No. 12-17558

United States Court of Appeals for the Ninth Circuit

PLANNED PARENTHOOD ARIZONA, INC.; JANE DOE #1; JANE DOE #2; JANE DOE #3; ERIC REUSS, M.D.,
Plaintiffs-Appellees,

v.

TOM BETLACH, DIRECTOR, ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM; TOM HORNE, ATTORNEY GENERAL,
Defendants-Appellants,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CIVIL ACTION NO. 2:12-01533, HON. NEIL V. WAKE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: January 7, 2013

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 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.

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

[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.

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, U.S. CONST. art. I, §8, cl. 1, 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). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. Indeed, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981). This contract-law analogy is not an open-ended invitation to interpret Spending-Clause agreements *broadly,* but rather – consistent with the clear-notice rule – applies "only as a potential *limitation* on liability." *Sossamon v. Texas,* 131 S.Ct. 1651, 1661 (2011) (emphasis added). Moreover, under *Nat'l Fed'n of Indep. Business v. Sebelius,* 132 S.Ct. 2566, 2606-07 (2012), the federal government cannot qualitatively alter recipients' *existing* Spending-Clause obligations as part of expanding the program on a take-it-or-leave-it basis.

Against that background, and with the required notice, recipients *potentially* can face enforcement for violating the conditions of federal spending. *Gorman,*

536 U.S. at 187-89. But absent rights-creating statutory language, "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst,* 451 U.S. at 28. Private remedies must "be applied sparingly and only to statutes in which Congress 'speak[s] with a clear voice,' and 'unambiguously' creates a 'right[] secured by the laws of the United States.'" *Sanchez v. Johnson,* 416 F.3d 1051, 1056 (9th Cir. 2005) (*quoting Pennhurst,* 451 U.S. at 17, alterations in *Sanchez*).

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). The Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity or Congress has abrogated immunity under the Fourteenth Amendment. *Alden,* 527 U.S. at 712-16. The test for waiver is "a stringent one," and "consent … must be unequivocally expressed." *Sossamon,* 131

S.Ct. at 1658 (interior quotations and citations omitted). Moreover, the *ability* of administrative or executive officers to waive sovereign immunity is a question of state law, such that if they lack authority to waive immunity, their failure to raise the immunity as an affirmative *defense* early in the litigation does not preclude their later raising the defense, even for the first time on appeal. *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459, 468-69 (1945), *overruled in part on other grounds Lapides v. Bd. of Regents of Univ. System of Georgia,* 535 U.S. 613, 623 (2002).

Although "the Constitution does not provide for federal jurisdiction over suits against *non-consenting* States," *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000) (emphasis added), states may consent to federal jurisdiction or waive their immunity via various means, such that immunity is not "jurisdictional in the sense that it must be raised and decided by [courts] on [their] own motion." *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 515 (1982). For example, immunity poses no jurisdictional barrier where the state simply declines to raise it, *id.*, or voluntarily invokes federal-court jurisdiction (*e.g.*, by removing to, intervening in, or filing suit in federal court). *Lapides*, 535 U.S. at 619-20 (distinguishing between cases where "a State … *voluntarily* invoked [federal] jurisdiction" and ones with "a State that a private plaintiff had *involuntarily* made [a federal] defendant") (emphasis in original). But non-consenting states may raise

immunity at any time, even on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

Statutory Background

Established in 1965 and administered by the Department of Health & Human Services ("HHS"), 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 requirements.

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. When HHS denies approval for SPAs, states may seek reconsideration, which initiates an administrative process – with a formal hearing and opportunity for public participation – and the eventual opportunity for judicial review directly in the appropriate U.S. Court of Appeals. 42 U.S.C. §§1316(a)(3), 1396c.

Under its "free-choice" provision, Medicaid requires that "[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 … who undertakes to provide him such services, and (B) an enrollment of an individual eligible for medical assistance in [various programs] shall not restrict the choice of the *qualified* person from whom the individual may receive services under section 1396d(a)(4)(C) of this title." 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.

