No. 12-50377

United States Court of Appeals for the Fifth Circuit

PLANNED PARENTHOOD ASSOCIATION OF HIDALGO COUNTY TEXAS, INCORPORATED; PLANNED PARENTHOOD ASSOCIATION OF LUBBOCK, INCORPORATED; PLANNED PARENTHOOD OF CAMERON AND WILLACY COUNTIES; FAMILY PLANNING ASSOCIATES OF SAN ANTONIO; PLANNED PARENTHOOD OF CENTRAL TEXAS; PLANNED PARENTHOOD OF GULF COAST, INCORPORATED; PLANNED PARENTHOOD OF NORTH TEXAS, INCORPORATED; PLANNED PARENTHOOD OF WEST TEXAS, INCORPORATED; PLANNED PARENTHOOD OF AUSTIN FAMILY PLANNING, INCORPORATED,
Plaintiffs-Appellees,

v.

THOMAS M. SUEHS, EXECUTIVE COMMISSIONER, TEXAS HEALTH AND HUMAN SERV. COMM'N, IN HIS OFFICIAL CAPACITY,
Defendant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, CIVIL NO. 1:12-CV-00322-LY, HON. LEE YEAKEL

AMICI CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND TEXAS EAGLE FORUM IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is No. 12-50377. The case is styled as *Planned Parenthood Ass'n of Hildago County, Texas, Inc. v. Suehs.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Planned Parenthood Association of Hidalgo County Texas, Inc.
Appellee

Planned Parenthood Association of Lubbock, Inc.
Appellee

Planned Parenthood of Cameron and Willacy Counties
Appellee

Family Planning Associates of San Antonio
Appellee

Planned Parenthood of Central Texas
Appellee

Planned Parenthood of Gulf Coast, Inc.
Appellee

Planned Parenthood of North Texas, Inc.
Appellee

Planned Parenthood of West Texas, Inc.
Appellee

Planned Parenthood of Austin Family Planning, Inc.
Appellee

Thomas M. Suehs, Executive Commissioner, Texas Health & Human Services Commission, in his Official Capacity
Appellant

Eagle Forum Education & Legal Defense Fund
Amicus Curiae

Texas Eagle Forum
Amicus Curiae

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Dated: May 14, 2012

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund and Texas Eagle Forum (collectively, "Eagle Forum") submit this *amicus* brief with the accompanying motion for leave to file.[1] Since 1981, Eagle Forum 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, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

This section outlines the relevant legal and factual background. Although the gravamen of the complaint relates to unconstitutional conditions imposed on eligibility for state funds under a state program, the appellees opposed the appellant's motion for an appellate stay on the bases that (1) the federal Department of Health & Human Services

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[1] Pursuant to FED. R. APP. P. 29(c)(5), 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.

("HHS") has offered to provide additional federal "phase-out" funding – for up to nine months – with the proviso that "the State should not make any eligibility changes to its program," *see* Mot. for Stay, App. at 206; and (2) that the challenged state regulations are inconsistent with *state* law, Opp'n to Stay at 3.

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.,* 523 U.S. at 94 (interior quotations omitted).

Under the Spending Clause, 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); *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847, 850 (5th Cir. 1967). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously, *Gorman,* 536 U.S. at 186, especially for state recipients with sovereign immunity. *Sossamon v. Texas,* 131 S.Ct. 1651, 1661 (2011). With the required notice, recipients *potentially* face enforcement for violating the conditions of federal spending, *Gorman,* 536 U.S. at 187-89, although the barrier is higher for state recipients: "Without such a clear statement from Congress and notice to the States, federal courts may not step in and abrogate state sovereign immunity." *Sossamon,* 131 S.Ct. at 1661. Significantly, *Sossamon* clarifies that this contract-law analogy for Spending-Clause legislation is not an open-ended invitation to interpret such agreements broadly but rather – consistent with the clear-notice rule – applies "only as a potential *limitation* on liability." *Sossamon,* 131 S.Ct. at 1661 (emphasis in original). Moreover, "[i]n legislation enacted pursuant to the spending power, the typical remedy for noncompliance with federal conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State School & Hospital v.*

Halderman, 451 U.S. 1, 28 (1981).

