No. 12-17558

IN THE 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 the United States District Court
for the District of Arizona, No. 2:12-cv-01533 (Hon. Neil V. Wake)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

The United States respectfully submits this amicus brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. We are submitting this brief because the Arizona statute at issue on this appeal violates the Medicaid statute, which is administered by the United States Department of Health and Human Services ("HHS").

This appeal presents the same issues that the United States addressed as amicus in *Planned Parenthood of Indiana v. Commissioner of the Indiana State Department of Health*, 699 F.3d 962 (7th Cir. 2012). That suit challenged an Indiana law that excludes providers that perform abortions from the Indiana Medicaid program. The effect of that exclusion is to prevent Medicaid beneficiaries from obtaining services that are unrelated to abortion (such as gynecological examinations, cancer screening, and contraception) from those providers. The Seventh Circuit upheld a preliminary injunction that blocks enforcement of the Indiana law with respect to the plaintiffs in that case. The Seventh Circuit concluded that the state law violates the Medicaid statute's free choice of providers requirement, 42 U.S.C. § 1396a(a)(23), which gives Medicaid recipients "the right to choose among a range of qualified providers, without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980) (emphasis omitted). The court also held that Medicaid beneficiaries

may enforce this free choice of providers requirement in an action brought pursuant to 42 U.S.C. § 1983.

This case is a challenge to an Arizona law that excludes providers that perform abortions from the Arizona Medicaid program. The district court issued a preliminary injunction that blocks enforcement of the Arizona law with respect to the plaintiffs in this case. The decision was issued shortly before the Seventh Circuit decision in the *Planned Parenthood of Indiana* case, and it anticipated the Seventh Circuit's reasoning. The district court concluded that the Arizona law violates the Medicaid statute's free choice of providers requirement, and that Medicaid beneficiaries may enforce this requirement in a § 1983 action.

On appeal, Arizona urges this Court to reverse the preliminary injunction and to reject the Seventh Circuit's reasoning in the *Planned Parenthood of Indiana* decision. This Court should decline the State's invitation to create a conflict with the Seventh Circuit decision, which is well reasoned and correct.

STATEMENT

A. Statutory Background

The Medicaid program, which was enacted in 1965 as Title XIX of the Social Security Act, "is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S.

498, 502 (1990). "The Federal Government shares the costs of Medicaid with States that elect to participate in the program." *Atkins v. Rivera*, 477 U.S. 154, 156-157 (1986). "In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services." *Id*. at 157.

To be eligible for federal funds, a State must submit a plan to the Secretary of Health and Human Services that demonstrates compliance with the Medicaid statute's requirements. *See* 42 U.S.C. § 1396a. If the Secretary approves the state plan, the federal government reimburses the State for a percentage of qualified Medicaid expenses. The federal contribution rate varies depending on a State's per capita income, but federal funds pay at least 50% of the cost of providing medical assistance to Medicaid beneficiaries. *See id*. § 1396d(b). In Arizona, for example, the percentage of medical assistance that is paid with federal funds is currently 65.68%. *See* 76 Fed. Reg. 74061, 74062 (Nov. 30, 2011). The federal contribution rate may be even higher for particular services. For family planning services (such as contraception and associated gynecological examinations provided to women of child-bearing years), the federal government pays 90% of the cost of the services, whereas a State pays only 10% of the cost. *See* 42 U.S.C. § 1396b(a)(5).

Although state participation in the Medicaid program is voluntary, "once a State elects to join the program, it must administer a state plan that meets federal requirements." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433 (2004). The statutory requirement at issue in this case is the "free choice of providers" requirement, 42 U.S.C. § 1396a(a)(23), which has two parts. Under subparagraph (A), "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services." *Id*. § 1396a(a)(23)(A). Longstanding HHS regulations that implement this requirement provide that a Medicaid beneficiary "may obtain Medicaid services from any institution, agency, pharmacy, person, or organization that is . . . (i) qualified to furnish the services; and (ii) willing to furnish them to that particular beneficiary." 42 C.F.R. § 431.51(b)(1) (capitalization omitted). At the same time, the HHS regulations allow States to set "reasonable standards relating to the qualifications of providers." *Id*. § 431.51(c)(2).

