No. _____

IN THE

Supreme Court of the United States

TOM BETLACH, DIRECTOR,
ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM;
TOM HORNE, ATTORNEY GENERAL,
Petitioners,

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the "clear statement" rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), the federal Medicaid statute is only legitimate under the Spending Clause to the extent that states voluntarily and knowingly accept Medicaid's terms in choosing to participate. Otherwise, enforcement of the legislative "contract" would undermine the status of the states as independent sovereigns in our federal system. *Id.*

The terms of the Medicaid "contract" include the choice criterion provision in 42 U.S.C. § 1396a(a)(23), which requires states to allow Medicaid beneficiaries to obtain medical assistance from any provider "*qualified* to perform the service or services required" (emphasis supplied). Arizona relied on that provision when it enacted HB 2800, codified as Arizona Revised Statute (A.R.S.) § 35-196.05(B), which provides that neither Arizona nor any political subdivision thereof may "enter into a contract with or make a grant to any person that performs nonfederally qualified abortions[1] or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services."

In the decision below, the Ninth Circuit held that (1) individual plaintiffs can privately enforce the

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[1] A nonfederally qualified abortion is "an abortion that does not meet the requirements for federal reimbursement under Title XIX of the Social Security Act." A.R.S. § 35-196.05(F)(4).

choice criterion provision under 42 U.S.C. § 1983, and (2) HB 2800 contravenes § 1396a(a)(23) by disqualifying providers that perform nonfederally qualified abortions.

This petition presents two issues:

1. Whether, under this Court's analysis in *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273, 282 (2002), the claimed right to choose a "qualified" health care provider under 42 U.S.C. § 1396a(a)(23), as the Ninth Circuit construes that right, is "so vague and amorphous that its enforcement would strain judicial competence" in a proceeding under 42 U.S.C. § 1983.

2. Whether the Ninth Circuit's misplaced definition of "qualified" under 42 U.S.C. § 1396a(a)(23) engenders a Spending Clause violation under *Pennhurst* and strips Arizona of powers reserved to it under the Tenth Amendment; namely, the power to regulate health care in furtherance of state law and policy by disqualifying from Medicaid participation those providers who perform nonfederally qualified abortions.

PARTIES TO THE PROCEEDING

Petitioners: Tom Betlach is the Director of the Arizona Health Care Cost Containment System. Tom Horne is the Attorney General of Arizona. They were named in their official capacities as defendants in the district court, and were appellants in the court of appeals.

Respondents: Planned Parenthood Arizona Incorporated (PPAZ); Unknown Parties named as Jane Doe #1, Jane Doe #2, and Jane Doe #3; and Eric Reuss, M.D., were plaintiffs in the district court and appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit holding that (1) 42 U.S.C. § 1396a(a)(23) compels Arizona to contract with Medicaid providers that perform nonfederally qualified abortions and reimburse those providers with state revenue, and (2) 42 U.S.C. § 1396a(a)(23) confers a private right of action, enforceable under 42 U.S.C. § 1983, to obtain Medicaid services from any professionally competent provider.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 727 F.3d 960. Pet.App. A. In separate orders, the district court granted a preliminary injunction to Respondents, opinion reported at 899 F. Supp. 2d 868, and summary judgment to Respondents, opinion reported at 922 F. Supp. 2d 858, declaring Arizona HB 2800, codified at A.R.S. § 35-196.05(B), invalid, and permanently enjoining its enforcement. Pet.App. B (Order Granting Summary Judgment); Pet.App. C (Judgment).

STATEMENT OF JURISDICTION

The Ninth Circuit entered the judgment below on August 22, 2013. Pet.App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291, and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set forth in Appendix D. They are Arizona House Bill 2800, as codified at A.R.S. § 35-196.05(B); 42 U.S.C. § 1983; 42 U.S.C. § 1396a(a)(23); 42 U.S.C. § 1396a(p)(1); U.S. Const. Art. 1, § 8; and U.S. Const. Amend. X.

STATEMENT OF THE CASE

Arizona courts, congruent with decisions of this Court, hold that "[t]he state has a justifiably strong interest in preserving life," *Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 188 n.5 (Ariz. App. 2011) (internal quotation marks omitted), and that abortion is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 324 (1980) (upholding federal statute prohibiting use of Medicaid funding for certain abortions).

In furtherance of these principles, the Arizona legislature passed a bill, signed into law in 2012, which states that no state or local governmental entity shall "enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services." HB 2800(B), codified at A.R.S. § 35-196.05(B). The stat-

ute is part of an array of state laws and regulations that limit allocation of public funds for elective abortion.

The Respondents, who are abortion providers and individual Medicaid recipients, brought suit under 42 U.S.C. § 1983, challenging the new legislation before it took effect. They contended that HB 2800 violated 42 U.S.C. § 1396a(a)(23) (the "choice criterion provision") of the Medicaid Act by preventing PPAZ Medicaid patients from selecting *any* professionally competent medical provider, including those not "qualified" by the state Medicaid office to participate in Arizona's Medicaid managed care program. The lawsuit sought declaratory judgment and an injunction prohibiting enforcement of HB 2800, an outcome that would perpetuate the Medicaid funding stream to elective abortion providers against the will of the Arizona legislature.

The Respondents achieved that outcome. The United States District Court for the District of Arizona granted a permanent injunction and the Court of Appeals for the Ninth Circuit affirmed. The panel opinion held that "Medicaid beneficiaries enjoy an unambiguously conferred individual right to a free choice of provider under § 1396a(a)(23)." Pet.App. 18a. In the panel's view, any licensed provider is eligible to receive state monies unless disqualified on a case-by-case basis due to misconduct or other performance-based exceptions: "[T]he statutory term here, 'qualified,' is tethered to an objective benchmark," which the panel described as "qualified to perform the service or services required." Pet.App.

17a. The panel held that a court can readily determine whether a particular health care provider is qualified to perform a given medical service, drawing on evidence such as descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and expert testimony regarding the appropriate credentials for providing the service. Pet.App. 17a-18a. On that premise, the panel found that HB 2800 denied "free choice," holding that § 1396a(a)(23) limits the states' authority by the words "qualified" and "undertakes," which denote any willing and able licensed provider. Pet.App. 7a.

