 581–82. Seven Justices noted that the

threatened loss of over 10 percent of a state's overall budget left the states with a Hobson's choice between accepting the post hoc condition and suffering a devastating blow to state fiscal solvency. *Id.*; *see also id.* at 683 (Scalia, Alito, Kennedy, Thomas, JJ., concurring and dissenting).

Even before the *NFIB* decision, however, the Court's most recent Spending Clause cases recognize the significant danger that state participation in federal funding programs may be coerced. States cannot be deemed to "voluntarily and knowingly" accept the conditions upon which federal funds are conditioned, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), unless those conditions are set forth "unambiguously." *Gonzaga Univ.*, 536 U.S. at 283; *see also Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1388 (2015). The focus is on whether the states have been "clearly told" about the conditions. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (holding that states were not clearly told that expert fees were recoverable as costs in lawsuits brought under the Individuals with Disabilities Education Act, notwithstanding contrary evidence of Congress's intent in the statute's legislative history).

Springing "post-acceptance" or "retroactive" conditions on states is inherently coercive. *NFIB*, 567 U.S. at 584 (quoting *Pennhurst*, 452 U.S. at 25). Otherwise, the Spending Clause power would "obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas

which otherwise would lie outside its reach." *NFIB*, 567 U.S. at 676 (Scalia, Alito, Kennedy, Thomas, JJ., concurring and dissenting) (quoting *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 654 (1999)) (Kennedy, J., dissenting).

The Fifth Circuit's decision impermissibly coerces policy in a sensitive area of state concern.

B. The Fifth Circuit Misread The Medicaid Act to Mandate Policy Regarding Whether State Taxpayer Monies Must Flow To PPGC.

The Fifth Circuit's flawed interpretation of the free-choice-of-provider and the exclusion-power-of-the-state provisions effectively coerced states to take the politically unpopular action of allocating taxpayer monies to Planned Parenthood. Congress may, as a condition of receipt of federal Medicaid funds, restrict the states' power to disqualify abortion providers as Medicaid contractors, but only if it clearly and unambiguously does so. *Gonzaga Univ.*, 536 U.S. at 283. No part of the free-choice-of-provider and the exclusion-power-of-the-state provisions can be read to require states to contract with abortion providers for Medicaid services.

The Fifth Circuit accordingly erred in holding that the free-choice-of-provider provision creates a federal right enforceable under § 1983 action to challenge Louisiana's decision to disqualify PPGC.

1. Medicaid's Free-Choice-Of-Provider Provision Does Not Confer A Right On PPGC or Medicaid Beneficiaries To Bring An Enforcement Action Under § 1983.

In purporting to find a § 1983 private enforcement right in 42 U.S.C. § 1396a(a)(23), the Fifth Circuit created a post-acceptance condition out of whole cloth with no support in the statute's text. Had the Fifth Circuit correctly read *Gonzaga University,* 536 U.S. at 283; *Armstrong*, 135 S. Ct. 1378; *Murphy*, 548 U.S. at 304; and *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), together with this Court's recent federalism cases, it could not have concluded that Congress unambiguously informed the states that their service provider disqualification decisions could be challenged in a private right of action under § 1983.

Section 1396a(a)(23)(A) provides: "[A]ny 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). The provision requires states to offer Medicaid beneficiaries a choice of service providers, but Section 1396a(p)(1) empowers states to determine the service providers among whom beneficiaries can choose. 42 U.S.C. § 1396a(p)(1). Medicaid regulations further mandate state authority over appeals from service provider

disqualification decisions. 42 C.F.R. § 1002.213 (2017). Neither § 1396a(a)(23)(A) nor § 1396a(p)(1) can be read to confer an enforceable right on PPGC or its Medicaid patients to force the states to continue to do business with PPGC.

Section 1396a(a)23 is a directive to the Secretary of Health and Human Services, not a conferral of a cause of action on Medicaid beneficiaries. A statute addressing federal officials who monitor the state recipient of federal funding "does not confer the sort of '*individual* entitlement' that is enforceable under § 1983." *Gonzaga Univ.*, 536 U.S. at 287; *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017).