Arizona House Bill 2800, 2nd Regular Session, 50th Legislature (2012) ("HB 2800") adopted A.R.S. §35-196.05, which provides that neither Arizona nor its "political subdivision[s] may … enter into a contract with or make a grant to any person that performs nonfederally qualified abortions [*i.e.*, abortions ineligible for federal Medicaid reimbursement] or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services."

Factual Background

Planned Parenthood Arizona, Inc., one of its doctors, and three Doe patients (collectively, "PPAZ") filed suit against Arizona's Attorney General and the Director of the Arizona Health Care Cost Containment System (collectively, "Arizona") to enjoin HB 2800. PPAZ performs both elective abortions and other, non-abortion medical services. Even if PPAZ ceases to provide its non-abortion services to Medicaid patients, services will remain available in Arizona from

hundreds of other Medicaid providers who perform those non-abortion medical services. *See* Arizona Br. at 11-12. Eagle Forum adopts the facts as stated in Arizona's brief. *Id.* at 7-12.

STANDARD OF REVIEW

Although it reviews preliminary injunctions deferentially on factual and equitable issues, this Court reviews legal issues *de novo. Grocery Outlet Inc. v. Albertson's Inc.,* 497 F.3d 949, 950-51 (9th Cir. 2007). 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). Finally, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici. Turner v. Rogers,* 131 S.Ct. 2507, 2519-20 (2011); *accord id.* at 2521 (Thomas, J., dissenting). Even where Arizona has not yet made the arguments that supporting *amici* make, Arizona may do so in the subsequent merits proceedings and at any time, even on appeal, for jurisdictional and immunity issues.

SUMMARY OF ARGUMENT

Neither the United States nor third-party beneficiaries can enforce Medicaid without the conditions precedent to Medicaid enforcement, which undermines PPAZ's standing and ability to state a claim for relief (Sections I.A-C, II.A-B, IV.C). Third-party beneficiaries lack standing to enforce promisees' non-vested rights, such as enforcing Medicaid's provisions before the administrative prerequisites to enforcement (Section I.B-C). Moreover, because PPAZ cannot cite an ongoing violation of federal law and seeks relief directly against Arizona's treasury and public administration, *Ex parte Young* provides no exception to Arizona's sovereign immunity (Section I.D).

Medicaid neither provides a private cause of action nor creates individual rights that support causes of action under 42 U.S.C. §1983 (Section II.A). Similarly, because Medicaid gives Arizona every right to run its medical programs in non-compliance with Medicaid, PPAZ cannot assert the ongoing *violation* of federal law needed to bring a cause of action under *Ex parte Young* (Section II.B).

Because it operates within a field traditionally occupied by the states, Medicaid is subject to the presumption against preemption, which PPAZ cannot surmount because Medicaid does not "clearly and manifestly" prohibit what Arizona has done (Section III.A). Moreover, HHS guidance to the effect that statutes like HB 2800 violate §1396a(a)(23) warrants no deference because it is

non-final, conclusory, and inconsistent with Medicaid, especially when interpreted in light of both the Spending Clause and the presumption against preemption (Section III.B). On the merits, Medicaid's "free-choice" provision expressly allows state exclusion of non-qualified providers (Section IV.A), and Medicaid plainly allows states to adopt exclusion criteria such as HB 2800 (Section IV.B).

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER PPAZ'S CLAIMS

Under Medicaid's plain terms, HHS can terminate or curtail Arizona's funding – which are Medicaid's exclusive remedies – 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 PPAZ's seeking a specific-performance remedy that Medicaid lacks doom PPAZ's challenge. Either way, PPAZ cannot prevail. Moreover, because Medicaid allows Arizona to elect non-compliance – with the possible termination or curtailment of federal funding – whatever fault HHS could find in Arizona's implementation of Medicaid nonetheless could not support federal-court jurisdiction over Arizona's Eleventh-Amendment immunity.