Thus, the panel decided that a Medicaid patient's choice of provider does *not* mean her choice from the list of state-funded providers deemed eligible to participate in Arizona's Medicaid program. Instead, the panel construed "qualified" to mean professionally competent to provide a given Medicaid covered service. Under the panel's decision, HB 2800 conflicts with 42 U.S.C. § 1396a(a)(23), and individuals have a private right of action to enforce the latter provision under 42 U.S.C. § 1983. Arizona now seeks a writ of certiorari to determine whether the states can prescribe rational limitations – other than professional competence – on participating Medicaid providers without violating a statutory, privately enforceable right created in § 1396(a)(a)(23).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has now followed the Seventh Circuit's erroneous lead in *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health* (*PPIN*), 699 F.3d 962 (7th Cir. 2012), by construing the federal Medicaid statute's choice criterion provision in terms of who is "qualified" to *render* Medicaid services based on professional competence, rather than in terms of who is qualified to *participate* as a Medicaid provider based on a state legislature's rational policy decisions. The panel's decision fundamentally alters the choice criterion provision. Consequently, it creates an enforceable right where none exists, violates the Spending Clause under *Pennhurst*'s clear statement rule, and encroaches upon state sovereignty under the Tenth Amendment.

To reach whether HB 2800 conflicted with the choice criterion provision, the panel first found that Congress gave the Respondents a private right of action to enforce the choice criterion provision under 42 U.S.C. § 1983. That finding flowed from the panel's erroneous decision to define "qualified" as possessing professional competence rather than meaning conditional or not absolute. Only the latter definition leaves the states free to prescribe policy-based conditions.

The single misinterpretation common to both issues in this petition permitted the Ninth Circuit to avoid three constitutional strictures that would otherwise have precluded the lawsuit and the relief

granted below. First, the misinterpretation created a private right of action to enforce a right that does not exist; specifically, the right to choose *any* professionally competent provider. Second, it violated the *Pennhurst* clear statement rule and therefore offended the Spending Clause by enlisting Arizona's participation in Medicaid on the false premise that the choice criterion left states free to qualify or disqualify providers on any rational policy basis. Third, it stripped Arizona of its sovereign prerogative to advance its own health care policy as a matter of police powers under the Tenth Amendment.

The panel's interpretation of the term "qualified" renders the choice criterion provision pointless and redundant. If "qualification" is a matter of licensure and competence, then the choice criterion serves no purpose because Arizona's existing licensure and oversight provisions *already* limit a Medicaid recipient's choice to "qualified" providers. "Qualified" therefore cannot mean professionally competent in this context. Unless the state's alternative interpretation of "qualified" (meaning simply meeting the state's conditions) is correct – a proposition the Ninth Circuit rejected in reaching its result – then there is no readily apparent definition. Consequently, the opinion below renders the choice criterion so vague and amorphous as to defy judicial competence in enforcing it. Because privately enforceable rights cannot rest on vague and amorphous provisions, the choice criterion provision cannot support an action under 42 U.S.C. § 1983.

Adopting Arizona's interpretation of "qualified" cures the vagueness problem, but it necessarily means that the right claimed by the Respondents does not exist in the first place. Review by this Court is necessary because the view now embraced by two federal circuit courts strips the states of their prerogative to rationally administer their respective state Medicaid programs as they see fit. The Ninth Circuit's interpretation materially changes the terms of the legislative "contract" and thereby renders the choice criterion illegitimate. *See National Federation of Independent Business v. Sebelius* (*NFIB*), 132 S. Ct. 2566, 2602 (2012) ("The legitimacy of Congress's exercise of the spending power 'rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"") (quoting *Pennhurst*, 451 U.S. at 17)).

Because the statute does not define "qualified," the Ninth Circuit adopted what it deemed the "ordinary meaning" of "qualified" based on definitions in the *Oxford English Dictionary* (quoted at page 969 of the opinion, Pet.App. 20a, as "having an officially recognized qualification to practice as a member of a particular profession; fit, competent") and *Black's Law Dictionary* (quoted on the same page as "[p]ossessing the necessary qualifications; capable or competent"). But those dictionaries alternatively define "qualified" in a way that supports Arizona's contrary interpretation, to mean "limited, modified, or restricted in some respect" (*Oxford*) and "limited; restricted" (*Black's*). The court's attempt to add context based on the additional language, i.e., "qualified *to perform the service or services required*," *id.* (em-

phasis in Ninth Circuit opinion), does not add any more weight to the court's interpretation than it does to Arizona's interpretation. Under Arizona's definition, a provider is qualified to perform the required service by meeting the rational, policy-based criteria established by the state. Here, Arizona chose to disqualify providers from performing any Medicaid-covered service if the provider also performs nonfederally qualified abortions. That decision, like Indiana's decision in *PPIN*, was rational and should be upheld.

The Ninth Circuit dispensed with Arizona's Tenth Amendment argument summarily, stating that "[n]othing in either the Medicaid Act's free-choice-of-provider requirement or the district court's order casts any doubt on Arizona's authority to regulate the practice of medicine within its borders." Pet.App. 34a. Yet that is what the choice criterion provision does under the Ninth Circuit's interpretation: it strips Arizona of the prerogative – which Arizona had already exercised – to prohibit direct or indirect expenditure of public funds, state tax monies, or federal funds for the performance of any abortion unless the abortion is necessary to save the life or health of the mother. *See* A.R.S. § 35-196.02; *Simat Corp. v. Arizona Health Care Cost Containment System*, 203 Ariz. 454, 56 P.3d 28 (2004). Either the choice criterion provision is correctly read as restricting Arizona's ability to so legislate, in which case the provision violates the "clear statement" rule, or it is correctly read as permitting the states to qualify Medicaid providers on rational policy grounds as Arizona contends. The Ninth Circuit re-

fused to consider the important federal question of whether states continue to have authority to implement Spending Clause provisions in furtherance of state public policy, and thus whether Arizona HB 2800 in fact conflicts with 42 U.S.C. § 1396a(a)(23).

