

No. 23-11184

---

**In the United States Court of Appeals  
for the Fifth Circuit**

---

UNITED STATES OF AMERICA, EX. REL., ALEX DOE, RELATOR,  
*Plaintiff-Appellee,*

v.

PLANNED PARENTHOOD FEDERATION  
OF AMERICA, INCORPORATED,  
*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO

---

**BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE  
IN SUPPORT OF AFFIRMANCE**

---

KEN PAXTON  
Attorney General

AARON NIELSON  
Solicitor General

BRENT WEBSTER  
First Assistant Attorney General

/s/ Kateland Jackson  
KATELAND JACKSON  
Assistant Solicitor General  
Kateland.Jackson@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
Tel.: (512) 936-1700  
Fax: (512) 474-2697

AMY SNOW HILTON  
Special Counsel

*Counsel for Amicus Curiae  
the State of Texas*

**CERTIFICATE OF INTERESTED PERSONS**

No. 23-11184

UNITED STATES OF AMERICA, EX. REL., ALEX DOE, RELATOR,  
*Plaintiff-Appellee,*

v.

PLANNED PARENTHOOD FEDERATION  
OF AMERICA, INCORPORATED,  
*Defendant-Appellant.*

Under the fourth sentence of Fifth Circuit Rule 28.2.1, amicus curiae, as a governmental entity, need not furnish a certificate of interested persons.

/s/ Kateland Jackson  
KATELAND JACKSON  
*Counsel of Record for Amicus Curiae*

**TABLE OF CONTENTS**

Certificate of Interested Persons ..... ii

Table of Contents ..... iii

Table of Authorities ..... iv

Identity and Interest of Amicus Curiae ..... 1

Summary of the Argument..... 2

Background ..... 2

Argument ..... 4

    I. Attorney Immunity Does Not Shield PPFA From Liability for Its  
    Strategic Decision to Violate the TMFPA..... 4

    II. Texas’s Authority to Enforce the TMFPA Will Be Curtailed If  
    Attorney Immunity Shields Entities’ Deliberate Violations. .... 8

Conclusion ..... 11

Certificate of Service..... 12

Certificate of Compliance ..... 12

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Cantey Hanger, LLP v. Byrd</i> , <a href="#"><u>467 S.W.3d 477</u></a> (Tex. 2015).....	5
<i>Haynes &amp; Boone, LLP v. NFTD, LLC</i> , <a href="#"><u>631 S.W.3d 65</u></a> (Tex. 2021).....	5
<i>In re RGV Smiles by Rocky L. Salinas D.D.S. P.A.</i> , <a href="#"><u>626 B.R. 278</u></a> (S.D. Tex. 2021).....	10
<i>In re Xerox Corp.</i> , <a href="#"><u>555 S.W.3d 518</u></a> (Tex. 2018).....	9, 10
<i>Johnson v. Johnson</i> , <a href="#"><u>385 F.3d 503</u></a> (5th Cir. 2004).....	4
<i>Kelly v. Nichamoff</i> , <a href="#"><u>868 F.3d 371</u></a> (5th Cir. 2017) .....	4, 8
<i>Landry’s, Inc. v. Animal Legal Def. Fund</i> , <a href="#"><u>631 S.W.3d 40</u></a> (Tex. 2021) .....	5, 8
<i>Landry's, Inc. v. Animal Legal Def. Fund</i> , <a href="#"><u>566 S.W.3d 41</u></a> (Tex. App.—Houston [14th Dist.] 2018).....	6
<i>Loja-Lema v. Holder</i> , <a href="#"><u>40 F. App’x 931</u></a> (5th Cir. 2010).....	4
<i>United States v. Hangar One, Inc.</i> , <a href="#"><u>563 F.2d 1155</u></a> (5th Cir. 1977) .....	4, 7
<b>Statutes</b>	
<a href="#"><u>42 U.S.C. § 1320a-7a</u></a> .....	9
<a href="#"><u>42 U.S.C. § 1396a</u></a> .....	9
<b>Regulations</b>	
<a href="#"><u>42 C.F.R. § 1007.11</u></a> .....	9

## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The State of Texas has a fundamental interest in the enforcement of its laws. That interest is directly affected by the questions presented in this case concerning the application of Texas's attorney immunity to a non-lawyer defendant who seeks to cloak corporate conduct with immunity that is reserved to attorneys. Texas's sovereign interest in enforcing the Texas Medicaid Fraud Prevention Act (TMFPA)<sup>1</sup> would be eviscerated if every entity that engages in a course of conduct that violates the TMFPA could impute its in-house lawyers' rights to assert attorney immunity to the company's own actions.

---

<sup>1</sup> As amended on September 1, 2023, the Texas Medicaid Fraud Prevention Act is now known as the Texas Health Care Program Fraud Prevention Act. This brief refers to the statute as the TMFPA, as it was titled when the lawsuit was filed.

## **SUMMARY OF THE ARGUMENT**

Planned Parenthood Federation of America's (PPFA) claim to attorney immunity should never have reached summary judgment—let alone this Court—because it failed to plead this affirmative defense. This Court should reject Plaintiffs' belated claim to this defense. *First*, this Court is bound by the Texas Supreme Court's application of attorney immunity, and PPFA cites no cases extending such immunity to a non-lawyer, non-law firm defendant. *Second*, endorsing PPFA's theory of immunity would undermine the Texas Supreme Court's circumspect application of attorney immunity and lodge in this Court's docket a flood of disputes on the application of attorney immunity to every Medicaid provider who employs in-house counsel. Moreover, the Court should be hesitant to find that PPFA is entitled to attorney immunity when it adopts contradictory positions on its relationship to its own lawyers in a haphazard attempt to avoid liability for its own conduct.

## **BACKGROUND**

The State of Texas intervened in the case below and filed a civil law enforcement action under the Texas Medicaid Fraud Prevention Act (TMFPA) to recover millions of taxpayer dollars paid to Planned Parenthood that the organization was not entitled to receive and retain. The background facts are outlined in the

district court’s detailed order on summary judgment; here, Texas highlights only the points most pertinent to the issues on appeal and to this amicus.

For the first time on appeal, PPFA claims it is entitled to attorney immunity for its involvement in the unlawful conduct alleged in this case. At the trial court, PPFA contended its *attorneys*—employed within PPFA’s Litigation & Law (L&L) department in PPFA’s larger Chief Experience Officer division—could not be liable for violations of the TMFPA or False Claims Act on the basis that they gave legal advice to the Planned Parenthood Affiliates. [ROA.10957](#); *see also* Dkt. 475-3 at 870.<sup>2</sup> But at no point did PPFA contend that attorney immunity applied to PPFA *itself*. *See, e.g.,* [ROA.11234](#) (“[A] *lawyer* providing advice within the scope of her client representation cannot be held liable by a third party for actions the client takes based on that advice.” (emphasis added)). Nor did the trial court imply as much; it explained that Plaintiffs’ claims do not attach personal liability to the individual L&L lawyers. Dkt. 554 at 43. The Court determined that PPFA could be liable for Relator’s implied false certification and conspiracy claims if PPFA employees “‘were acting within the scope of their authority and for the purpose of benefitting’

---

<sup>2</sup> As it is not a party to the appeal, the State of Texas does not have access to the sealed record on appeal. Because Texas is a party below, it cites to the sealed materials here by their docket number.

PPFA.” Dkt. 554 at 43 (quoting *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1158 (5th Cir. 1977)).

Attorney immunity is an affirmative defense under Texas law, *see Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017), which PPFA has waived, *see In re Deepwater Horizon*, 857 F.3d 246, 251 (5th Cir. 2017) (holding that arguments not raised in the district court are waived); *see also Loja-Lema v. Holder*, 40 F. App’x 931, 933 (5th Cir. 2010) (holding that the Court “lack[s] jurisdiction to consider the arguments that have been raised for the first time on appeal”); *Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (5th Cir. 2004) (describing the general rule “that affirmative defenses not raised in the answer are ordinarily deemed waived”). This Court should not now entertain PPFA’s untimely claim. Regardless, attorney immunity does not protect PPFA from liability under the TMFPA; holding otherwise would render Texas’s enforcement power under the TMFPA meaningless.