A. HHS Lacks a Vested Right to Enforce Medicaid with Unmet Conditions Precedent

To "invoke[e] federal jurisdiction, [PPAZ] must establish the irreducible constitutional minimum of standing in addition to meeting the statutory standing

requirements." *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1172 (9th Cir. 2002). Here, the conditions precedent to federal enforcement have not occurred, which means that rights in enforcement have not yet vested and thus cannot support standing. *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 822-24 (9th Cir. 1985); *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1147 (9th Cir. 1987) (rights vest upon satisfaction of 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. When a statutory scheme defines obligations, the *entire* scheme defines that obligation. *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 59 (2007); *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, PPAZ cannot bring this action as an alleged beneficiary.

Under "traditional principles of contract interpretation," third-party beneficiaries cannot "cherry-pick" the specific provisions that they wish to enforce. *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 957 (9th Cir. 2008) (no cherry-picking on factual issues); *In re United Airlines, Inc.*, 368 F.3d 720, 725 (7th Cir. 2004) ("[d]ebtors in bankruptcy can't cherry-pick favorable features of a contract to be assumed");

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 favorable – interpretation of a statute"). 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); *Holbrook v. Pitt*, 643 F.2d 1261, 1273 n.24 (7th Cir. 1981) ("tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts"); *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"). Here, not even HHS could enforce Medicaid to compel Arizona to provide funding to PPAZ. *What agencies cannot do directly, plaintiffs cannot do indirectly as third-party-beneficiaries.*

B. PPAZ Lacks Standing to Enforce Arizona's Non-Vested Obligations

As explained in Section I.A, *supra*, and Section IV.C, *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, who "must be seeking to enforce a right that is personal to him and vested in him at the time of the suit," *Karo*, 762 F.2d at 822, without which "[h]e does not have standing to sue as a third party beneficiary because he

had no vested rights." *Karo*, at 824. Failure to meet conditions precedent can render third-party beneficiaries unable to state a claim for relief. *See, e.g., Karo*, 762 F.2d at 822-24; *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 540 & n.15 (5th Cir. 2004); *Peabody v. Weider Publications, Inc.*, 260 Fed.Appx. 380, 383 (2d Cir. 2008) ("[b]ecause the condition precedent never came to fruition, Peabody's rights … never vested") (non-precedential summary order).[2] Without the conditions precedent to Medicaid enforcement, PPAZ lacks a legally protected interest in that enforcement and thus lacks standing. Significantly, *plaintiffs* always bear the burden of proving jurisdiction in federal court, *Summers v. Earth Island Inst.*, 555 U.S. 488, 494-96 (2009), and the non-vested nature of PPAZ's claim goes to PPAZ's standing to enforce Medicaid.

This Circuit treats statutory standing as the "second part" of the standing inquiry, falling under failure to state a claim, not under subject-matter jurisdiction:

> If a plaintiff has shown sufficient injury to satisfy Article III, but has not been granted statutory standing, the suit must be dismissed under Federal Rule of Civil Procedure 12(b)(6), because the plaintiff cannot state a claim upon which relief can be granted.

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[2] Whatever federal agencies may say, the states plainly never signed up for private Medicaid enforcement, especially without the administrative conditions precedent to federal Medicaid enforcement. If the states did not agree to such enforcement, then that enforcement is not part of the agreement. *Price v. Pierce*, 823 F.2d 1114, 1122 (7th Cir. 1987) (courts construe third-party beneficiaries' rights by looking to intent of promisee and promisor).

Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008) (citing *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 n.7 (9th Cir. 2008)). As such, this Court could avoid statutory standing if PPAZ lacks constitutional standing, *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1073, 1075 (9th Cir. 2009), and vice versa. *Potter v. Hughes*, 546 F.3d 1051, 1055 (9th Cir. 2008) (including statutory standing as one of the "non-constitutional grounds on which we may dismiss a suit before considering the existence of federal subject matter jurisdiction"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999) (courts may address statutory standing before constitutional standing).