The law embodied in HB 2800 reflects a public policy preference for childbirth over abortion and gives effect to Arizona's "justifiably strong interest" in "preserving life" and recognizing the "inherent[] differen[ce]" of abortion "from other medical procedures." Consequently, Arizona determined not to "enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services." HB 2800(B). The Ninth Circuit decision set aside Arizona's legislative priorities by erroneously endorsing a private right of action under § 1983 to enforce a right that Congress did not confer under § 1396a(a)(23).

ARGUMENT

I. CERTIORARI IS WARRANTED TO REMEDY SUPREMACY CLAUSE AND TENTH AMENDMENT VIOLATIONS RESULTING FROM THE NINTH CIRCUIT'S MISINTERPRETATION OF SECTION 1396A(A)(23) OF THE MEDICAID ACT TO (1) CREATE A PRIVATELY ENFORCEABLE RIGHT TO CHOOSE ANY MEDICALLY COMPETENT PROVIDER AND (2) PROHIBIT THE STATES FROM DISQUALIFYING PROVIDERS ON RATIONAL POLICY GROUNDS OTHER THAN PROFESSIONAL INCOMPETENCE.

A. The Ninth Circuit Has Enforced a Non-Existent Right at the Expense of Arizona's Reserved Powers Under the Tenth Amendment.

Under the choice criterion provision set forth in 42 U.S.C. § 1396a(a)(23), 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 (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, and (B) an enrollment of an individual eligible for

> medical assistance in a primary care case-management system (described in section 1396n(b)(1) of this title), a medicaid managed care organization, or a similar entity 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 . . . .

The Ninth Circuit decision below construes the choice criterion provision to confer a right to choose any medically competent provider under § 1396a(a)(23) of the Medicaid Act, based on an interpretation of the word "qualified" that renders it redundant and pointless. That decision must be overturned, not only to correct the misinterpretation but to remedy the resulting Supremacy Clause and Tenth Amendment violations.

In *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), this Court attempted to create a workable framework for determining whether a statutory provision creates a privately enforceable right of action under 42 U.S.C. § 1983. Widely disparate results, particularly in Medicaid cases,[1] led this Court to develop the three-

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[1] Prior to *Gonzaga*, the Fifth and Eighth Circuits each held that § 1396a(a)(30) of the Medicaid Act gave recipients a private right of action enforceable under § 1983. *See Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 927-28 (5th Cir. 2000); *Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993); *cf. Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 543-44 (3d Cir. 2002) (en banc) (positing, in dicta, a right for recipients while rejecting such a right for providers); *Visiting Nurse Ass'n v. Bullen*, 93 F.3d 997, 1004 n.7 (1st Cir. 1996)

pronged test cited in the Ninth Circuit decision below: (1) Congress must have "intended that the provision in question benefit the plaintiff," as evidenced by "rights-creating terms"; (2) the right allegedly protected by the statute must not be "so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) the provision giving rise to the right must be stated in "mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340-41. Reaffirming the *Blessing* test in *Gonzaga*, this Court stated that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms." *Gonzaga University*, 536 U.S. at 290.

In finding an actionable right under § 1983, the Ninth Circuit nullified the second prong of the *Blessing* test by adopting a clear – but clearly *wrong* – definition of the word "qualified." That definition strains judicial competence to enforce the statute because the federal limitation it creates upon the right is illusory. It limits a recipient's right to choose only to the degree that a state has *already* limited that right by virtue of its licensing and professional regulatory provisions. Viewed as a statuto-

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(positing, in dicta, a right for recipients while holding that such a right existed for providers). The First, Seventh, and Eighth Circuits held that a private right of action existed for Medicaid providers. *See Bullen*, 93 F.3d at 1005; *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996); *Ark. Med. Soc'y*, 6 F.3d at 528. In contrast, the Third and Fifth Circuits explicitly held that § 1396a(a)(30) did not create a right enforceable by Medicaid providers. *See Pa. Pharmacists Ass'n*, 283 F.3d at 543; *Walgreen Co. v. Hood*, 275 F.3d 475, 478 (5th Cir. 2001); *Evergreen Presbyterian Ministries*, 235 F.3d at 929.

rily created, affirmative individual right to choose any competent provider, the choice criterion provision as interpreted by the Ninth Circuit serves no purpose.

Read as Arizona interprets it – as a limitation on the providers that a recipient may choose rather than an affirmative right to choose any competent provider – the choice criterion provision becomes clear, unambiguous, and readily amenable to judicial enforcement. Simply put, a recipient may choose any provider that meets the state's criteria. The Tenth Amendment enables the state to set those criteria based on rational policy decisions, as Arizona did in HB 2800.

Even viewed as a mandatory, affirmative right, the Ninth Circuit's construction of the choice criterion provision is erroneous. The statute simply assigns the choice – among qualified providers – to recipients rather than to the states. Accordingly, Arizona cannot dictate which qualified provider will perform a covered service in any given instance. Instead, it must leave that choice to the Medicaid recipient. To the extent the choice criterion provision creates a privately enforceable right, that is its limit. Anything more is judicially engrafted onto the statute.

B. The Ninth Circuit Violated the Spending Clause by Creating a Right the Medicaid Statute Does Not Confer, and Violated the Tenth Amendment by Displacing Arizona's Policy Decision to Exclude Providers that Perform Nonfederally Qualified Abortions.

This Court reaffirmed the federalism principle embodied in *Pennhurst*'s "clear statement" rule this past session in *NFIB v. Sebelius*, 132 S. Ct. at 2602, stating once again that "[t]he legitimacy of Congress's exercise of the spending power 'rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" (quoting *Pennhurst*, 451 U.S. at 17). This Court further stated that "[r]especting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Id.*

Accepting this important federalism principle, the Medicaid statute and its implementing regulations recognize that states retain the authority to define what makes a provider "qualified" in the first place, for reasons supplied by state law. *See* 42 U.S.C. § 1396a(p)(1) ("*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 . . . .") (emphasis added); S. Rep. No. 100-109, at 20 (1987), 1987 WL 61463 (express authority to exclude providers for fraud and abuse "is

not intended to preclude a State from establishing, *under State law, any other bases for excluding individuals or entities* from its Medicaid program") (emphasis added); 42 C.F.R. § 1002.2 ("Nothing 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*.") (emphasis added).