Moreover, § 1396a(a)23 confers enforcement power on the Secretary of Health and Human Services, granting authority to withhold federal funds. *See* 42 U.S.C. § 1396c (2010). Congress clearly intended the withholding of federal funds to be the sole remedy for noncompliance with the free-choice-of-provider provision. *See Armstrong*, 135 S. Ct. at 1385; *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others"); *Does*, 867 F.3d at 1041.

The free-choice-of-provider provision is unambiguous, but even if it were unclear, the Fifth Circuit ignored the cardinal rule that ambiguities in federal statutes must be resolved in a manner that least treads upon state sovereignty. *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014). There can hardly be a "more direct affront to state sovereignty," *Murphy*, 2018 U.S. LEXIS 2805, at *30, than reading § 1396a(a)23 as Congressional authorization for

states to 1) be hauled into federal court, 2) have potentially hundreds [1] of their Medicaid service provider disqualification decisions second-guessed and 3) have their limited Medicaid budgets drained of the substantial funds inevitably associated with hundreds of federal lawsuits.

The broad service provider exclusion powers that Congress granted to the states in § 1396a(p)(1) establish that Congress did not unambiguously inform the states that their decisions to disqualify service providers could be challenged in federal court by the service providers and their Medicaid patients. If Congress had intended the states to be subjected to § 1983 lawsuits over their service provider disqualification decisions, it presumably would have given the states far more specific guidance as to the kinds of decisions that would trigger liability.

2. The Exclusion-Power-Of-The-State Provision In § 1396a(p)(1) Confers Plenary Power On The State To Set Medicaid Service Provider Qualifications.

The Fifth Circuit erred further by narrowly circumscribing the state's authority under 42 U.S.C. § 1396a(p)(1) to establish reasonable standards relating to service provider qualifications. The court below misread *O'Bannon* to mean that states may only disqualify Medicaid service providers if those providers are disqualified from providing services to

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[1] *See* Pet. for Writ of Cert. 19.

all state residents. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 460–61 (5th Cir. 2017). This cramped interpretation of the state's disqualification power led the court to the erroneous holding that PPGC and its patients would likely prevail against the State in their § 1983 action challenging Louisiana's disqualification of PPGC as a service provider. *Id.* at 470.

No language in § 1396a(p)(1) supports the Fifth's Circuit's interpretation. To the contrary, section § 1396a(p)(1) provides plenary authority to the states to establish service provider qualifications:

> *In addition to any other authority*, a State may exclude any individual or entity for purposes of participating under the State plan under this title for any reason for which the Secretary could exclude the individual or entity from participation in a program under title XVIII under section 1128, 1128A, or 18866(b)(2) [42 USC § 1320a-7, 1320a-7a, or 1395cc(b)(2)].

42 U.S.C. § 1396a(p)(1) (emphasis added). Sections 1320a-7, 1320a-7a, and 1395cc(b)(2) set forth reasons that the Secretary may exclude providers, including for fraud, drug crimes, and failure to disclose certain information to government authorities.

Section 1396a(p)(1)'s legislative history supports the conclusion that Congress intended the clause "[i]n addition to any other authority" to permit states to disqualify providers for any reason established under state law. Senate Report 100-109 explicitly

states that § 1396a(p)(1) "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 (1987) (emphasis added). *See also First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) ("The legislative history clarifies 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.").

In addition to these clear statutory terms, the federal regulations reinforce the state's plenary authority over provider qualifications: "Nothing 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." 42 C.F.R. § 1002.3(b) (2017) (emphasis added).

Even assuming, however, that § 1396a(p)(1) limits state authority to exclude service providers only for the reasons set forth in §§ 1320a-7, 1320a-7a, the letters from Louisiana to PPGC clearly stated that PPGC was being terminated because of its fraudulent billing practices. *PPGC*, 862 F.3d at 480–81 (Owen, J., dissenting). That alone should have been enough for the Fifth Circuit. Notwithstanding extensive allegations of fraudulent billing practices by PPGC in two federal False Claims Act suits, and PPGC's refusal to appeal the state's decision in the appeal process afforded under state law, the Fifth Circuit rushed to the stunning and wholly unwarranted conclusion that PPGC and the patient

Plaintiffs were likely to succeed in their § 1983 action challenging the state's disqualification of PPGC.