## ARGUMENT

### **I. Attorney Immunity Does Not Shield PPFA From Liability for Its Strategic Decision to Violate the TMFPA.**

PPFA’s conduct cannot be cloaked with immunity simply because it employs in-house counsel. PPFA insists it should be afforded the same immunity that applies to a law firm and sounds the alarm that its “lawyers are at risk of being required to stand trial.” PPFA Br. at 18, 33. Of course, PPFA is not a law firm; its lawyers are



not defendants; and PPFA does not cite any cases expanding Texas’s attorney immunity to a corporate defendant like itself. This Court should decline the invitation to do so now.

With limitations, attorney immunity exists to protect practicing attorneys and law firms from liability to third parties for actions taken in the course of representing a client. Attorney immunity allows lawyers “to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.” *Haynes & Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65, 73 (Tex. 2021) (quoting *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015)). Even so, attorney immunity does not immunize attorney conduct simply because a lawyer’s “activity may advance a client’s . . . goals.” See *Landry’s, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40, 52 (Tex. 2021) (cleaned up). And attorney immunity does not insulate a *non-lawyer, non-law firm* defendant’s activities.

The Texas Supreme Court has “carefully drawn” the boundaries of what conduct is insulated by attorney immunity. See *id.* at 53. In *Landry’s*, a case relied upon by PPFA (PPFA Br. at 24, 37), the Supreme Court declined to extend attorney immunity to a nonprofit organization—an animal rights organization founded by attorneys—that “operate[d] as a private law firm.” *Id.* at 44, 51 n.12 (internal quotation marks omitted). This holding’s significance is buttressed by the fact that

the lower court *had* recognized attorney immunity to extend to the nonprofit organization; yet the Texas Supreme Court declined to extend that protection to it on appeal. *See Landry's, Inc. v. Animal Legal Def. Fund*, [566 S.W.3d 41, 60–61](#) (Tex. App.—Houston [14th Dist.] 2018). This Court should similarly decline to extend Texas’s attorney immunity to PPFA because doing so would strain its application beyond the parameters of what the Texas Supreme Court has recognized.

To start, PPFA is not a law firm. PPFA insists that L&L is a “captive” law firm but fails to define what a captive law firm is and how L&L meets that standard. *See* PPFA Br. at 16. Perhaps that is because L&L is simply PPFA’s in-house lawyers. L&L attorneys are employed by PPFA. PPFA Br. at 21. PPFA pays for all costs incurred by L&L during its representation of Planned Parenthood affiliate entities. [ROA.10325](#). And those Affiliates must meet conditions of membership, “undergo a regular and thorough accreditation process,” and PPFA committee membership is “made up of affiliate CEOs, affiliate board leaders, and PPFA board directors.” [ROA.8335–37](#). PPFA, including its attorney-employees in L&L, and the Affiliates all work towards the same PPFA mission. [ROA.10324–25](#). According to PPFA, it is “made up of, and partially controlled by, [its] independent members.” [ROA.8346](#). L&L does not embark upon the representation of an Affiliate without considering the effect on the Planned Parenthood “federation” as a whole. [ROA.10325](#). And

L&L only provides legal advice to Planned Parenthood entities. L&L's representative matters are deliberately and entirely motivated by PPFA's organizational interests and priorities. In sum, the Affiliates and L&L are part and parcel of PPFA.