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine,* 527 U.S. 706, 728-29 (1999), applying equally to suits by a state's own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). When a state agency is the named defendant, the Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993). Moreover, like jurisdiction, immunity may be raised at any time, even on appeal. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974).

Statutory and Regulatory Background

Established in 1965, 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 and the implementing HHS regulations.

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.[2] In addition, HHS may waive specific federal requirements for state demonstration projects that promote Medicaid objectives. 42 U.S.C. §1315. By opting WHP into Medicaid, Texas and HHS implicated certain relevant Medicaid provisions, which would not apply absent the demonstration project.

The Texas Women's Health Program ("WHP") was first enacted in 2005 as a five-year Medicaid demonstration project under §1315 to provide a variety of medical services to women with net family incomes below 185 percent of the federal poverty level (*i.e.,* beyond Medicaid's coverage). TEX. HUM. RES. CODE §32.0248(b). As with Medicaid itself,

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[2] When HHS denies SPAs, states may seek reconsideration, which initiates an administrative process – with a formal hearing and opportunity for public participation – and the opportunity for judicial review directly in the appropriate U.S. Court of Appeals. 42 C.F.R. §§430.18, 430.60, 430.76, 430.102(c); 42 U.S.C. §§1316(a)(3), 1396c.

the federal and state governments split WHP's costs. In reauthorizing WHP, the Texas Legislature clarified the original WHP intent to "ensure that [WHP] money … is not used to perform or *promote* elective abortions, or to contract with entities that perform or *promote* elective abortions or *affiliate* with entities that perform or promote elective abortions." *Id.* §32.024(c-1) (emphasis added).

To implement the reauthorizing legislation, the Health & Human Services Commission ("HHSC" or "Texas") proposed and promulgated regulations that define key statutory terms. *See* 1 TEX. ADMIN. CODE §354.1362(6) ("promotes" means "[a]dvocates or popularizes by, for example, advertising or publicity"); *id.* §354.1362(1)(A) ("affiliate" includes "common ownership, management, or control" or "granting or extension of a license or other agreement that authorizes the affiliate to use the other entity's brand name, trademark, service mark, or other registered identification mark"). These regulations are procedurally final and therefore bind HHSC to the same extent as Texas statutes. *Public Utility Comm'n of Texas v. Gulf States Utilities Co.,* 809 S.W.2d 201, 207 (Tex. 1991); *Rodriguez v. Service Lloyds Ins. Co.,* 997 S.W.2d 248, 254 (Tex. 1999).

Under Medicaid's "free-choice" provision, "[a] State plan for medical assistance must – … provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, *qualified* to perform the service or services required." 42 U.S.C. §1396a(a)(23) (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.

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*." *Boyle,* 487

U.S. at 520 (*quoting Miree v. DeKalb County,* 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). Thus, federal common law does not necessarily apply to private enforcement of federal contracts like this litigation.

"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." *Kimbell Foods,* 440 U.S. 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. Accordingly, Section I.B, *infra,* looks not only to federal common law but also to Texas law for third-party beneficiaries' standing to enforce federal contracts.

Factual Background

The various plaintiffs (collectively, "Planned Parenthood") seek to

enjoin WHP's implementing regulations to enable their continued promotion of elective abortion and affiliation with other Planned Parenthood entities that perform and promote elective abortion. They complain that WHP's eligibility criteria impose unconstitutional conditions on their participation in WHP. Nothing in the record demonstrates that HHS has issued any phase-out funding or, if so, what conditions HHS and Texas reached regarding the phase-out period.

