



Planned Parenthood  
Federation of America

October 19, 2020

Office of the Clerk  
United States Court of Appeals for the Fifth Circuit  
F. Edward Hebert Building  
600 S. Maestri Place  
New Orleans, LA 70130-3408

**RE: Rule 28(j) Letter in *Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc., et al. v. Courtney Phillips, et al.*, No. 17-50282**

Dear Clerk,

Appellees write to alert the Court of a development relevant to one of the two issues before this Court in the above-captioned case: whether the Medicaid Act’s “Free-Choice-of-Provider” requirement, 42 U.S.C. § 1396a(a)(23), gives rise to a private right of action allowing enforcement by individual Medicaid-insured patients. On October 13, 2020, the United States Supreme Court denied South Carolina’s petition for a writ of certiorari to review the Fourth Circuit’s ruling answering this question in the affirmative. *Planned Parenthood S. Atlantic v. Baker*, 941 F.3d 687 (4th Cir. 2019), *cert. denied*, 2020 WL 6037212 (2020); Fed. R. App. P. 28(j). By denying certiorari, the Supreme Court left in place a preliminary injunction against South Carolina’s attempt to terminate the local Planned Parenthood provider from the Medicaid program. *Baker*, 941 F.3d.

The Supreme Court thus allowed to stand the Fourth Circuit’s analysis that the Free-Choice-of-Provider requirement creates a private right of action enforceable through §1983. As the 3-0 panel opinion authored by Judge Wilkinson explained, “[i]t is difficult to imagine a clearer or more affirmative directive,” “unmistakably confer[ing] on a discrete class of individual Medicaid beneficiaries” the right to challenge a provider’s termination “on grounds unrelated to . . . willingness and professional competency to furnish the required medical service.” *Baker*, 941 F.3d at 694, 699. As set forth in Appellees’ briefing, the Fifth, Sixth, Seventh, Ninth and Tenth Circuits have similarly held that the Free-Choice-of-Provider Requirement creates a privately enforceable right (though the Eighth Circuit has held to the contrary), and the Supreme Court has denied states’ petitions for certiorari on this issue four times previously.

The Supreme Court’s most recent denial of certiorari therefore supports Appellees’ argument that *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017)—holding that Medicaid-insured patients have a private right of action to enforce their Free-Choice-of-Provider rights—was correctly decided.



**Public Policy  
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Respectfully submitted,

s/ Jennifer Sandman

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