Despite all this, PPFA has strenuously defended itself by asserting that PPFA does not exercise control over L&L, thereby precluding a finding of liability against PPFA. PPFA Br. at 7–8; [ROA.11242](#) (insisting that “Plaintiffs wrongly conflate L&L with PPFA”). Yet, despite the purported separateness PPFA claims to enjoy from L&L, PPFA asks this Court to apply L&L *attorneys*' common law immunity to itself. Br. at 3. PPFA cannot have its cake and eat it too. If, as PPFA claims, L&L is truly separate from PPFA, then PPFA has no claim to any defense an attorney could raise on his own behalf. Despite PPFA's assertions on appeal, attorney immunity simply has no place here because PPFA is not a law firm and cannot retain law firm defenses.

This case instead presents a straightforward application of the Court's precedent regarding corporate-employee liability. Corporate employees' conduct forms the basis for corporate liability if the “employees were acting within the scope of their authority and for the purpose of benefitting the corporation.” *Hangar One, Inc.*, [563 F.2d at 1158](#). PPFA makes no effort to rebut the application of *Hangar* to this case, despite Plaintiffs' citation to it at summary judgment and the district

court's reliance on it in its summary judgment order. *Compare* PPFA Br., *with* ROA.10458 *and* Dkt. 554 at 43. PPFA does not dispute that L&L attorneys were acting within the scope of their authority to PPFA, *see, e.g.*, PPFA Br. at 3, nor does it contest that L&L acted to benefit PPFA. *See generally* PPFA Br. Indeed, that L&L *must* act for the purpose of benefitting PPFA is well established. *Supra* 5-6.

To find in favor of PPFA would require this Court to “expand Texas law in ways Texas courts have yet to do.” *Kelly*, [868 F.3d at 377](#). PPFA “bears the burden of establishing entitlement to the [attorney immunity] defense.” *Id.* at 375. It cannot meet this burden, because the Texas Supreme Court has explicitly declined to extend attorney immunity to nonprofit organizations. *See Landry's, Inc.*, [631 S.W.3d at 51 n.12](#). PPFA cites no case applying attorney immunity to an *entity* that allows its salaried employee-attorneys to provide advice to other (purportedly) separate entities. The Court should decline PPFA's invitation to extend attorney immunity to its corporate conduct.

## **II. Texas's Authority to Enforce the TMFPA Will Be Curtailed If Attorney Immunity Shields Entities' Deliberate Violations.**

The State acts as a sovereign in investigating and bringing enforcement actions based on civil offenses under the TMFPA. Both federal and State law impose exacting sanctions on those who violate the integrity of the Medicaid program. The federal Social Security Act imposes penalties and assessments for Medicaid program

violations. 42 U.S.C. § 1320a-7a. Texas law, likewise, authorizes criminal punishment for Medicaid violations and provides a parallel enforcement mechanism in the form of TMFPA civil remedies. The Medicaid program requires States, as a condition of receiving matching funds, to implement fraud detection and prevention measures. For one, a State must have a “medicaid fraud control unit,” 42 U.S.C. § 1396a(a)(42)(B)(ii)(IV)(cc), which investigates program violations and can refer matters for criminal prosecution or “to an appropriate State agency” for other action, 42 C.F.R. § 1007.11. In Texas, those enforcement actions can take the form of criminal proceedings, administrative proceedings under chapter 32 of the Human Resources Code, or civil proceedings under the TMFPA. Fundamentally, TMFPA suits are sovereign law-enforcement actions to vindicate the public interest.

“Similar to the federal False Claims Act . . . , the Texas Medicaid Fraud Prevention Act is a powerful tool for targeting fraud against the Texas Medicaid program and securing the program’s integrity.” *In re Xerox Corp.*, 555 S.W.3d 518, 525 (Tex. 2018). The Texas Attorney General has “broad investigative and enforcement authority.” *Id.* The TMFPA is intentionally “onerous” and “undeniably punitive,” and the statute allows for “death-penalty administrative sanctions.” *Id.* at 525–27.