STANDARD OF REVIEW

Although it reviews preliminary injunctions deferentially on factual and equitable issues, this Court reviews legal issues *de novo*. *Planned Parenthood of Houston & Southeast Texas v. Sanchez,* 403 F.3d 324, 329 (5th Cir. 2005) ("*Sanchez I*"). Put another way, a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990). Moreover, even preliminary injunctions require jurisdiction, *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983), and courts may decide the merits at the jurisdictional stage "where… jurisdiction is dependent on … the merits." *Land v. Dollar,* 330 U.S. 731, 735 (1947).

SUMMARY OF ARGUMENT

Because Planned Parenthood asserted the relevance of HHS

phase-out funding and violations of state law in its opposition to Texas' motion for an appellate stay, *amicus* Eagle Forum briefs not only relevant issues under the unconstitutional-conditions doctrine, but also issues under Medicaid (with respect to HHS phase-out funding) and the *Ex parte Young* exception to sovereign immunity (with respect to alleged violations of state law). Notwithstanding *Sanchez I,* Planned Parenthood cannot establish jurisdiction or state a claim for Medicaid-based relief (Section I) and cannot litigate violations of *state* law against Texas in *federal* court (Section I.D).

Neither the United States nor third-party beneficiaries can pursue Medicaid-based claims without meeting Medicaid's conditions precedent, which undermines Planned Parenthood's standing and ability to state a claim for relief (Sections I.A-C, I.E.1-2, II.A.5). Under both Texas and federal common law, third-party beneficiaries lack standing to enforce promisees' non-vested rights (Section I.B-C). Moreover, because Planned Parenthood's Medicaid-based claims do not cite an ongoing violation of federal law, *Ex parte Young* provides no exception to Texas' sovereign immunity (Section I.D, I.E.2). Similarly, Medicaid neither provides a private cause of action nor creates

individual rights that support causes of action under 42 U.S.C. §1983 (Section I.E.1).

On the statutory merits, Medicaid operates within a field traditionally occupied by the states and thus is subject to the presumption against preemption, which Planned Parenthood cannot surmount because Medicaid does not "clearly and manifestly" prohibit what Texas has done (Section II.A.1). Medicaid's "free-choice" provision expressly allows state exclusion of non-qualified providers (Section II.A.3), and Medicaid plainly allows states to adopt exclusion criteria such as the WHP criteria (Section II.A.4).

On the constitutional merits, WHP does not impose unconstitutional conditions on the acceptance of state funds (Section II.B). Even with respect to political speech, WHP recipients are agents of Texas, and the Planned Parenthood connection with abortion is inconsistent with Texas' permissible and significant pro-life WHP mission. In any event, some of the speech that WHP regulates is merely commercial speech, which does not rise to the strict-scrutiny levels that Planned Parenthood advocates, and WHP meets the criteria the lesser standards for commercial-speech restrictions.

ARGUMENT

I. PLANNED PARENTHOOD CANNOT ESTABLISH JURISDICTION OR STATE A CLAIM FOR MEDICAID RELIEF

While HHS may elect not to renew its WHP's Medicaid waiver, HHS can terminate or curtail Texas' approved funding – which is Medicaid's exclusive remedy – only after providing an opportunity for a hearing. Whether jurisdictionally or on the merits, both the failure to meet that regulatory precondition to an enforcement remedy and Planned Parenthood's seeking a specific-performance remedy that Medicaid lacks doom Planned Parenthood's challenge here. *See, e.g., Blanchard 1986, Ltd. v. Park Plantation, LLC,* 553 F.3d 405, 409 (5th Cir. 2008) (distinguishing statutory and constitutional standing); *James v. City of Dallas, Tex.,* 254 F.3d 551, 562 (5th Cir. 2001). Texas is free to raise these issues as this litigation proceeds to the merits. *Kinney v. Weaver,* 367 F.3d 337, 355 n.21 (5th Cir. 2004). Because these issues either go to jurisdiction (which this Court must address) or to Planned Parenthood's ability to state a claim (which Planned Parenthood needs to prevail), these issues are relevant at this stage, whether

jurisdictional or not.[3] Moreover, because the Medicaid statute allows Texas to elect non-compliance and the possible termination or curtailment of federal funding, whatever fault HHS could find in the WHP under Medicaid nonetheless could not support federal-court jurisdiction over Texas' Eleventh-Amendment immunity.