3. The Fifth Circuit Undermined Louisiana's Statutory Scheme Establishing Administrative Proceedings To Evaluate The Merits Of The State's Disqualification Decisions.

The Fifth Circuit rendered superfluous the Louisiana state appeal process provided to disqualified Medicaid service providers. *See* La. Stat. Ann. § 46:437.4 (2016); La. Admin. Code tit. 50, §§ 4161, 4211, 4213 (2012). Medicaid regulations require that when a state disqualifies a service provider, the state must provide an appeal process. 42 C.F.R. § 1002.213. In sanctioning PPGC's decision to skip the state appeal process and file the § 1983 action, the Fifth Circuit undermined the very state authority that the Secretary of Health and Human Services sought to preserve.

Federalism requires the judiciary to protect federal interests "in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). This is equally true when the state exercises "its sovereignty through the administrative process." *Moore v. E. Cleveland*, 431 U.S. 494, 530 (1977) (Burger, C.J., dissenting). "A proper respect for state integrity" should weigh against "action which encourages evasion and undermining of other important state interests embodied in regulatory procedures." *Id*. The

Fifth Circuit's decision encourages future evasion of the states' statutory scheme governing appeals from service provider disqualification decisions.

In its letter giving notice of its intention to terminate PPGC's contract as a Medicaid service provider, Louisiana cited 1) PPGC's settlement of a federal False Claims Act suit brought by a former PPGC employee; 2) provider audits regarding false claims; and 3) another pending federal False Claims Act suit. *See PPGC*, 862 F.3d at 480–81 (Owen, J., dissenting).

In the pending False Claims action, the federal district court had concluded that the Complaint allegations supported "the reasonable inference that Planned Parenthood knowingly filed false claims." Memorandum Opinion and Order, *U.S. ex rel. Carroll v. Planned Parenthood Gulf Coast, Inc.*, 21 F. Supp. 3d 825, 835 (S.D. Tex. 2014). In the False Claims Act *qui tam* suit that PPGC settled, the Complaint alleged that PPGC had submitted false claims for medically unnecessary or unneeded items and services, and items and services that PPGC never provided. In addition to the *qui tam* claims, both the United States and the State of Texas asserted fraud claims against PPGC. *PPGC*, 862 F.3d at 480–81 (Owen, J., dissenting).

Though PPGC did not admit liability, it paid the United States $4,300,000, $1,247,000 of which was paid to the *qui tam* plaintiff, and $500,831 to the State of Texas. *Id*. PPGC also paid the *qui tam* plaintiff's attorney's fees and costs under a separate settlement agreement. *Id*. The settlement agreement reserved the rights of the United States and the

State of Texas to maintain administrative actions to exclude PPGC from federal health care programs, including Medicare. *Id*. Thus, even before receiving the termination letter, PPGC was on notice that its status as a Medicaid service provider was in jeopardy.

By forgoing its right to appeal the state's termination decision, PPGC forfeited its right to continue as a service provider during the pendency of the appeal. That should have been the end of the line for PPGC, but the Fifth Circuit held that PPGC and the patient Plaintiffs could challenge the state's termination decision under § 1983. *Id.* at 457.

Making the trespass on Louisiana's sovereignty even worse, the Fifth Circuit determined that all the allegations of fraudulent billing were essentially meritless because PPCG settled the first *qui tam* False Claims Act case. *Id.* at 469–70. Thus, the Fifth Circuit summarily concluded that Louisiana based its disqualification of PPGC on illegitimate grounds, while simultaneously declaring unnecessary the state proceedings established to address the merits of the state's disqualification decision. The message to PPGC and its affiliates is clear: by 1) settling any False Claims Act cases, 2) refusing to participate in state appeal processes when disqualified as a service provider, and 3) filing a § 1983 action in federal court challenging the disqualification decision, access to taxpayer monies can be assured in perpetuity.

II. This Case Is Particularly Appropriate for Review Given that the Federal Government Has Recently Established Policy that the States May Defund Planned Parenthood, and State Decisions to Defund Planned Parenthood are Justified by the Organization's Practices.