Arizona relied on this principle of federalism when it chose to participate in the federal Medicaid program, reserving its authority under the Tenth Amendment to impose any conditions that the federal statute did not prohibit in a "clear statement" that it "voluntarily and knowingly accepted." That understanding is reflected in the plain language of A.R.S. § 35-196.05 and its implementing regulations, which provide that state authority to determine the "qualifications" inherent in a "free choice of *qualified* providers" is retained under the statutory scheme. Ex. A to Mem. in Opp. to Mot. for Prelim. Inj. filed Aug. 31, 2012 (Dist. Ct. Docket No. 44), Dec. of Kim Elliott, Ph.D., C.P.H.Q. at 5, ¶¶ 14-15 (emphasis added).

The Ninth Circuit's contrary, restrictive interpretation of the choice criterion provision brings the statute into conflict with the Spending Clause of Article I, Section 8 of the Constitution. It violates the *Pennhurst* rule, which premises legitimacy on *clear* statements of conditions on federal spending that the states knowingly and voluntarily accept. As explained in Argument A above, the Ninth Circuit's erroneous interpretation of the word "qualified"

changed the terms of the legislative contract by creating an individual right at the expense of Arizona's public policy prerogatives. Construed as the Ninth Circuit construes it, the choice criterion provision usurps Arizona's proper role in implementing its own state law and policy relating to the health and welfare of its citizens.

The Tenth Amendment guarantees that Arizona retains its sovereign police power authority to regulate the health and welfare of its citizens even when acting in partnership with the federal government, and that where Congress has not already spoken through the terms of a Spending Clause statute, state authority to legislate in the area occupied jointly by the federal and state governments is reserved to the state.[2] Any purported surrender of Arizona's sovereignty must be interpreted strictly in favor of the state. *Anderson v. Dunn*, 19 U.S. 204, 213 (1821) ("[T]he powers delegated to the United States, being in derogation of the rights of sovereign States, must be construed strictly."); *see also Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) (quoting *Lane v. Pena*, 518 U.S. 187 (1996)) (for the same reasons that a state's surrender of its sovereign immunity from suit "'will be strictly construed, in terms of its scope, in favor of the sovereign,'" all other surrenders of a state's sovereign authority to the federal government must also be read narrowly and in deference to the sovereign said to be surrendering its authority).

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[2] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

Because of this guiding principle of the federal system, "courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended." *California v. FERC*, 495 U.S. 490, 497 (1990). "Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress' would justify th[e] conclusion" that states could not act in the absence of federal legislation. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963)).

> In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted).

The states' ability to set reasonable provider qualifications thus inheres in their sovereignty, and not in any authorization to do so by a federal statute. Recognizing this, 42 U.S.C. § 1396a(p)(1) is a dual statement that state authority is co-extensive with the Secretary's authority in acting upon certain

enumerated grounds for discretionary exclusion, *and* an explicit reservation of existing and inherent state authority to exclude providers for reasons germane to state law and policy. This express grant of co-equal authority and acknowledgment of retained inherent state authority applies without any distinction between initial qualifications and disqualifications or exclusions. *See* 42 U.S.C. § 1396a(p)(3) ("As used in this subsection, the term 'exclude' includes the refusal to enter into or renew a participation agreement or the termination of such an agreement.").

Because states contract at arms' length with the federal government as co-equal sovereigns to implement federal programs, "states accepting funds from the federal government must be aware of the conditions attached to the receipt of those funds so that they can be said to have 'voluntarily and knowingly accept[ed] the terms of the 'contract.'" *Sanchez v. Johnson,* 416 F.3d 1051, 1057 n.4 (9th Cir. 2005) (quoting *Pennhurst*, 451 U.S. at 17). "Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously . . . [and] speak with a clear voice [in order to] enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, *ibid.*; *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (describing as an "ordinary rule of statutory construction" the principle that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmis-

takably clear in the language of the statute.") (internal quotation marks omitted).[3]

This is a particularly important principle under the Medicaid program, because it *guarantees* states "*flexibility in designing plans* that meet their individual needs" and "*considerable latitude* in formulating the terms of their own medical assistance plans." *Addis v. Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998)

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[3] The Ninth Circuit's analysis in *Guzman v. Shewry*, 552 F.3d 941, 949 (9th Cir. 2009) demonstrates the proper approach to statutory interpretation where preemption by the terms of the Medicaid statute is claimed. "In preemption cases, we begin with the presumption that the 'historic police powers of the States' are not superseded by federal law unless such result was the 'clear and manifest purpose of Congress.'" *Id*. Guzman argued that the state statute was preempted because federal law prohibited States from suspending providers from a state health care program simply because the provider is "under investigation" for fraud or abuse. Because the provision referred to other authority to exclude retained by the States in the statutory scheme, the court concluded:

> This provision plainly 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. Were such not the case, this subsection would not vest the Secretary with any authority not already provided elsewhere in the statute, and its inclusion would be redundant.

Id. at 949-50 (citation omitted). "[N]ot only does the applicable federal statute fail to prohibit states from suspending providers from state health care programs for reasons other than those upon which the Secretary of HHS may act, the governing regulation specifically instructs that states have such authority." *Id*. at 950.

(citing *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)) (emphases added). This flexibility and wide latitude is a reflection of the fact that when a state acts within its core or natural sphere of operation,[4] or expends its own funds,[5] attention to the *Pennhurst* "clear statement rule" is all the more critical. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("[Where] [c]ongressional interference [with a core state function] would upset the usual constitutional balance of federal and state powers[,] . . . 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." (quoting *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 243 (1985))).

The court of appeals' interpretation of the choice criterion provision is contrary to the "clear statement" rule of *Pennhurst*. The choice criterion provision does not explicitly preclude states from imposing qualifications based on scope of practice; it guarantees free choice among "qualified" providers, and elsewhere the implementing regulation explicitly acknowledges retained state authority to define such qualifications. Section 1396a(p)(1) codifies states'

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[4] Establishing qualifications for medical providers is a traditional State function. *Pennsylvania Medical Society v. Marconis*, 942 F.2d 842, 847 (3d Cir. 1991) ("The licensing and regulation of physicians is a state function . . . . Thus, the state regulation is presumed valid. To rebut this presumption, appellants must show that Congress intended to displace the state's police power function.").