A. HHS Lacks Vested Medicaid Rights Due to Unmet Conditions Precedent

As indicated, courts analogize Spending-Clause programs to contracts struck between the federal government and recipients, with the public as third-party beneficiaries. *Gorman,* 536 U.S. at 186; *Bossier Parish,* 370 F.2d at 850. 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

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[3] Although the failure to satisfy regulatory conditions precedent negates both constitutional standing and statutory standing, this Court may address statutory standing first. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999). Because this standing argument overlaps with the merits, Eagle Forum reprises this issue as a merits argument in Section II.A.5, *infra.*

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"), Planned Parenthood cannot bring this action as an alleged beneficiary.

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 Planned Parenthood. *What agencies cannot do directly, plaintiffs cannot do indirectly as third-party-beneficiaries.*

B. Planned Parenthood Lacks Standing to Enforce Texas' Non-Vested Obligations

As explained in Section I.A, *supra,* and Section II.A.5, *infra,* lack of conditions precedent affects both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). But even if lack of 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 law, neither Medicaid nor WHP provides Planned Parenthood 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, Planned Parenthood lacks a legally protected interest in that enforcement and thus lacks standing. Significantly, *plaintiffs* always bear the burden of proving jurisdiction, *Summers v. Earth Island Inst.,* 129 S.Ct. 1142, 1150 (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 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 Planned Parenthood] cannot be read as foreclosing an argument that

they never dealt with"). "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 ." *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. Medicaid Does Not Confer Protected Interests – *i.e.,* Standing – on Planned Parenthood

Texas and the United States have entered a contract that requires Texas to meet certain Medicaid criteria or run the risk of termination or curtailment of its Medicaid funding. That arrangement does not confer protected interests on third parties like Planned Parenthood, much less demonstrate the "clear showing of intent" required for third-party beneficiaries to have standing. *City of Houston v. Williams,* 353 S.W.3d 128, 145 (Tex. 2011). At most, consistent with Medicaid, a reviewing court conceivably could order HHS to reduce or eliminate the Medicaid funding that otherwise would go to Texas. That creates two problems for standing. First, because it does not benefit Planned Parenthood, the funding remedy simply cures a general grievance – such as an interest in proper government operation or in getting the "bad guys" – that

cannot establish standing. *FEC v. Akins,* 524 U.S. 11, 23 (1998). Moreover, terminating or curtailing Texas' Medicaid funding would do absolutely nothing to redress Planned Parenthood's injuries, which is an even more fundamental failure of Planned Parenthood's standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992) (standing requires cognizable injury, causation, and redressability).

D. The Eleventh Amendment Precludes Medicaid-Based Claims

Texas may assert its immunity from suit both on appeal and as the district court case proceeds, which makes immunity relevant to Planned Parenthood's likelihood of prevailing. *Ex parte Young* is a limited exception to sovereign immunity, and that exception applies only to ongoing *violations* of federal law. Thus, for example, the *Ex parte 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, it is undisputed that the Medicaid statute allows Texas to elect to field a non-compliant Medicaid program, leaving to HHS the decision whether

to curtail or eliminate Texas' Medicaid funding. This is the nature of the Medicaid contract that Texas and the United States entered. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90 (1949) (breach of civil-law duty or "claim of error in the exercise of [delegated] power is … not sufficient" to avoid "impleading the sovereign"). Texas' alleged breach of Medicaid provisions simply does not "violate" federal law under the *Ex parte Young* exception to immunity.

In opposing Texas' motion for an appellate stay, Planned Parenthood suggested that the implementing Texas regulation is inconsistent with Texas law. That would be irrelevant, even if it were true because the rationale for the *Ex parte Young* exception to sovereign immunity "is wholly absent … when a plaintiff alleges that a state official has violated *state* 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 School & Hospital v. Halderman,* 465 U.S. 89, 106 (1984) (emphasis in original). The district court rejected Planned Parenthood's state-law claims, USCA5 323-24, and Planned Parenthood cannot reopen the issue by the back door here.