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 PPAZ] 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 precedents." *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. The Relevant Statutes Do Not Confer Protected Interests – *i.e.*, Standing – on PPAZ

Arizona and the United States have entered a contract that requires Arizona to meet certain Medicaid criteria or run the risk of termination or curtailment of federal Medicaid funding. That arrangement does not confer any protected interests on PPAZ. At most, consistent with Medicaid, a reviewing court conceivably could order HHS to reduce or eliminate the Medicaid funding that otherwise would go to Arizona. That creates two problems for standing. First, because it does not benefit PPAZ, 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 Arizona's Medicaid funding does absolutely nothing to redress PPAZ's injuries, which is an even more fundamental failure of PPAZ'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 PPAZ's Suit

Arizona may assert its immunity from suit both on appeal and as the district court case proceeds, which makes immunity relevant to PPAZ's likelihood of prevailing. *Ex parte Young* is a limited exception to sovereign immunity for prospective declaratory and injunctive relief (not money damages), and that exception has two limitations that deny PPAZ an avenue to sue Arizona.

First, *Ex parte Young* applies only to ongoing *violations* of federal law: "when there is no ongoing violation, the issuance of a declaratory judgment ... is barred." *Cardenas v. Anzai*, 311 F.3d 929, 936 (9th Cir. 2002); *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914, 918 n.4 (9th Cir. 2003). 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 Medicaid *allows* Arizona the option of electing to field a non-compliant Medicaid program, leaving to HHS the decision whether to curtail or eliminate Arizona's Medicaid funding. This is the nature of the Medicaid contract that Arizona and the United States entered. Arizona's alleged breach of that contract is simply not a "violation" of "federal law" that triggers the *Ex parte Young* exception to immunity.

Second, the relief requested here falls outside the limited *Ex parte Young* exception to sovereign immunity because "relief sought nominally against an officer is in fact against the sovereign" where "the decree would operate against the latter" by "expend[ing] itself on the public treasury or domain," "interfer[ing] with the public administration," or "restrain[ing] the Government from acting, or to compel[ling] it to act." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89,

101-02 & n.11 (1984) (interior quotations omitted). Thus, even if Arizona were presently "violating" §1396a(a)(23), the relief requested nonetheless would fall outside the *Ex parte Young* exception to sovereign immunity. The path that Arizona has chosen is simply not *ultra vires* the paths that Medicaid allows Arizona to take.

Although Arizona neither asserted sovereign immunity as an affirmative defense in its Answer nor argued it below, Arizona is free to do so at any time, even on appeal. *Edelman,* 415 U.S. at 678. By way of background, Arizona has waived its state-law, common-law sovereign immunity to suit in state court, *Stone v. Arizona Highway Commission,* 93 Ariz. 384, 387-93, 381 P.2d 107, 109-13 (1963), *overruled on other grounds by Grimm v. Ariz. Bd. of Pardons & Paroles,* 115 Ariz. 260, 564 P.2d 1227 (1977), *and abrogated in part by* A.R.S. §§12-820 to 12-823, but that does not waive Arizona's Eleventh Amendment sovereign immunity from suit in federal court, both because the two immunities are different and because consent to be sued in state court is not consent to be sued in federal court. *Ronwin v. Shapiro,* 657 F.2d 1071, 1073-74 (9th Cir. 1981) (*citing Kennecott Copper Corp. v. Tax Commission,* 327 U.S. 573, 577-80 (1946)).

As in *Ford Motor Company, supra,* the executive and administrative officers here lack authority to waive Arizona's immunity from suit:

> The question is whether the state is liable to respond in damages for the negligent acts of its agents, servants, or

> [employees]. As to this question it is well settled by the great weight of authority that the state, in consequence of its sovereignty, is immune from prosecution in the courts and from liability to respond in damages for negligence, except in those cases where it has expressly waived immunity or assumed liability by constitutional or legislative enactment.

State v. Sharp, 21 Ariz. 424, 426, 189 P. 631, 631 (1920), *overruled in part on other grounds in Stone*, 93 Ariz. at 387-93, 381 P.2d at 109-13. Because PPAZ has haled Arizona involuntarily into federal court, *Lapides*, 535 U.S. at 623, and the officer defendants and their counsel lack the authority to waive Arizona's immunity, *Sharp*, 21 Ariz. At 426, 189 P. at 631; *see, e.g., Magnolia Venture Capital Corp. v. Prudential Sec., Inc.*, 151 F.3d 439, 444 (5th Cir. 1998) (government attorney lacked authority to waive Louisiana's immunity),[3] Arizona retains the ability to assert its sovereign immunity at any time in this litigation.