Subparagraph B of the free choice of providers requirement establishes additional protections for recipients of family planning services (which, as noted above, are reimbursed at an enhanced federal rate). Even in the context of managed care, where a State otherwise may place certain limits on a Medicaid beneficiary's free choice of providers, a State may not limit a beneficiary's free

choice of providers of family planning services. Subparagraph B provides that "an enrollment of an individual eligible for medical assistance in a primary care case-management system . . . a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive" family planning services. 42 U.S.C. § 1396a(a)(23)(B) (cross-referencing § 1396d(a)(4)(C)). A related statutory provision authorizes the Secretary to waive the free choice of providers requirement in order to allow a State to establish a managed care delivery system, but that provision states that "[n]o waiver under this subsection may restrict the choice of the individual" in receiving family planning services. *Id*. § 1396n(b) (cross-referencing § 1396d(a)(4)(C)). A State also may establish a managed care delivery system pursuant to 42 U.S.C. § 1396u-2, which contains an exception to the general requirement of subparagraph (A) of the free choice of providers provision, but which contains no exception to the free choice of family planning providers requirement under subparagraph (B).[1]

B. Factual Background and District Court Proceedings

1. Arizona participates in Medicaid through an approved state plan and a demonstration project that together authorize the Arizona Health Care Cost

[1] As discussed below, Arizona did not use either of these two statutory options to establish a managed care delivery system, but instead obtained authority to do so through a demonstration project authorized by the Secretary pursuant to 42 U.S.C. § 1315.

Containment System, which provides medical assistance to eligible individuals through a managed care system. The Secretary's demonstration project authority allows HHS to reimburse the State for providing medical assistance to individuals not otherwise eligible for Medicaid, and to waive compliance with certain requirements that ordinarily would govern the program. *See* 42 U.S.C. § 1315(a)(1), (a)(2)(A). Under Arizona's approved demonstration project, all Medicaid requirements expressed in law, regulation, and policy statement not expressly waived or identified as not applicable, apply to the demonstration project. *See* CMS Waiver List 1.[2]

In order to allow Arizona to use a managed care system, the Secretary, acting through the Centers for Medicare & Medicaid Services ("CMS"), waived subparagraph (A) of the free choice of providers requirement "[t]o the extent necessary to enable the State to restrict freedom of choice of providers through mandatory enrollment of eligible individuals in managed care organizations and/or Prepaid Inpatient Health Plans." CMS Waiver List 3.[3] The Secretary did not waive the requirement in subparagraph (B) that Medicaid recipients be afforded their free choice of family planning provider.

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[2] Available at http://www.azahcccs.gov/reporting/Downloads/1115waiver/1115WaiverApprovalPkg.pdf.

[3] Available at http://www.azahcccs.gov/reporting/Downloads/1115waiver/1115WaiverApprovalPkg.pdf.

2. On May 4, 2012, Arizona Governor Jan Brewer signed into law a statute that prohibits any person or entity that performs abortions from participating in the Medicaid program. *See* ER 3.[4] Federal law prohibits the use of Medicaid funding for abortions except where the pregnancy results from rape or incest or the life of the pregnant woman is at stake. *See Harris v. McRae*, 448 U.S. 297, 302 (1980) (discussing the Hyde Amendment). The effect of the new Arizona statute is thus to prevent Medicaid recipients from obtaining services that are unrelated to abortion—including gynecological examinations, cervical pap smears, breast exams, testing and treatment for sexually transmitted diseases, HPV immunizations, and contraceptive pills and supplies—from providers that perform abortions. *See* Supplemental Excerpts of Record ("SER") 2 ¶ 3 (describing the services that Planned Parenthood Arizona provides in 13 health centers throughout the State).

3. Plaintiffs in this lawsuit are Planned Parenthood Arizona, one of its employees, and three Medicaid beneficiaries who receive health services from Planned Parenthood Arizona. Plaintiffs allege that the exclusion of providers imposed by the new Arizona statute violates the Medicaid statute's free choice of providers requirement. Plaintiffs moved for a preliminary injunction, and the

[4] The Arizona statute has a limited exception for abortions performed where the pregnancy is the result of rape or incest or the life of the pregnant woman is at stake. *See* ER 3.

United States filed a Statement of Interest in support of the motion for a preliminary injunction. *See* R.51.