E. Planned Parenthood Lacks a Cause of Action to Enforce Medicaid-Based Claims

Medicaid itself does not provide a private right of action for beneficiaries to enforce Medicaid's perceived requirements. To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186; *Sossamon,* 131 S.Ct. at 1661. Medicaid says nothing about private causes of action, which heightens the barrier to private enforcement against state and local government:

> The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.

Astra USA, Inc. v. Santa Clara County, Cal., 131 S.Ct. 1342, 1347-48 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)); *Sossamon,* 131 S.Ct. at 1661 (same). Thus, although Planned Parenthood would "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra,* 131 S.Ct. at 1349, the states never agreed to that as part of Medicaid, and federal law does not sanction it.

In general, a plaintiff without a statutory right of action who seeks to enforce federal law against a conflicting state law can consider

two alternate paths, 42 U.S.C. §1983 and the *Ex parte Young* exception to sovereign immunity. *Perez v. Ledesma,* 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.* Here, however, Planned Parenthood lacks the federal right needed to sue under §1983 and lacks an ongoing violation of federal law needed to sue under *Ex parte Young*.

1. Planned Parenthood Cannot Bring Medicaid-Based Claims 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*)). As such, "[i]n order to seek redress through §1983, ... a plaintiff 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). Under this rationale, it is clear that neither the Supremacy Clause itself nor analogous Medicaid provisions provide a cause of action for either Medicaid recipients or providers. *Golden State Transit Corp. v. City of*

Los Angeles, 493 U.S. 103, 107-08 (1989) (Supremacy Clause); *Equal Access for El Paso, Inc. v. Hawkins,* 509 F.3d 697, 704 (5th Cir. 2007) (Medicaid); *cf. Planned Parenthood of Houston & Southeast Texas v. Sanchez,* 480 F.3d 734, 738 (5th Cir. 2007) (Title X).

2. Planned Parenthood Cannot Bring Medicaid-Based Claims under *Ex parte Young*

In *Sanchez I,* this Court found federal-question subject-matter jurisdiction and a cause of action for injunctive and declaratory relief outside §1983, which *amicus* Eagle Forum submits relied on *Ex parte Young* as the only possible exception to sovereign immunity. *See Sanchez I,* 403 F.3d at 334 & n.47; *McCarthy ex rel. Travis v. Hawkins,* 381 F.3d 407, 412 (5th Cir. 2004). As signaled in the prior subsection and as indicated in Section I.D, *supra,* Planned Parenthood lacks an ongoing violation of federal law sufficient to trigger the *Ex parte Young* exception to sovereign immunity for Medicaid-based claims.

Amicus Eagle Forum respectfully submits that recent Supreme Court decisions have abrogated *Sanchez I* with respect to private litigation against states under Spending-Clause legislation, *see, e.g., Sossamon,* 131 S.Ct. at 1661, but that issue remains for another Title X case to reach this Court. By its express terms, *Sanchez I* "express[es] no

opinion beyond Title X," *Sanchez I,* 403 F.3d at 338 n.68, and Title X simply is not relevant here. With respect to Medicaid, WHP represents an entirely permissible exercise of Texas' sovereignty, regardless of whether HHS elects to eliminate or curtail Medicaid funding for WHP. That is not a "violation" of federal law that triggers *Ex parte Young*.

II. PLANNED PARENTHOOD CANNOT PREVAIL ON THE MERITS

In the prior section, *amicus* Eagle Forum addressed threshold Medicaid issues implicated by Planned Parenthood's arguments in opposition to an appellate stay. This section demonstrates why Planned Parenthood has no likelihood of prevailing, either under those Medicaid issues or under the unconstitutional-condition doctrine.