In addition to effectively coercing state policy on the allocation of state taxpayer dollars to PPGC, the decision below also creates an anomalous situation: at the same time that the federal government has adopted policies supporting the states' prerogative to defund Planned Parenthood, the federal judiciary is foreclosing that prerogative through faulty interpretations of the Medicaid Act. In April 2017, the President signed into law House Joint Resolution 43, reversing an Obama Administration rule that forced states to allocate Title X family planning funds to Planned Parenthood and other abortion-providers. H.R.J. Res. 43, 115th Cong., 131 Stat. 89 (2017). On May 18, 2018, the Trump Administration announced a proposed rule to cut taxpayer funding to Planned Parenthood and other abortion providers under Title X of the Public Health Service Act, which grants federal funding for family planning services.[2]

Both states and the federal government have ample grounds to defund Planned Parenthood in whole or in part. Allocation of taxpayer dollars to

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[2] Bill McMorris, *Trump Moves Forward on Partial Planned Parenthood Defunding*, Wash. Free Beacon, (May 23, 2018, 1:05 PM), http://freebeacon.com/issues/trump-moves-forward-partial-planned-parenthood-defunding/.

Planned Parenthood is a politically charged issue not only because the organization generates enormous revenue from its abortion business,[3] but because both the national organization and its affiliates have been enmeshed in scandal and controversy for many years:

1) There are numerous reports that Planned Parenthood affiliates regularly defy child abuse reporting laws, when providing abortions or birth control to girls who disclose to Planned Parenthood personnel that they are victims of sex trafficking, sexual predators, or statutory rape.[4]

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[3] The organization's latest annual report shows that while operating as a nonprofit, Planned Parenthood generated $1.4 billion in revenue in fiscal year 2016-17, including over $543 million from government funds. *Planned Parenthood 100 Years: 2016-2017 Annual Report*, Planned Parenthood, https://www.plannedparenthood.org/uploads/filer_public/d4/50/d450c016-a6a9-4455-bf7f-711067db5ff7/20171229_ar16-17_p01_lowres.pdf. The organization persists in making the manifestly false claim that abortions comprise only 3% of the services it performs. Michelle Ye Hee Lee, *For Planned Parenthood Abortion Stats, '3 Percent' and '94 Percent' are Both Misleading*, Wash. Post (Aug. 12, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/08/12/for-planned-parenthood-abortion-stats-3-percent-and-94-percent-are-both-misleading/?utm_term=.6e811d07659a).

[4] Mark Crutcher, *Exposing the Partnership Between Planned Parenthood, The National Abortion Federation And Men Who Sexually Abuse Underage Girls*, Child Predators, http://www.childpredators.com/the-child-predator-report/ (last visited May 24, 2018).

2) The organization is notorious for its rampant fraudulent billing practices.[5] A report published last year summarized the fifty-one known external audits of Planned Parenthood affiliates, and sixty-one federal audits of state family planning programs. The report concluded that "nearly every known government audit of Planned Parenthood affiliates has found overbilling." [6] "In total, these audits uncovered at least $8,552,264.20 in waste, abuse, and potential fraud" and found overbilling ranging from $3,537 to $1,615,083.25. [7] Indeed, reports of PPGC's fraudulent billing practices substantially contributed to Louisiana's decision to disqualify PPGC as a service provider.[8]

3) The organization's online sex education programs encourage teenagers to engage in dangerous sexual behavior, such as bondage, domination, sadism, and masochism.[9]

4) Most recently, Planned Parenthood has been involved in a widely publicized fetal organ harvesting scandal that resulted in numerous criminal and

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[5]*See generally* Catherine Glenn Foster, *Profit. No Matter What.: 2017 Report on Publicly Available Audits of Planned Parenthood Affiliates and State Family Planning Programs*, Lozier Institute (2017), https://lozierinstitute.org/wp-content/uploads/2017/01/plannedparenthood-profit-no-matter-what.pdf.

[6]*Id*. at 10.

[7]*Id*.

[8]*PPGC*, 862 F.3d at 453.