[5] Participation in the Medicaid program requires states to expend their own funds as well as administer the federal share. The state share for family planning services is ten percent, resulting in a substantial outlay of state funds.

plenary (though not arbitrary) authority to set qualification standards.[6] Such authority may be and has been exercised broadly for many reasons that advance state law and policy, including fraud (*Guzman*, 552 F.3d at 950); conflicts of interest (*First Medical Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 49-50 (1st Cir. 2007)); engaging in industrial pollution (*Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 578-79 (2d Cir. 1989)); and inadequate record-keeping (*Triant v. Perales*, 491 N.Y.S.2d 486, 488 (N.Y. App. Div. 1985)).

Arizona law does not offend the choice criterion provision because implementation of A.R.S. § 35-196.05 would result only in a minimal loss of available family planning providers to Arizona patients. Medicaid beneficiaries seeking family planning services could choose from among approximately 2,000 Medicaid providers that have historically billed for family planning services. Pet.App. 33a. In view of this fact, Respondents cannot claim that A.R.S. § 35-196.05 deprives Medicaid beneficiaries of a meaningful choice among qualified providers. *See O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 178 (2d Cir. 1991).

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[6] Approval of a state plan amendment that is arbitrary or capricious or otherwise incongruous with applicable law is subject to review under the Administrative Procedure Act. *See Arizona Cattle Growers' Association v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citing 5 U.S.C. § 706(2)(A)).

CONCLUSION

The Ninth Circuit decision undermines vital principles of federalism and state sovereignty. States contract at arms' length with the federal government as co-equal sovereigns to implement federal programs. The Ninth Circuit decision changed the provisions of the legislative "contract" after the fact, rendering involuntary the state's agreement to the choice criterion provision.

Certiorari is warranted to correct the Spending Clause and Tenth Amendment violations caused by the Ninth Circuit's failure to adequately consider the implications of defining the word "qualified" in a way that brings 42 U.S.C. § 1396a(a)(23) into conflict with HB 2800 as well as 42 U.S.C. § 1396a(p)(1) and creates an unintended right of action under 42 U.S.C. § 1983.

Respectfully submitted,

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Dated: November 20, 2013.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Slip Opinion

PLANNED PARENTHOOD ARIZONA INCORPORATED; UNKNOWN PARTIES, named as Jane Doe # 1, Jane Doe # 2, and 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	No. 12–17558 D.C. No. 2:12-cv-01533-NVW

PLANNED PARENTHOOD ARIZONA INCORPORATED; UNKNOWN PARTIES, named as Jane Doe # 1, Jane Doe # 2, and 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	No. 13-15506 D.C. No. 2:12-cv-01533-NVW

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding.

Argued and Submitted
June 12, 2013 - San Francisco, California

Filed Aug. 22, 2013

Before: Marsha S. Berzon and Jay S. Bybee, Circuit Judges, and Consuelo B. Marshall, Senior District Judge.*

Opinion by Judge Berzon

SUMMARY**

Civil Rights

The panel affirmed the district court's summary judgment and permanent injunction, and also dismissed an appeal of the district court's preliminary injunction, in this action challenging an Arizona

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* The Honorable Consuelo B. Marshall, Senior District Judge for the U.S. District Court for the Central District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

statute that bars patients eligible for the state's Medicaid program from obtaining covered family planning services through health care providers who perform abortions in cases other than medical necessity, rape, or incest. *See* Ariz. Rev. Stat. § 35-196.05(B).

The panel held that the Medicaid Act's free-choice-of provider requirement, 42 U.S.C. § 1396a(a)(23), confers a private right of action under 42 U.S.C. § 1983. The panel then held that the Arizona statute contravenes the Medicaid Act's requirement that states give Medicaid recipients a free choice of qualified provider. The panel held that the Arizona law violates this requirement by precluding Medicaid patients from using medical providers concededly qualified to perform family planning services to patients in Arizona generally, solely on the basis that those providers separately perform privately funded, legal abortions.

The panel dismissed Arizona's appeal from the district court's preliminary injunction on the grounds that the district court's entry of final judgment and a permanent injunction mooted the appeal.

COUNSEL

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Andrew D. Beck and Susan Talcott Camp, American Civil Liberties Union Foundation, New York, NY; Alice J. Clapman (argued), Planned Parenthood Federation of America, Washington, D.C.; Roger Evans, Planned Parenthood Federation of America, New York, NY; Kelly Joyce Flood and Daniel J. Pochoda, ACLU Foundation of Arizona, Phoenix, AZ; Daniel B. Pasternak_and Laurence J. Rosenfeld, Squire Sanders LLP, Phoenix, AZ, for Plaintiffs–Appellees.

Denise Mary Burke, Americans United for Life, Washington, D.C., for Amicus Curiae 29 Arizona Senators, Representatives, and Representatives–Elect.

Lawrence John Joseph, Law Office of Lawrence J. Joseph, Washington, D.C., for Amicus Curiae Eagle Forum Education & Legal Defense Fund.

Alisa Beth Klein and Mark B. Stern, Appellate Staff, United States Department of Justice, Civil Division, Washington, D.C., for Amicus Curiae United States of America.

OPINION

BERZON, Circuit Judge:

An Arizona statute bars patients eligible for the state's Medicaid program from obtaining covered family planning services through health care providers who perform abortions in cases other than medical necessity, rape, or incest. *See* Ariz.Rev.Stat. § 35–196.05(B). Such abortions are already ineligible for Medicaid coverage and so must be paid for with private funds. The Arizona law extends the ineligibility to non-abortion services such as gynecological exams and cancer screenings unless the patient's provider agrees to stop performing privately funded elective abortions.

