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Mr. Michael Gans, Clerk
Eighth Circuit Court of Appeals
111 South 10th Street
Room 24.329
St. Louis, MO 63102

Re: *Planned Parenthood Arkansas & Eastern Oklahoma v. Selig*
Eighth Circuit Case No. 15-3271

Dear Clerk Gans:

On April 27, 2016, Plaintiffs-Appellees filed a Federal Rule of Appellate Procedure 28(j) letter. The letter attaches and discusses an April 19, 2016 communication from the federal Centers for Medicare & Medicaid Services ("CMS") to *all* state Medicaid directors. Plaintiffs-Appellees significantly overstate the relevance of this communication.

First, this is a general communication from CMS to all states. It is not specifically addressed to Arkansas, and it is not specifically focused on Arkansas's decision to terminate Planned Parenthood from the Medicaid program for unethical (and potentially illegal) conduct that failed to meet professionally recognized standards of healthcare. Indeed, what is most relevant about CMS's statements and conduct to date is that CMS has not taken any actions whatsoever suggesting that CMS believes Arkansas is out of compliance with the Medicaid Act. CMS has not even told Arkansas it is out of compliance, let alone initiated the notice and hearing process that is specifically set up to address situations where CMS believes a state has acted improperly. *See* 42 U.S.C. § 1396c.

Second, this CMS communication does not address whether patients have a private right of action under 42 U.S.C. § 1396a(a)(23) to bring what is in essence a collateral challenge to a state's administrative determination that a particular provider is unqualified because of specific, unethical (and potentially illegal) conduct that failed to meet professionally recognized standards of healthcare. And it certainly does not address this question in a situation where the provider did not challenge the state's administrative determination that the provider was unqualified. Even if the CMS communication had addressed these issues, the question of whether Congress created a private right of action is not one on which an agency has any special expertise or should be afforded deference. *Cf. King v. Burwell*, 576 U.S. __ at *8, 135 S.Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly.").

Best regards,

Colin R. Jorgensen
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CRJ