[9]*Investigative Report Lies, Corruption, and Scandal: Six Years of Exposing Planned Parenthood*, Planned Parenthood Exposed, http://plannedparenthoodexposed.com/ (last visited May 24, 2018).

regulatory referrals to federal, state, and local law enforcement entities.[10] The Department of Justice has recently confirmed it is investigating the matter.[11]

If even half of what has been reported about Planned Parenthood is true, it is no surprise that so many states have determined that Planned Parenthood should not be subsidized by taxpayer dollars because it does not represent their citizenry's values. *See PPGC*, 862 F.3d at 452; *see also Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 967 (7th Cir. 2012) (Indiana Law prohibiting abortion providers from receiving any state contracts and grants, including those involving state-administered federal funds); *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 962 (9th Cir. 2013) (Arizona law prohibiting Medicaid patients from obtaining covered family planning services through health care providers who perform abortions in cases other than medical necessity, rape, or incest); *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1224–25

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[10] Select Investigative Panel of the Energy & Commerce Committee, Final Report (Dec. 30, 2016), https://archives-energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/Select_Investigative_Panel_Final_Report.pdf; Staff of S. Comm. on the Judiciary, 114th Cong., Human Fetal Tissue Research: Context & Controversy, (Comm. Print 114-27 2016); Letter to Attorney General and FBI Director, S. Doc. No. 20510-6275 (2016).

[11] Letters from Assistant Attorney General to Committee Chairman and Ranking Member, S. Doc. No. 20530, (2016); Letter to Attorney General and FBI Director, S. Doc. No. 20510-6275.

(10th Cir. 2018), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Mar. 21, 2018) (No. 17-1340) (Kansas's Medicaid provider agreements terminated with Planned Parenthood because executives of the national organization had been video-recorded negotiating the sale of fetal tissue and body parts); *Does*, 867 F.3d at 1038 (Arkansas terminated its Medicaid provider agreements with Planned Parenthood because the abortion provider does not represent the values of the Arkansas people). In addition to Louisiana, Arkansas, Kansas, Indiana, and Arizona, the states of Alabama, Iowa, Mississippi, Nebraska, Ohio and Tennessee have also passed measures designed to ensure that taxpayer monies are not allocated to Planned Parenthood.[12]

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[12]*See* Jordan Buie, *Senate Votes to Ban TennCare Funds from Health-Care Providers that Perform Elective Abortions*, knox news (Mar. 29, 2018, 4:02 PM), https://www.knoxnews.com/story/news/politics/2018/03/29/senate-votes-ban-tenncare-funds-health-care-providers-perform-elective-abortions/469216002/; Letitia Stein, *U.S. Judge Bars Alabama from Defunding Planned Parenthood Clinics*, Reuters (Oct. 28, 2015, 11:47 AM), https://www.reuters.com/article/us-alabama-plannedparenthood-idUSKCN0SM24120151028; Chris Kenning, *Planned Parenthood to Close Four Iowa Clinics After Cuts*, Reuters (May 18, 2017, 8:21 PM), https://www.reuters.com/article/usa-abortion-iowa-idUSL2N1IL00Y; *2016 State of the States: A Pivotal Time for Reproductive Rights*, Center for Reproductive Rights, 16 (Jan. 2017), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA_StateofStates_11.16_Web_Final.pdf.; Nicole Stacy, *Nebraska Defunds Planned Parenthood of Title X Funding*, Susan B. Anthony List (Apr. 4, 2018), https://www.sba-list.org/newsroom/press-releases/nebraska-defunds-planned-parenthood-title-x-funding; Karen Kasler, *As*

Review of the opinion below is particularly timely and appropriate given the federal government's recent policies supporting the states' prerogative to defund Planned Parenthood and the consensus among federal and state officials that Planned Parenthood's questionable practices and procedures warrant that defunding.

Expected, Kasich Signs Bill Stripping Government Funds from Planned Parenthood, Statehouse News Bureau (Feb. 21, 2016), http://statenews.org/post/expected-kasich-signs-bill-stripping-government-funds-planned-parenthood; Calvin Freiburger, *Tennessee Governor Signs Bill Defunding Planned Parenthood,* LifeSite News (Apr. 13, 2018, 1:38 PM), https://www.lifesitenews.com/news/tennessee-governor-signs-bill-defunding-planned-parenthood.

CONCLUSION

Amicus respectfully requests this Court to grant review and reverse the Fifth Circuit.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave. NE
Washington, DC 20002
(202) 546-8890
Sekulow@aclj.org