A. WHP Does Not Violate Medicaid

Assuming *arguendo* that federal courts have jurisdiction over private Medicaid-preemption claims and that Planned Parenthood can state a claim for Medicaid preemption during any phase-out plan for federal WHP funding, Planned Parenthood nonetheless can prevail on its Medicaid-based claims *only* (1) if WHP violates Medicaid's free-choice provision, *and* (2) if Texas lacks authority to exclude Planned Parenthood on the basis of state-law criteria not included in Medicaid.

Because WHP does not violate the free-choice provision and Texas may exclude providers like Planned Parenthood on the basis of state law, Planned Parenthood cannot prevail on the Medicaid merits.

Moreover, before addressing Medicaid-preemption theories, this Court must address two canons of statutory interpretation, and both favor Texas. First, 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 state law without a "clear and manifest" intent to do so. Here, "clear and manifest" evidence of preemptive intent is lacking. Second, the conclusory (and preliminary) HHS correspondence on Texas' application for a renewed waiver are not entitled to any deference under *Skidmore* or *Chevron.*[4] With *Chevron,*

[4] Under the former, courts defer to agency interpretation based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). Under the latter, courts owe deference to an agency's plausible construction of an interstitial gap in a statute under that agency's administration (*Chevron* prong two), unless the Court can interpret the statute's requirements using tools of traditional statutory construction (*Chevron* prong one). *Chevron U.S.A., Inc. v. N.R.D.C.,* 467 U.S. 837, 843-44, 865-66 (1984).

this Court can decide the issue using traditional tools of statutory construction, which obviates deference to HHS altogether. With *Skidmore,* the HHS correspondence lack the power to persuade through any thoroughness in reasoning.

1. The Presumption against Preemption Applies

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *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 expressly 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 of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 540 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Because the public health field here is one traditionally occupied by states, the presumption

applies. In essence, Planned Parenthood must establish that no plausible reading of Medicaid supports Texas.

2. This Court Owes No Deference to HHS's Review of Texas' Renewed Waiver Request

At the outset, it does not matter what Congress and federal agencies believe about the Constitution: the "power to interpret the Constitution … remains in the Judiciary." *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997). Accordingly, on constitutional issues, only prior holdings of this Court or the Supreme Court bind the panel here. But even on Medicaid, this Court owes no deference to Texas' interaction with HHS over WHP reauthorization or phase-out plans under either *Skidmore* or *Chevron.*

HHS's denial of WHP renewal on December 12, 2012, does not dispute Texas' merits position. As explained in Section II.A.4, *infra,* Medicaid expressly allows *states* to impose provider-qualification criteria under state law beyond those that *HHS* may impose under Medicaid. Thus, HHS's conclusion that WHP's criteria do not serve "any Medicaid purpose" is entirely beside the point. At best, the HHS denial reflects a policy dispute between HHS and Texas. HHS in no way adopted a legal interpretation that binds – or even informs – Texas or

this Court on applicable law.[5]

HHS's March 15, 2012, negotiating position that Texas "should not make any eligibility changes to its program" under a phase-out plan *to which Texas has not yet agreed* is both tentative and conclusory; as such, it cannot serve as the basis for judicial deference. While notice-and-comment rulemaking is not required for *Chevron* deference to apply, *Chevron* deference simply does not apply to tentative, non-final decisions. *Matter of Appletree Markets, Inc.,* 19 F.3d 969, 973 (5th Cir. 1994); *accord Public Citizen, Inc. v. Shalala,* 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, F.D.A.,* 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney,* 222 F.3d 819, 829 (10th Cir. 2000). Moreover, there is nothing in the record on whether Texas will accept federal phase-out funding and, if so, under what final terms. Final agency action may be an entirely different issue, but neither HHS nor

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[5] It is unclear that HHS's declining to grant a waiver *could* preempt state law: "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] ... [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986). As indicated in the text, HHS did not do so.

its beneficiaries can rely on terms to which Texas has not yet agreed.