[3] By contrast, other states allow attorneys to waive sovereign immunity, and the issue is one of state law. *Katz v. Regents of the University of California*, 229 F.3d 831, 834-35 (9th Cir. 2000) (California); *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975) (Iowa). General language in decisions rendered for such permissive-waiver states like California and Iowa is therefore inapposite to evaluating sovereign immunity in restrictive-waiver states like Arizona and Louisiana. *Compare Mills Music, Inc. v. State of Ariz.*, 591 F.2d 1278, 1282 (9th Cir. 1979) (Arizona can raise immunity for the first time on appeal) *with Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754, 762-63 (9th Cir. 1999) (California cannot raise immunity for the first time on appeal). To the extent that the *Blind Industries* panel discussed issues of Arizona law in its case or controversy over California's immunity, that discussion is *dicta*.

II. PPAZ LACKS A CAUSE OF ACTION TO ENFORCE THE RELEVANT STATUTES AGAINST ARIZONA

At the outset, it is both clear and undisputed that Medicaid itself does not provide a private right of action for recipients to enforce Medicaid's perceived requirements. *Wilder*, 496 U.S. at 521. To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman*, 536 U.S. at 186. Medicaid says nothing about private causes of action:

> 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)). Instead, PPAZ proposes to "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:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference.

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, PPAZ lacks the federal right needed to sue under §1983 and lacks an ongoing violation of federal law needed to sue under *Ex parte Young*, which does not cover this action in any event.

A. PPAZ Cannot Sue 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). To meet this test, §1983 plaintiffs must establish an enforceable federal right under a three-part test: (1) Congress must have intended the provision in question to benefit the plaintiff; (2) the alleged right is not so "vague and amorphous" that enforcing it would "strain judicial competence;" and (3) the rights-creating provision is stated in mandatory, rather than precatory, terms. *Blessing*, 520 U.S. at 340-41. PPAZ as an entity cannot establish any of these three prerequisites to enforcing Medicaid under §1983, and the PPAZ plaintiff group

cannot establish them either.

First, Congress could not have intended §1396a(a)(23) to benefit PPAZ as an entity because – unlike the Doe plaintiffs – PPAZ is not a Medicaid beneficiary and Medicaid allows Arizona to adopt a Medicaid non-compliant program, hampered only by the potential to lose some or even all Medicaid funding. 42 U.S.C. §1396c. Indeed, §1396a(a) itself regulates *states* on the content of their Medicaid plans, not on the services (or rights) that third-party beneficiaries must receive: "Statutes that focus on the person regulated rather than the individuals protected create '*no implication* of an intent to confer rights on a particular class of persons.'" *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (*quoting California v. Sierra Club*, 451 U.S. 287, 294 (1981)) (emphasis added); *accord Gonzaga*, 536 U.S. at 286 (applying the *Sandoval* reasoning to §1983 actions).

Although *Wilder*, 496 U.S. at 522-23, held that Medicaid's Boren Amendment constituted rights-creating language that enabled the plaintiff there to avoid Medicaid's enforcement remedies, *Gonzaga* – consistent with *Sandoval* – narrowed *Wilder* by mooring it to its facts, including that the "statutory provisions explicitly conferred specific monetary entitlements upon the plaintiffs." *Gonzaga*, 536 U.S. at 274. Here, by contrast, the statute addresses what SPAs must contain, and (by allowing Arizona to accept curtailed funding if HHS rejects a SPA) does not go beyond either the SPA or the HHS-Arizona funding arrangement. The