The district court issued a preliminary injunction. *See* ER 29-30. The court held that the free choice of providers requirement is subject to private enforcement in an action brought under 42 U.S.C. § 1983, *see* ER 7-12; that plaintiffs are likely to succeed on the merits of their claim, *see* ER 13-22; and that the balance of harms and public interest warrant injunctive relief. *See* ER 22-25.[5]

ARGUMENT

I. The Arizona Statute Violates the Medicaid Statute's Free Choice of Providers Requirement.

Arizona's new statute excludes providers that perform abortions from the Medicaid program for reasons that bear no relation to the providers' qualifications to render services. The exclusion violates the Medicaid statute's free choice of providers requirement. *See Planned Parenthood of Indiana v. Commissioner of the Indiana State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012) (upholding a preliminary injunction that blocks enforcement of an analogous Indiana law).

[5] On February 8, 2013, the district court granted plaintiffs' motion for summary judgment. *See* R.103. The order directed the parties to submit proposed forms of permanent injunction by February 14, 2013.

A. States Do Not Have Unfettered Discretion To Exclude Providers from the Medicaid Program.

1. Under the free choice of providers requirement, a state plan must provide that "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required, . . . who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23). "The same 'free choice of providers' is also guaranteed by" longstanding HHS regulations, *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 779 n.8 (1980), which require that a state plan ensure that a Medicaid recipient "may obtain Medicaid services from any institution, agency, pharmacy, or organization that is . . . (i) qualified to furnish the services; and (ii) willing to furnish them to that particular beneficiary." 42 C.F.R. § 431.51(b)(1) (capitalization omitted). The same HHS regulations allow States to set "reasonable standards relating to the qualifications of providers." *Id.* § 431.51(c)(2).

It is common ground that § 1396a(a)(23) does not give Medicaid recipients the right to obtain services from providers that are not "qualified to perform the service or services required." The Supreme Court explained, in discussing a nursing home that was decertified for failure to meet federal standards, that § 1396a(a)(23) "gives recipients the right to choose among a range of *qualified* providers, without government interference." *O'Bannon*, 447 U.S. at 785 (emphasis in original). The Court stated that, "[b]y implication, it also confers an

absolute right to be free from government interference with the choice to remain in a home that continues to be qualified." *Ibid*. The provision does not, however, "confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." *Ibid*.; *see also Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (observing that "the aim" of § 1396a(a)(23) "is to give the recipient a choice among available facilities, not to require the creation or authorization of new facilities") (citing *O'Bannon*, 447 U.S. at 785-86; *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991); *Catanzano v. Wing*, 103 F.3d 223, 231 (2d Cir. 1996)).

2. Arizona does not contend that its new statute excludes providers from the Medicaid program on the ground that they are "unqualified" in any conventional sense. Instead, Arizona contends that any providers that a State chooses to exclude must be deemed to be not "qualified to perform the service or services required" within the meaning of federal law. 42 U.S.C. § 1396a(a)(23). *See* State's Br. 21 (asserting that a State has an "inherent reserved right to set provider qualifications, i.e., to write the list of eligible providers from whom patients may exercise their right to choose"). Arizona thus "claims plenary authority to exclude Medicaid providers for *any* reason, as long as it furthers a legitimate state interest—here, the

State's interest in avoiding indirect subsidization of abortion." *Planned Parenthood of Indiana*, 699 F.3d at 978 (emphasis in original).

The Seventh Circuit rejected the identical argument when it was urged by Indiana. The court explained that "[t]his sweeping claim conflicts with the unambiguous language of § 1396a(a)(23) and finds no support in related Medicaid statutes and regulations." *Ibid*. The State's assertion of "carte blanche" authority "to expel otherwise competent Medicaid providers" from the Medicaid program, *Planned Parenthood of Indiana v. Commissioner of the Indiana State Dep't of Health*, 794 F. Supp. 2d 892, 908 (S.D. Ill. 2011), would render illusory the "absolute right" that § 1396a(a)(23) affords Medicaid beneficiaries to choose among qualified providers without government interference. *O'Bannon*, 447 U.S. at 785. "If the states are free to set any qualifications they want—no matter how unrelated to the provider's fitness to treat Medicaid patients—then the free-choice-of-provider requirement could be easily undermined by simply labeling any exclusionary rule as a 'qualification.'" *Planned Parenthood of Indiana*, 699 F.3d at 978.