Even more importantly, assuming *arguendo* that the relevant statutes conferred any deference or delegated any authority, *Chevron* prong one directs reviewing courts to assess the question using traditional tools of statutory construction before deferring to an agency interpretation. *Chevron,* 467 U.S. at 842-43. Under that test and the presumption against preemption, the law here is clear, without the need for an administrative gloss. Medicaid shows no clear and manifest congressional intent to preempt Texas' approach. Moreover, any latter-day HHS conclusion to the contrary – without notice and the opportunity for comment and contrary to prior HHS indications – would warrant *no* deference. *Wyeth v. Levine,* 129 S.Ct. 1187, 1201-04 (2009).[6] A recent dissent by Justice Stevens – joined by the Chief Justice and Justice Scalia, and not disputed by the majority – calls into question the entire enterprise of administrative preemption vis-à-vis the presumption against preemption. *Watters v. Wachovia Bank, N.A.,* 550

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[6] In *Wyeth,* the Supreme Court emphasized that – while federal regulations may perhaps preempt state law – a *Federal Register* preamble cannot claim that power, and denied the agency deference for the procedural irregularity of providing a different view in a final rule's preamble than the agency announced in the proposal's preamble. *Id.*

U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive that federal law generally. *Id.* at 12 (majority). At the least, federal courts must use caution in weighing deference to federal agencies versus state sovereignty.[7] On the record here, HHS warrants no deference.

3. WHP Complies with "Free Choice"

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 on the basis of state law beyond the bases on which HHS may exclude entities. *See* Section II.A.4, *infra* (*discussing* 42 U.S.C. §1396a(p)(1)). Thus, if WHP lawfully disqualifies Planned Parenthood, WHP does not conflict with §1396a(a)(23) *by §1396a(a)(23)'s express terms.*

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[7] *See, e.g., Fellner v. Tri-Union Seafoods, L.L.C,* 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt,* 194 F.3d 176, 182-83 (1st Cir. 1999); *National Ass'n Of State Utility Consumer Advocates v. F.C.C.,* 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron,* this presumption guides our understanding of the statutory language that preserves the power of the States to regulate").

4. WHP Lawfully Defines "Qualified" Providers

As indicated in the Statutory Background, *supra,* 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(b) ("[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 legislative 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 Medicaid's free-choice requirements and entity-exclusion authority.

But the constitutional setting of the Spending Clause and the Supremacy Clause make it *contextually* impossible for Planned Parenthood 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 – a field traditionally occupied by the states – and neither HHS nor Planned Parenthood can overcome the presumption against preemption, which requires only that Texas have a plausible non-preemptive interpretation to support WHP. *See* Section II.A.1, *supra.* By preserving state authority to regulate alongside the federal act, clauses like §1396a(p)(1) undermine preemption claims like Planned Parenthood's by negating congressional intent to preempt, making it virtually impossible to make the required showing of a clear and manifest congressional intent *to preempt. Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1978 (2011). In summary, §1396a(p)(1) makes Planned Parenthood's preemption claims untenable.

5. Planned Parenthood Fails to State Vested Medicaid Claims

As indicated in Section I.A, *supra,* Medicaid imposes conditions precedent on Medicaid enforcement – namely, the process under 42 U.S.C. §1396c – that remain unmet here. Under federal common law, failure to meet conditions precedent can 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); *Kane Enterprises v. MacGregor (USA) Inc.,* 322 F.3d 371, 375 (5th Cir. 2003). Alternatively, Planned Parenthood lacks standing as a third-party beneficiary to the federal contracts because Medicaid's enforceability has not vested. *See* Section I.B, *supra.* Either way, Planned Parenthood cannot prevail on Medicaid-based claims. Assuming *arguendo* that the lack of a vested, enforceable interest is *not* jurisdictional, it nonetheless precludes Planned Parenthood's stating a claim for regulatory relief.