statute neither focuses on the individuals ostensibly protected (*i.e.*, Medicaid patients) nor explicitly entitles PPAZ to *anything*, monetary or otherwise. *See Sanchez*, 416 F.3d at 1056 (analyzing entitlement to relief separately for recipients and providers). Under *Sandoval* and *Gonzaga*, such group-based *benefits* and *systemic* requirements do not create *rights*. Similarly, *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 786-88 (1980), distinguished between direct Medicaid benefits like financial assistance and indirect benefits like freedom of choice, finding that the Due Process Clause protected only direct benefits. Given those differences with *Wilder* (*i.e.*, §1396a(a)(23)'s not explicitly conferring benefits on PPAZ and its conferring only indirect benefits on Medicaid patients), nothing authorizes §1983's circumventing Medicaid's exclusive review procedures and remedies. *Rancho Palos Verdes*, 544 U.S. at 122-23; *Sanchez*, 416 F.3d at 1062.

Second, the only Medicaid remedies that Arizona agreed to under the Spending Clause and the relevant statutes are fund termination and fund curtailment, and even then only *after* an administrative process. 42 U.S.C. §1396c. Under the circumstances, it would indeed "strain judicial competence" either to interfere in or to circumvent that administrative process before HHS acts. *See also* Arizona Br. at 16-22 (arguing that §1396a(a)(23)'s standards are too vague to apply judicially). In addition to the second *Blessing* criterion, this Court also could

rely on the doctrines of non-justiciable political questions or the primary jurisdiction of a federal agency to reject PPAZ's claims.

Third, and notwithstanding that §1396a(a) uses the word "must," §1396a(a)(23) is not mandatory in the way that the *Blessing* test uses the term. The answer to Medicaid's critical "*or what?*" question is not sufficiently concrete for §1396a(a) to qualify as mandatory for purposes of creating a federal right. Assuming *arguendo* that HB 2800 conflicts with §1396a(a)(23), Arizona's Medicaid plan would be noncompliant, and HHS could terminate or curtail Arizona's Medicaid funding. 42 U.S.C. §1396c. Because not even the United States could compel Arizona to comply with §1396a(a)(23), that provision cannot be considered "mandatory" for purposes of creating an individual right to specific performance of that provision. Neither the United States as promisee nor any plaintiff as third-party beneficiary can obtain that relief.

B. PPAZ Cannot Sue under *Ex parte Young*

As signaled in the prior paragraph and as indicated in Section I.D, *supra*, PPAZ – and the federal courts – lack an ongoing violation of federal law sufficient to trigger the *Ex parte Young* exception to sovereign immunity. Indeed, HB 2800 is not inconsistent with federal law (*i.e.*, Arizona's actual *obligations* under Medicaid). Instead, HB 2800 represents an entirely permissible exercise of Arizona's sovereignty, regardless of whether HHS elects to eliminate or curtail

Arizona's Medicaid funding. For that reason, moreover, the relief that PPAZ seeks falls outside the *Ex parte Young* exception to sovereign immunity. *Pennhurst*, 465 U.S. 89, 101-02 & n.11 (quoted *supra*). Accordingly, PPAZ cannot surmount Arizona's sovereign immunity in this litigation.

III. THE RULES OF STATUTORY CONSTRUCTION FAVOR ARIZONA'S INTERPRETATION OF MEDICAID

Assuming *arguendo* that federal courts have jurisdiction over PPAZ's claims and that PPAZ has a cause of action against Arizona on PPAZ's preemption theories, this Court must address two canons of statutory interpretation before it addresses the merits. Both canons favor Arizona and therefore counsel for reversal.

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 Arizona law without a "clear and manifest" intent to do so. Here, "clear and manifest" evidence of preemptive intent is lacking, and PPAZ cannot overcome the presumption against preemption.

Second, HHS's conclusory §1396a(a)(23) guidance, on which the district court relied, is not entitled to *any* deference under *Chevron* or *Skidmore*.[4] With

[4] Under the former, 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*

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

A. 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*, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). Because the public health field here is one traditionally occupied by state government, the

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U.S.A., Inc. v. N.R.D.C., 467 U.S. 837, 842-44, 865-66 (1984). Under the latter, 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).

presumption applies. In essence, PPAZ must establish that no plausible reading of Medicaid supports Arizona.