Before the Arizona law could go into effect, Planned Parenthood of Arizona and several individual plaintiffs filed this lawsuit challenging the Arizona law as a violation of the federal Medicaid Act. That Act provides that state Medicaid programs must allow Medicaid recipients to obtain care from "any [provider] qualified to perform the service or services required," and that enrollment in a Medicaid managed-care plan "shall not restrict the choice of the qualified [provider] from whom the individual may receive" "family planning services." 42 U.S.C. §§ 1396a(a)(23) & 1396d(a)(4)(C). This provision is known as the Act's free-choice-of-provider requirement. *See Planned Parenthood of Ind. v. Comm'r of the Ind. State Dep't of Health,* 699 F.3d 962, 968 (7th Cir.2012).

Finding that plaintiffs were likely to succeed on the merits of their Medicaid Act claim and would be irreparably harmed were the statute to become effective, the district court first entered a preliminary injunction barring implementation of the Arizona law while this lawsuit was pending. Arizona appealed that injunction to this court. Meanwhile, proceedings continued in the district court, with that court ultimately holding that the Arizona law runs afoul of the Medicaid Act's free-choice-of-provider requirement and granting summary judgment to the plaintiffs. To enforce that judgment, the district court permanently enjoined Arizona from enforcing the law against Medicaid providers. Arizona again appealed.

The district court's entry of final judgment and a permanent injunction moots Arizona's appeal of the preliminary injunction. *See Planned Parenthood of Cent. & N. Ariz. v. Arizona,* 718 F.2d 938, 949–50 (9th Cir.1983); *SEC v. Mount Vernon Mem'l Park,* 664 F.2d 1358,1361-62 (9th Cir. 1982). We therefore dismiss that appeal (Case No. 12–17558), and consider here only Arizona's appeal of the summary judgment order and permanent injunction (Case No. 13–15506).

For the reasons here summarized and further explained below, we affirm. First, joining the only two other circuits that have decided the issue, we hold that the Medicaid Act's free-choice-of-provider requirement confers a private right of action under 42 U.S.C. § 1983. *See Planned Parenthood of Ind.,* 699 F.3d at 968; *Harris v. Olszewski,* 442 F.3d 456, 459

(6th Cir.2006).

Second, echoing the Seventh Circuit's recent determination with regard to a nearly identical Indiana law, we hold that the Arizona statute contravenes the Medicaid Act's requirement that states give Medicaid recipients a free choice of qualified provider. *See* 42 U.S.C. § 1396a(a)(23); *Planned Parenthood of Ind.,* 699 F.3d at 968. The Arizona law violates this requirement by precluding Medicaid patients from using medical providers concededly qualified to perform family planning services to patients in Arizona generally, solely on the basis that those providers separately perform privately funded, legal abortions.

BACKGROUND

A. Medicaid and the Free–Choice–of–Provider Requirement

Medicaid is a cooperative federal-state program to help people of limited financial means obtain health care. Under the program, the federal government provides funds to the states, which the states then use (along with state funds) to provide the care. *See Nat'l Fed'n of Indep. Bus. v. Sebelius,* —— U.S. ––, ——, 132 S.Ct. 2566, 2581, 183 L.Ed.2d 450 (2012). Each state designs, implements, and manages its own Medicaid program, with discretion as to "the proper mix of amount, scope, and duration limitations on coverage." *Alexander v. Choate,* 469 U.S. 287, 303, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). But that discretion has limits: To receive Medicaid fund-

ing, states must comply with federal criteria governing, among other matters, who is eligible for care, what services must be provided, how reimbursement is to be determined, and what range of choice Medicaid recipients must be afforded in selecting their doctors. *See* 42 U.S.C. § 1396 *et seq.; cf. Sebelius,* 132 S.Ct. at 2581. If a state Medicaid plan fails to conform to the statutory criteria, the Secretary of Health and Human Services ("HHS") may withhold Medicaid funds from the state, either in whole or part. *See* 42 U.S.C. § 1396c; *cf. Sebelius,* 132 S.Ct. at 2607–08 (holding portions of 42 U.S.C. § 1396c unconstitutional but noting that "[n]othing in our opinion precludes Congress from ... requiring that States accepting such [federal Medicaid] funds comply with the conditions on their use").

At issue here is the provision of the Medicaid Act known as the free-choice-of-provider requirement. *See Planned Parenthood of Ind.,* 699 F.3d at 968. That provision imposes two criteria upon state Medicaid plans: First, with some exceptions, state plans must generally allow Medicaid recipients to obtain care from any provider who is "qualified to perform the service or services required" and "who undertakes to provide ... such services." 42 U.S.C. § 1396a(a)(23)(A). Second, the provision adds an additional, more specific layer of protection for patients seeking family planning services, requiring that "enrollment of an individual eligible for [Medicaid] 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 services un-

der section 1396d(a)(4)(C) of this title," i.e., "family planning services." *Id.* §§ 1396a(a)(23)(B) & 1396d(a)(4)(C). Section 1396a(a)(23)(B) thus carves out and insulates family planning services from limits that may otherwise apply under approved state Medicaid plans, assuring covered patients an unfettered choice of provider for family planning services.

B. Arizona's House Bill 2800

In spring 2012, the Arizona legislature enacted House Bill 2800 ("HB 2800"), which provides:

> [Arizona] or any political subdivision of [Arizona] may not enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services.

2012 Ariz. Leg. Serv. Ch. 288 (H.B.2800) (West) (codified at Ariz.Rev.Stat. § 35–196.05(B)). HB 2800 defines a "nonfederally qualified abortion" as "an abortion that does not meet the requirements for federal reimbursement under title XIX of the social security act," i.e., the requirements of the Hyde Amendment, as applied to the Medicaid Act. *Id.* § 35–196.05(F)(4). *See generally Harris v. McRae,* 448 U.S. 297, 302–03, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (explaining the background of the Hyde Amendment). Under the Hyde Amendment—actually, a rider that Congress attaches to each year's appropriations legislation—federal funds (including Medicaid funds) may not be

used to pay for abortions except in cases of danger to the life of the mother, rape, or incest. *See* Consolidated Appropriations Act, 2012, Pub.L. No. 112–74, §§ 613–14, 125 Stat. 786, 925–96 (2011).[1]