From the broad mandate to protect a beneficiary's freedom to choose her provider, Congress delineated certain narrow exceptions, which Arizona's position would render superfluous. For example, § 1396a(a)(23) states that "nothing in this paragraph shall be construed as requiring a State to provide medical assistance for

such services furnished by a person or entity convicted of a felony under Federal or State law for an offense which the State agency determines is inconsistent with the best interests of beneficiaries under the State plan." If, as Arizona asserts, a State had unfettered authority to exclude providers from Medicaid, Congress would not have specified that a State may exclude a provider convicted of a felony for an offense that is inconsistent with the best interests of Medicaid beneficiaries. Likewise, if Arizona's position were correct, Congress would not have provided that a State may—if the Secretary allows it—limit beneficiary choice to providers that meet certain "reimbursement, quality, and utilization standards," as long as those standards "are consistent with access, quality, and efficient and economic provision of covered care and services" and "such restriction does not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing those services." 42 U.S.C. § 1396n(b)(4). The specific statutory exceptions to the free choice of providers requirement confirm that a State does not have unfettered discretion to expel providers from the Medicaid program.

The regulations that implement § 1396a(a)(23) similarly recognize, consistent with *O'Bannon*, that a State may set only "reasonable standards" relating to the qualifications of providers. 42 C.F.R. § 431.51(c)(2). On Arizona's theory, by contrast, a State could exclude providers regardless of whether the

exclusion bears a "reasonable" relationship to their ability to perform the services or furthers any other objective of the Medicaid program, such as its financial integrity. *See Planned Parenthood of Indiana*, 699 F.3d at 978.

Arizona's position is particularly untenable with respect to providers of family planning services such as Planned Parenthood Arizona, because Congress singled out recipients of family planning services for additional protection in the free choice of providers requirement. Under § 1396a(a)(23)(B), a Medicaid recipient's enrollment in a managed care program "shall not restrict the choice of the qualified person from whom the individual may receive services under section 1396d(a)(4)(C)," *i.e.*, "family planning services." Thus, even in the managed care setting, where a State may place certain limits on a Medicaid beneficiary's free choice of providers, a beneficiary is free to choose her provider of family planning services. Arizona's contention that the free choice of providers requirement is satisfied because the patients of Planned Parenthood Arizona can obtain family planning services from *other* providers (State's Br. 38) "inverts what the statute says." *Planned Parenthood of Indiana*, 699 F.3d at 979. "Section 1396a(a)(23) does not simply bar the states from ending *all* choice of providers, it guarantees to every Medicaid beneficiary the right to choose *any* qualified provider." *Ibid*. (emphases in original).

3. Arizona claims that a 1987 amendment to the Medicaid statute gave States carte blanche authority to exclude providers from the Medicaid program. But that provision, 42 U.S.C. § 1396a(p)(1), provides no support for the State's position. Section 1396a(p)(1) states: "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 [Medicare] under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title." The referenced sections address the Secretary's authority to exclude providers for reasons such as criminal offenses related to the delivery of services or abuse or neglect of patients (42 U.S.C. § 1320a-7); submission of false claims or acceptance of kickbacks (*id*. § 1320a-7a); or failure to comply with regulations or corrective action requirements (*id*. § 1395cc(b)(2)). A State's authority to exclude providers for the reasons listed in § 1396a(p)(1) is not at issue here.

There is no doubt that § 1396a(p)(1) "contemplates that states have the authority to suspend or to exclude providers from state health care programs for reasons other than those upon which the Secretary of HHS has authority to act." *Guzman v. Shewry*, 552 F.3d 941, 949 (9th Cir. 2009). Accordingly, the 1987 Senate Report explained that § 1396a(p)(1), "by expressly granting States the authority to exclude individuals or entities from participation in their Medicaid

programs for any of the reasons that constitute a basis for an exclusion from Medicare under sections 1128, 1128A, or 1866(b)(2) of the Social Security Act," was "not intended to preclude a State from establishing, under State law, any other bases for excluding individuals or entities from its Medicaid program." S. Rep. No. 100-109, at 20 (1987).