B. WHP Does Not Impose Unconstitutional Conditions on State Funding

Planned Parenthood argues that WHP unconstitutionally ties eligibility for state funds to Planned Parenthood's associations with abortion providers and its abortion advocacy. Texas has *no federal obligation* to fund abortions with public funds. *Webster v. Reproductive*

Health Servs., 492 U.S. 490, 511 (1989); *Harris v. McRae,* 448 U.S. 297, 318 (1980). In response, Planned Parenthood cites *Perry v. Sindermann,* 408 U.S. 593, 597 (1972), and its progeny for the proposition that states must meet strict scrutiny to restrict eligibility for benefits by requiring beneficiaries to forego constitutional rights, particularly fundamental First-Amendment rights like speech and association.

Because money is fungible, Texas' funding the specific Planned Parenthood entities here would at least indirectly subsidize Planned Parenthood's parallel abortion businesses, along with other, non-abortion services that Planned Parenthood provides. As Texas explains, the Supreme Court's using the availability of affiliates to buttress its funding decisions does not elevate that *dicta* into an affiliate-mandating holding. Texas Br. at 30 n.4. Were it otherwise, Planned Parenthood would be using the First Amendment – as incorporated via the Fourteenth Amendment – to compel Texas and her citizens to speak *in support* of abortion, in violation of *their* First-Amendment rights. *Id.* at 41-46 (WHP is speech by Texas). The Constitution simply does not require Texas to fund Planned Parenthood.

Even if Planned Parenthood had valid arguments with respect to

its *political* speech, *Citizens United v. F.E.C.,* 130 S.Ct. 876, 898-99 (2010),[8] it would not follow that Planned Parenthood will prevail with respect to its *commercial* speech (*e.g.,* advertising, trademarks) that falls under lower constitutional scrutiny, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Com. of New York,* 447 U.S. 557, 563-64 (1980), and does not include an overbreadth doctrine. *Bates v. State Bar of Arizona,* 433 U.S. 350, 380-81 (1977). Given Texas' undisputed interest in promoting life, *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), particularly in its own health program, Texas meets *Central Hudson* with important interests, directly advanced by WHP's criteria, and not advanced by less-restrictive criteria.

In this respect, WHP recipients are actually agents of Texas in implementing WHP. As such, they more closely resemble government workers, with an obligation to avoid personal views in discord with their government mission, *United Public Workers v. Mitchell,* 330 U.S. 75, 78-79 (1947) (restricting political activity outside government

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[8] Although liberal groups typically lament *Citizens United,* Planned Parenthood must argue for expanding its strict-scrutiny for political speech to include additional fundamental corporate-entity rights under the First Amendment.

employment); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 564-65 (1973), than they resemble mere beneficiaries of public benefits. *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Speiser v. Randall,* 357 U.S. 513, 526 (1958). Given that Planned Parenthood is synonymous with abortion, Texas cannot convey its pro-life message if compelled to operate WHP under the Planned Parenthood banner. *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 652-54 (2000). As Texas explains, its criteria are germane to its WHP mission, Texas Br. at 35-39, which removes any concern that Texas adopted its criteria for impermissibly discriminating based on Planned Parenthood's viewpoint, as opposed to permissibly furthering its own WHP mission.

CONCLUSION

This Court should vacate the preliminary injunction.

Dated: May 14, 2012

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CERTIFICATE OF COMPLIANCE

No. 12-50377, *Planned Parenthood Ass'n of Hildago County, Texas, Inc. v. Suehs.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,956 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

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No. 12-50377, *Planned Parenthood Ass'n of Hildago County, Texas, Inc. v. Suehs.*

I hereby certify that, on May 14, 2012, I electronically filed the foregoing brief, together with the accompanying 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 some of the participants in the case are not CM/ECF users and that, on the same date, I served a copy of the foregoing brief, together with the accompanying motion for leave to file, by U.S. Mail, first class postage prepaid, on the following CM/ECF non-participants:

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

No. 12-50377, *Planned Parenthood Ass'n of Hildago County, Texas, Inc. v. Suehs.*

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 document; 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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