C. Planned Parenthood's Challenge to HB 2800

Planned Parenthood of Arizona is a nonprofit network of 13 clinics that offer a range of family planning and reproductive health services, including annual gynecological exams, pap smears, testing and treatment for sexually transmitted diseases, and contraceptive counseling. For those services, Planned Parenthood has a longstanding provider agreement with Arizona's Medicaid program, known as the Arizona Health Care Cost Containment System or "AHCCCS" (pronounced "Access"). Together, Planned Parenthood of Arizona clinics treat about 3,000 Medicaid patients each year, for which the clinics receive about $350,000 in payments.[2]

In addition to the family planning and reproductive health services described above, five of the 13 Planned Parenthood clinics in Arizona also perform

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[1] Arizona restricts the use of public funds for abortions except where an abortion is necessary to save the life or health of the mother. *See* Ariz.Rev.Stat. § 35–196.02

[2] Planned Parenthood estimates that those reimbursements cover 55% of the costs it incurs in providing Medicaid services. Arizona disputes this estimate but does not provide an estimate of its own. This factual dispute is not material to any of the legal issues in this case.

abortions. Except under the narrow circumstances permitted by Arizona and federal law, Planned Parenthood does not receive any public funds or reimbursement for the abortions it performs.

In summer 2012, Planned Parenthood received a letter, sent by AHCCCS to all Arizona Medicaid providers, concerning the implementation of HB 2800. The letter asked Planned Parenthood to return a signed form attesting that, as of August 2, 2012, it "[would] not perform any abortions ... or maintain or operate a facility where any abortion is performed" except in cases of rape, incest, or medical necessity. If Planned Parenthood did not return the signed attestation by the deadline, the letter explained, AHCCCS would "terminate [its] provider participation agreement" and would no longer "reimburse [Planned Parenthood] for ANY medical services."

Rather than sign and return the form, Planned Parenthood and several individual plaintiffs filed suit to block HB 2800 from going into effect. The individual plaintiffs are three Arizona women who, through Medicaid, receive family planning services at the Planned Parenthood clinics in Yuma and Flagstaff, and Dr. Eric Reuss, an obstetrician-gynecologist in private practice in Scottsdale, who, like Planned Parenthood, has a Medicaid provider agreement with AHCCCS.[3] The initial complaint alleged that HB 2800 violates the Medicaid Act free-

[3] We refer to the plaintiffs collectively as "Planned Parenthood." The named defendants are Tom Betlach, AHCCCS Director, and Tom Horne, Arizona Attorney General. We refer to the defendants collectively as "Arizona."

choice-of-provider requirement as well as several constitutional provisions. Finding that Planned Parenthood was likely to succeed on its Medicaid Act claim, the district court granted a preliminary injunction barring Arizona from implementing HB 2800 while the lawsuit was pending. Arizona timely appealed the preliminary injunction to this court.

Meanwhile, Planned Parenthood moved for summary judgment solely on the Medicaid Act claim, which it stipulated would fully resolve the case. In February 2013, the district court granted summary judgment for Planned Parenthood, holding that HB 2800 violates the Medicaid Act's free-choice-of-provider requirement. Under that requirement, the district court explained, Arizona unambiguously "lacks [the] authority" to "limit the range of qualified Medicaid providers for reasons unrelated to a provider's ability to deliver Medicaid services." Based on its legal ruling, the district court permanently enjoined Arizona from enforcing HB 2800 against plaintiffs, from "disqualifying otherwise qualified providers from receiving Medicaid reimbursement for medical services covered by Medicaid on the basis that these providers provide otherwise legal abortions," and from "requiring providers to sign the attestation form issued by [AHCCCS] in furtherance of [HB 2800] ... [or] enforcing any previously signed attestation forms." Arizona timely appealed to this court. We consolidated the new appeal with Arizona's already pending preliminary injunction appeal.

DISCUSSION

A. § 1396a(a)(23) Confers a § 1983 Right of Action

There is an issue to be addressed at the threshold; whether Planned Parenthood has pleaded a viable cause of action. Planned Parenthood asserts a right of action for enforcement of the Medicaid Act's free-choice-of-provider requirement under § 1983. Arizona objects, maintaining that the free-choice-of-provider provision does not satisfy the requisites for a § 1983 claim. Joining two of our sister circuits, we hold that § 1396a(a)(23) may be enforced through individual § 1983 lawsuits. *See Planned Parenthood of Ind.,* 699 F.3d at 968; *Harris,* 442 F.3d at 459.[4]

Section 1983 creates a federal remedy against anyone who, under color of state law, deprives "any citizen of the United States ... of any rights, privileges, or immunities secured by the Constitution and laws."

42 U.S.C. § 1983. Section 1983 thus authorizes lawsuits "to enforce individual *rights* under federal

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[4] In addition, the Eleventh Circuit, in the course of deciding that the Medicaid free-choice-of-provider provision does not create a private right "enforceable by health care providers" on their own behalf, indicated that "Medicaid *recipients* ... have enforceable rights under [that provision]." *Silver v. Baggiano,* 804 F.2d 1211, 1216–18 (11th Cir.1986) (emphasis added), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002).

statutes," not " 'the broader or vaguer "benefits" or "interests" ' " a federal statute may implicate. *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119–20, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005) (emphasis added) (quoting *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002)).

To determine whether a federal statutory provision creates a private right enforceable under § 1983, we consider three factors: First, "Congress must have intended that the provision in question benefit the plaintiff"; second, the plaintiff must have "demonstrate[d] that the right assertedly protected ... is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and third, "the provision giving rise to the asserted right" must be "couched in mandatory, rather than precatory, terms." *Blessing v. Freestone,* 520 U.S. 329, 340–41, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (internal citation and quotation marks omitted). If all three prongs are satisfied, "the right is presumptively enforceable" through § 1983. *Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268. The defendant may overcome the presumption by demonstrating that Congress foreclosed private enforcement expressly "or impliedly, by creating a comprehensive enforcement scheme that is incompatible with" individual private lawsuits. *Id.* at 284 n. 4, 122 S.Ct. 2268 (quoting *Blessing,* 520 U.S. at 341, 117 S.Ct. 1353).