As this legislative history indicates, the introductory phrase of § 1396a(p)(1) was not a grant of new authority. Rather, it was a savings clause clarifying that, in expressly making available to States the exclusion remedies available to the Secretary to address programmatic fraud and abuse, Congress did not intend to preclude States from implementing other exclusion authorities of the same type under State or other federal laws. Thus, the authority of a State to set reasonable qualifications for providers was left unaltered by § 1396a(p)(1). But nothing in § 1396a(p)(1) suggests that this authority was expanded to give a State the *unfettered* authority to exclude providers from the Medicaid program. *See Planned Parenthood of Indiana*, 699 F.3d at 979. To the contrary, the 1987 amendments to the Social Security Act were generally designed to "protect beneficiaries under the health care programs of [the Social Security Act] from unfit health care practitioners, and otherwise to improve the antifraud provisions relating to those programs[.]" S. Rep. No. 100-109, at 1 (1987). Section 1396a(p)(1) addressed that goal by allowing States to exclude providers for reasons that constitute a basis

for exclusion from Medicare. Arizona's position would render that specific grant of authority superfluous. If, as Arizona asserts, States had unconstrained discretion to exclude providers from Medicaid for whatever reasons they saw fit, Congress would have had no reason to enact § 1396a(p)(1) in the first place.[6]

The cases that Arizona cites provide no support for its position. "In *First Medical Health Plan, Inc. v. Vega–Ramos*, 479 F.3d 46 (1st Cir.2007), for instance, the First Circuit simply recognized the point we have just made—that states may exclude providers from participating in Medicaid for reasons not listed in § 1396a(p)(1)." *Planned Parenthood of Indiana*, 699 F.3d at 979. "*Vega–Ramos*, moreover, involved a conflict-of-interest rule applicable only in Puerto Rico; the First Circuit had no reason to consider the effect of the free-choice-of-provider requirement, which does not apply to Puerto Rico's Medicaid program." *Ibid*. (citing 42 U.S.C. § 1396a(a)(23)(B)).

"Nor does *Guzman v. Shewry*, 552 F.3d 941 (9th Cir.2009), help [the State's] case." *Id*. at 980. "There, a provider was suspended from California's Medicaid program based on a pending criminal investigation." *Ibid*. "He claimed

[6] The 1987 amendments that enacted § 1396a(p)(1) expanded the grounds upon which the Secretary is authorized or required to exclude providers. *See* Remarks of Senator Glenn, 133 Cong. Rec. S10529-02, 1987 WL 946700 (July 23, 1987). It was eminently sensible for Congress, in enacting § 1396a(p)(1), to make plain that States share authority coextensive with the Secretary's for the specified new grounds for exclusion.

that federal law occupies the entire field of regulation pertaining to Medicaid and therefore preempted the state's disciplinary measure." *Ibid*. This Court "rejected this argument, relying in part on 42 U.S.C. § 1320a–7(b)(5), which provides that the states may suspend or exclude providers from participating in Medicaid 'for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.'" *Ibid*. This Court noted that "this provision presupposes state regulatory authority over provider qualifications." *Ibid*. (citing *Guzman*, 552 F.3d at 949).

"No one disputes that the states retain considerable authority to establish licensing standards and other related practice qualifications for providers," a power that is "expressly recognized in the Medicaid regulations." *Ibid*. (citing 42 C.F.R. § 431.51(c)(2)). "This case raises a question about the limits of that authority." *Ibid*. (emphasis omitted). "*Guzman*, which involved state action falling within the core of the state's residual authority, does not support [the State's] argument" here. *Ibid*.[7]

[7] Other decisions cited by Arizona concerned the exclusion from Medicaid of physicians involved in malpractice or providers under criminal investigation. *See Triant v. Perales*, 491 N.Y.S.2d 486, 488 (N.Y. App. Div. 1985) (physician was barred from the Medicaid program in light of "monumental deficiencies" in record-keeping that left him unable to recall the reason for prescribing medication, ordering tests, or referring Medicaid patients to specialists); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 579 (2d Cir. 1989) (provider was indicted for a felony offense that the State determined related to the furnishing or billing for

Continued on next page.

B. The CMS Administrator's Interpretation of the Free Choice of Providers Requirement Is Entitled to Deference.

For the reasons discussed above, the Medicaid statute unambiguously forecloses the State's position, and there is thus no need for the Court to address the State's contention that the CMS Administrator's interpretation of the free choice of providers requirement is not entitled to deference. *See* State's Br. 38 n.15; *Planned Parenthood of Indiana*, 699 F.3d at 980 ("*Chevron* deference is triggered only when a statute is ambiguous"). If the Court addresses the issue, deference to the CMS Administrator's position is plainly appropriate.