B. This Court Owes No Deference to HHS Guidance that Fails to Consider Controlling Legal Issues

The district court improperly deferred to the HHS guidance that statutes like HB 2800 violate §1396a(a). At the outset, of course, 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). Moreover, the citation-free and conclusory HHS missives do not address the presumption against preemption, sovereign immunity, or the Supreme Court's Spending-Clause jurisprudence, all of which cut against PPAZ here. Thus, whether the HHS action would qualify for *Chevron* deference or only the lesser *Skidmore* deference is entirely beside the point. With *Chevron*, this Court can decide the issue using traditional tools of statutory construction, which obviates deference to agency constructions altogether. With *Skidmore*, the agency's views lack the power to persuade for the same reason.

Further, the implementing regulation simply restates §1396a(a)(23), *see* 42 C.F.R. §431.51, which does not provide a basis for independent deference. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("near equivalence of the statute and regulation belies the Government's argument for *Auer* deference"). And as to interpreting §1396a(a)(23) itself, HHS is not entitled to *Chevron* deference. *Price*

v. Stevedoring Services of America, Inc., 697 F.3d 820, 831-32 (9th Cir. 2012). Finally, any latter-day HHS conclusion to the contrary – without notice and the opportunity for comment – would be entitled to *no* deference. *Wyeth v. Levine*, 555 U.S. 555, 576-81 (2009).[5]

Agencies axiomatically lack authority not expressly delegated to them, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and judicial deference applies only to actions within agencies' delegations. *Chevron*, 467 U.S. at 865. 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, as well as the presumption against preemption and the Spending Clause's clear-notice requirements, the law here is clear, without the need for an administrative gloss. Medicaid shows no clear and manifest congressional intent to preempt Arizona's approach. For all of the foregoing reasons, HHS warrants no deference here.

IV. PPAZ CANNOT PREVAIL ON THE MERITS

Assuming *arguendo* that federal courts have jurisdiction over PPAZ's claims

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[5] 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.*

and that PPAZ has a cause of action against Arizona on PPAZ's preemption theories, PPAZ can prevail on its Medicaid-based claims only if HB 2800 violates Medicaid's free-choice provision *and* if Arizona lacks authority to exclude providers like PPAZ on the basis of state-law criteria not included in Medicaid. Because HB 2800 does not violate the free-choice provision and Arizona may exclude PPAZ on the basis of state laws like HB 2800, PPAZ cannot prevail on the merits of its Medicaid claims.

A. HB 2800 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 IV.B, *infra* (*discussing* 42 U.S.C. §1396a(p)(1)). Thus, provided that HB 2800 lawfully disqualifies PPAZ, HB 2800 does not conflict with §1396a(a)(23) by that section's express terms.

B. HB 2800 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 ("[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 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, Arizona 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 PPAZ to prevail. First, courts must construe Spending-Clause agreements to provide clear notice before finding recipients like Arizona to have violated them. Second, Medicaid regulates in the field of public health – a field traditionally occupied by the states – and PPAZ cannot overcome the presumption against preemption, which requires only a

plausible non-preemptive interpretation to support HB 2800. By preserving state authority to regulate alongside the federal act, clauses like §1396a(p)(1) undermine preemption claims like PPAZ's by negating congressional intent to preempt, making it virtually impossible for plaintiffs like PPAZ 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). As such, §1396a(p)(1) makes PPAZ's preemption claims untenable.

C. PPAZ 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. Failure to meet conditions precedent can render third-party beneficiaries unable to state a claim for relief. *See, e.g., Shaw Constructors,* 395 F.3d AT 540 & n.15; *Kane Enterprises v. MacGregor (USA) Inc.,* 322 F.3d 371, 375 (5th Cir. 2003). Alternatively, PPAZ 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, PPAZ cannot prevail on its Medicaid claims. This lack of a vested, enforceable interest is a jurisdictional defect, but even if it were not, it nonetheless still would preclude PPAZ's stating a claim on which relief could be granted.

CONCLUSION

This Court should vacate the preliminary injunction and remand with instructions to dismiss this action.

Dated: January 7, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,998 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 7, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file – 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, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

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