“As a government program with limited resources, enforcement [of the TMFPA] is particularly important to remedy and prevent the fraud, abuse, and waste that diverts funds that could otherwise be used to provide essential health-care services to the residents of the State of Texas.” *In re RGV Smiles by Rocky L. Salinas D.D.S. P.A.*, 626 B.R. 278, 286 (S.D. Tex. 2021); *see also Xerox*, 555 S.W.3d at 525 (“[T]he Texas Medicaid Fraud Prevention Act is a powerful tool for targeting fraud against the Texas Medicaid program and securing the program’s integrity.”). The TMFPA is intended to “punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.” *Id.* at 527. Here, PPFA seeks to avoid punishment by asserting attorney immunity for its violations of the TMFPA. If the Court were to entertain PPFA’s argument here—where PPFA, L&L, and the Affiliates operate as one and the same—it would open the floodgates for every Medicaid provider to employ in-house counsel to ensure the ability to invoke those attorneys’ rights to assert immunity. And certainly entities facing liability under the TMFPA would simply assert their attorneys were involved in the entity’s challenged conduct. Such an effect would eviscerate Texas’s authority under the TMFPA and gut the powerful civil enforcement mechanism the Texas Legislature provided to safeguard taxpayer dollars. This Court should reject PPFA’s blatant attempts to avoid the consequences of violating the law by expanding the immunity privilege.

## CONCLUSION

The Court should affirm the judgment of the district court rejecting PPFA's invocation of attorney immunity to its conduct.

Dated March 6, 2024.

Respectfully submitted.

KEN PAXTON  
Attorney General

AARON NIELSON  
Solicitor General

BRENT WEBSTER  
First Assistant Attorney General

/s/ Kateland Jackson  
KATELAND JACKSON  
Assistant Solicitor General  
Kateland.Jackson@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
Tel.: (512) 936-1700  
Fax: (512) 474-2697

AMY SNOW HILTON  
Special Counsel

*Counsel for Amicus Curiae  
the State of Texas*

### **CERTIFICATE OF SERVICE**

On March 6, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kateland Jackson  
KATELAND JACKSON

### **CERTIFICATE OF COMPLIANCE**

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,248 words, excluding the parts of the brief exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kateland Jackson  
KATELAND JACKSON



***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

March 05, 2024

Ms. Kateland R. Jackson  
Office of the Attorney General  
Office of the Solicitor General  
209 W. 14th Street  
7th Floor  
Austin, TX 78701

No. 23-11184 Doe v. Planned Parenthood  
USDC No. 2:21-CV-22

Dear Ms. Jackson,

We filed your brief. However, you must make the following corrections by **Friday, March 8, 2024**.

You need to correct or add:

The cover of brief must indicate whether the brief supports affirmance or reversal.

You must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see Fed. R. App. P. 12(b) and 5th Cir. R. 12 & 46.3. The form is available from the Fifth Circuit's website, [www.ca5.uscourts.gov](http://www.ca5.uscourts.gov). If you fail to electronically file the form, the brief will be stricken and returned unfiled.

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Renee S. McDonough".

By: \_\_\_\_\_  
Renee S. McDonough, Deputy Clerk  
504-310-7673

cc:

Ms. L. Nicole Allan  
Mr. Danny Scot Ashby  
Ms. Leah Godesky  
Ms. Heather Gebelin Hacker  
Mr. Anton Metlitsky  
Mr. Andrew Bowman Stephens

***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

March 06, 2024

Ms. Kateland R. Jackson  
Office of the Attorney General  
Office of the Solicitor General  
209 W. 14th Street  
7th Floor  
Austin, TX 78701

No. 23-11184 Doe v. Planned Parenthood  
USDC No. 2:21-CV-22

Dear Ms. Jackson,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

If your brief was insufficient and required corrections, the paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk



By: \_\_\_\_\_  
Renee S. McDonough, Deputy Clerk  
504-310-7673

cc:

Ms. L. Nicole Allan  
Mr. Danny Scot Ashby  
Ms. Leah Godesky  
Ms. Heather Gebelin Hacker  
Mr. Anton Metlitsky

Mr. Andrew Bowman Stephens