Before the Arizona law was enacted, the CMS Administrator reviewed and rejected a proposed amendment to Indiana's state plan that would have included a restriction very similar to the Arizona Act. *See* R.51-3, Exhibit B (letter disapproving the proposed Indiana state plan amendment). The CMS Administrator disapproved the proposed state plan amendment because the proposed restriction would not have complied with the Medicaid statute's free choice of providers requirement. *See ibid*. The determination letter explained that "Medicaid programs may not exclude qualified health care providers from

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medical care, services or supplies). Arizona also cites *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), but, in rejecting a due process challenge to a county's decision to terminate a provider's Medicaid contract, the Second Circuit stressed that the termination did "not bear on Kelly Kare's status as a qualified provider." *Id*. at 176.

providing services that are funded under the program because of a provider's scope of practice." *Ibid*. The letter further noted that "[s]uch a restriction would have a particular effect on beneficiaries' ability to access family planning providers, who are subject to additional protections under" § 1396a(a)(23)(B). *Ibid*. CMS subsequently issued an informational bulletin that reminded all States that they are "not . . . permitted to exclude providers from the program solely on the basis of the range of medical services they provide," and that "Medicaid programs may not exclude qualified health care providers . . . from providing services under the program because they separately provide abortion services . . . ." R.51-3, Exhibit C (June 1, 2011 informational bulletin).[8]

This Court recently reaffirmed that the determinations that CMS makes in approving or disapproving a state plan amendment are entitled to *Chevron* deference. *See Managed Pharmacy Care v. Sebelius*, __ F.3d __, 2012 WL 6204214, *7-10 (9th Cir. Dec. 13, 2012), *petition for rehearing en banc pending*. Following the D.C. Circuit's reasoning, this Court emphasized that such determinations are based upon an express delegation of authority by Congress:

> "This is not a case of implicit delegation of authority through the grant of general implementation authority. In the case of the Medicaid payment

[8] Indiana sought reconsideration of the CMS Administrator's decision and, after a hearing, the CMS presiding officer issued a detailed proposed decision that concluded that Indiana's proposed plan amendment would violate the Medicaid statute's free choice of providers requirement. *See* SER 40.

> statute, the Congress expressly conferred on the Secretary authority to review and approve state Medicaid plans as a condition to disbursing federal Medicaid payments.... In carrying out this duty, the Secretary is charged with ensuring that each state plan complies with a vast network of specific statutory requirements.... Through this 'express delegation of specific interpretive authority,' [citation], the Congress manifested its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law."

Id. at *10 (quoting *Pharmaceutical Research & Mfrs. of America v. Thompson*, 362 F.3d 817, 821-822 (D.C. Cir. 2004)) (emphasis omitted); *see also Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 939 (9th Cir. 2005). The Sixth Circuit also has followed the D.C. Circuit's reasoning, *see Harris v. Olszewski*, 442 F.3d 456, 467-68 (6th Cir. 2006), and other courts of appeals likewise have held that CMS's denial or approval of a proposed state plan amendment is entitled to *Chevron* deference. *See ibid*. (citing *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 (5th Cir. 2004); *Georgia, Department of Medical Assistance ex rel. Toal v. Shalala*, 8 F.3d 1565, 1572-73 (11th Cir. 1993)).

Arizona cites no contrary authority. Nor does the State advance its position by invoking the clear statement principle of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). *See* State's Br. 30-32. It is well settled that "Congress need not spell out every condition with flawless precision for a provision to be enforceable." *West Virginia Dep't of Health & Human Services v. Sebelius*, 649 F.3d 217, 223 (4th Cir. 2011). In *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), for example, the Supreme Court concluded that

"*Pennhurst* does not suggest that the Federal Government may recover misused federal funds only if every improper expenditure has been specifically identified and proscribed in advance." *Id*. at 666. "Given the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements" of the statute. *Id*. at 669. "Moreover, the fact that [the spending program] was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements." *Ibid*. Here, Arizona chose to enact its new law even though the CMS Administrator already had disapproved a materially indistinguishable proposed Indiana restriction on the ground that it would violate the free choice of providers requirement, and even though CMS had issued a bulletin that specifically reminded States that exclusions of this sort are contrary to federal law.

II. The Free Choice of Providers Requirement Confers Individual Rights That Medicaid Beneficiaries May Enforce in a § 1983 Action.

Arizona also argues that the free choice of providers requirement does not confer individual rights that a Medicaid beneficiary can enforce in an action brought under § 1983. The district court correctly rejected that contention. For the reasons discussed by the Seventh Circuit in *Planned Parenthood of Indiana* and by the Sixth Circuit in *Harris v. Olszewski* , 442 F.3d 456 (6th Cir. 2006), the free choice of providers requirement meets the standard established by *Gonzaga*

University v. Doe, 536 U.S. 273 (2002), for determining that a provision of Spending Clause legislation may be enforced in a § 1983 action. *See Ball v. Rodgers*, 492 F.3d 1094, 1103-1112 (9th Cir. 2007) (applying the *Gonzaga* standard to a Medicaid statute requirement).

First, "Medicaid patients are the obvious intended beneficiaries" of the free choice of providers requirement, which states that any Medicaid-eligible person may obtain medical assistance from any institution, agency, community pharmacy, or person qualified and willing to perform that service. *Planned Parenthood of Indiana*, 699 F.3d at 974. "In other words, Medicaid patients have the right to receive care from the qualified provider of their choice." *Ibid*. "This language does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled." *Ibid*.

"Second, the right is administrable and falls comfortably within the judiciary's core interpretive competence." *Ibid*. Arizona, in arguing to the contrary, cites *Harris v. Olszewski*, 442 F.3d 456, 462 (6th Cir. 2006), for the proposition that the free choice of providers requirement is "so vague that it would difficult for courts to enforce." State's Br. 19. But the Sixth Circuit in *Harris* expressly rejected that argument and held that courts can enforce the free choice of providers requirement in an action under § 1983. The *Harris* court explained that, "while there may be legitimate debates about the medical care covered by or

exempted from the freedom-of-choice provision, the mandate itself does not contain the kind of vagueness that would push the limits of judicial enforcement." *Harris*, 442 F.3d at 462. There is, of course, no debate that family planning services are covered by the free choice of providers requirement, because subparagraph (B) of § 1396a(a)(23) expressly singles these services out for protection. Nor is there any merit to Arizona's assertion that "[w]hether 'qualified' [in § 1396a(a)(23)] means 'qualified as a doctor and able to perform a procedure' . . . or 'meeting requirements and so qualified by the state'" is "too 'vague' to be administered equitably by this Court." State's Br. 23. As the Seventh Circuit explained in *Planned Parenthood of Indiana*, "the term 'qualified' as used in § 1396a(a)(23) unambiguously refers to the provider's fitness to render the medical services required." 699 F.3d at 980 (citation omitted).

Third, "§ 1396a(a)(23) is plainly couched in mandatory terms." *Planned Parenthood of Indiana*, 699 F.3d at 974. "It says that all states 'must provide' in their Medicaid plans that beneficiaries may obtain medical care from any provider qualified to perform the service." *Ibid*.

Finally, "the Medicaid Act does not 'explicitly or implicitly foreclose the private enforcement of this statute through § 1983 actions.'" *Id*. at 975 (quoting *Harris*, 442 F.3d at 462). "That the Federal Government may withhold

federal funds to non-complying States is not inconsistent with private enforcement." *Harris*, 442 F.3d at 463. Likewise, "Congress has explicitly legislated that a Medicaid Act provision cannot be construed as unenforceable under § 1983 merely because it requires action under a state plan." *Ball*, 492 F.3d at 1111 (discussing the "*Suter* fix") (quotation marks and citation omitted). Accordingly, courts of appeals, including this Court in *Ball v. Rodgers*, have held that various requirements of the Medicaid statute create rights that Medicaid beneficiaries can vindicate under § 1983. *See* ER 10-11 (citing examples). This Court should follow the reasoning of the Sixth Circuit in *Harris*, 442 F.3d 456, and the Seventh Circuit in *Planned Parenthood of Indiana*, 699 F.3d 962, in holding that § 1396a(a)(23), too, creates rights that are individually enforceable under § 1983.

CONCLUSION

The judgment of the district court should be affirmed.

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FEBRUARY 2013

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
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CERTIFICATE OF COMPLIANCE

I hereby certify that the certify that this amicus brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 5,527 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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