That Congress intended the free-choice-of-provider requirement to create an individual right is evident; Arizona does not contend otherwise. The statutory language unambiguously confers such a

right upon Medicaid-eligible patients, mandating that all state Medicaid plans 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." 42 U.S.C. § 1396a(a)(23) (emphasis added). "While express use of the term 'individuals' (or 'persons' or similar terms) is not essential to finding a right for § 1983 purposes, usually such use is sufficient for that purpose." *Ball v. Rodgers,* 492 F.3d 1094, 1108 (9th Cir.2007); *see also Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268 (pointing to similarly individually focused language in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), as prototypical examples of rights-creating language). The two other federal circuits that have directly considered the Medicaid free-choice-of-provider provision under the *Blessing/ Gonzaga* framework have agreed that it contains rights-creating language sufficient to establish the first *Gonzaga* requisite for a right enforceable under § 1983. *See Planned Parenthood of Ind.,* 699 F.3d at 974; *Harris,* 442 F.3d at 461.[5]

Nor does Arizona question whether the statute is "couched in mandatory, rather than precatory, terms," *Blessing,* 520 U.S. at 347, 117 S.Ct. 1353, as it indubitably is. *See* 42 U.S.C. § 1396a(a) ("A State plan for medical assistance must—").

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[5] *Harris* was cited with approval by this court in *Ball,* 492 F.3d at 1109.

Arizona's § 1983 challenge centers, instead, on the "vague and amorphous" prong of the *Blessing/ Gonzaga* standard. *See Blessing,* 520 U.S. at 340–41, 117 S.Ct. 1353. The concern underlying this factor is that some statutory rights do not give courts "meaningful instruction" for the resolution of particular cases. *Watson v. Weeks,* 436 F.3d 1152, 1162 (9th Cir.2006). Where a provision "suppl[ies] concrete and objective standards for enforcement," that concern does not arise. *Id.* at 1161. In the Medicaid Act context, a provision will satisfy this prong of the *Blessing/ Gonzaga* "right" requirement if a state's compliance with the provision can be ascertained by reviewing "sources such as a state's Medicaid plan, agency records and documents, and the testimony of Medicaid recipients and providers." *Ball,* 492 F.3d at 1115.

The free-choice-of-provider requirement does "supply concrete and objective standards for enforcement." *Watson,* 436 F.3d at 1161. The provision specifies that any individual Medicaid recipient is free to choose any provider so long as two criteria are met: (1) the provider is "qualified to perform the service or services required," and (2) the provider "undertakes to provide [the recipient] such services." 42 U.S.C. § 1396a(23)(A). These are objective criteria, well within judicial competence to apply. The second criterion raises a simple factual question no different from those courts decide every day. For example, a doctor could establish that requisite by submitting a declaration or sworn testimony that she is willing to provide Medicaid patients with the service in question. The first criterion, whether the doctor is quali-

fied to do so, may require more factual development or expert input, but still falls well within the range of judicial competence. The requirement could be established, for example, by a combination of evidence as to the medical licenses the doctor holds and evidence as to the licenses necessary under state law to perform family planning services. Together, the two criteria do not require courts to engage in any balancing of competing concerns or subjective policy judgments, but only to answer factual, yes-or-no questions: Was an individual denied the choice of a(1) qualified and (2) willing provider? The answer to these questions is "likely to be readily apparent." *Harris,* 442 F.3d at 462.

Arizona contends otherwise, seizing on the statutory term "qualified" as "too vague for the court to enforce." We disagree.

Watson held that a provision requiring states to set "*reasonable* [eligibility] standards" was too vague for judicial enforcement because the provision did not tie "reasonableness" to any objective standard. 436 F.3d at 1162 (citation and quotation marks omitted) (emphasis added). By contrast, the statutory term here, "qualified," is tethered to an objective benchmark: "qualified *to perform the service or services required*." 42 U.S.C. § 1396a(a)(23)(A) (emphasis added). A court can readily determine whether a particular health care provider is qualified to perform a particular medical service, drawing on evidence such as descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and expert testimony

regarding the appropriate credentials for providing the service. This standard is not subjective or amorphous, and requires no balancing.[6] It is no different from the sorts of qualification or expertise assessments that courts routinely make in various contexts.

In light of the foregoing analysis, we hold that Medicaid beneficiaries enjoy an unambiguously conferred individual right to a free choice of provider under § 1396a(a)(23). Arizona makes no attempt to demonstrate that Congress has expressly or impliedly foreclosed § 1983 remedies for this right, nor would any such attempt succeed. *See Ball,* 492 F.3d at 1116–17. Medicaid's free-choice-of-provider requirement therefore creates a right that may be enforced under § 1983.

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[6] Arizona also argues that the right is too vague to be judicially enforceable because "it would be a usurpation of [Arizona's] delegated power [to define provider qualifications under state law] for a court to second-guess Arizona's determination." This argument is inapposite to the second *Blessing* prong, which asks only whether the provision in question provides adequate guidance for judicial application, not whether the right that the provision confers impinges upon any other concerns, constitutional or otherwise. Whether the Medicaid Act's free-choice-of-provider provision impermissibly interferes with state police powers goes to the merits of an action brought under the provision, not whether the provision supports a right of action under § 1983. In any event, Arizona's argument lacks merit. A court applying the free-choice-of-provider provision in a § 1983 case does not usurp a state's authority to set medical qualifications; instead, it defers to and applies the state's own determination of appropriate qualifications for the services provided.

B. HB 2800 Violates § 1396a(a)(23)

We now turn to the merits of the case: whether HB 2800, as applied in the context of Arizona's Medicaid program, violates the Medicaid Act's free-choice-of-provider requirement.[7]

1. We begin, as always, with the "cardinal canon" of statutory construction: Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). "In determining the scope of a statute," we "giv[e] the words used their ordinary meaning," *Moskal v. United States,* 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) (internal quotation marks and citation omitted), unless Congress has directed us to do otherwise.

The relevant Medicaid provision states:

> A State plan for medical assistance must . . . provide that (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, and (B) an enrollment of an individual eligible for medical assistance in a primary care case-

[7] This case only concerns HB 2800's application in the context of withholding Medicaid reimbursement. We express no opinion on HB 2800's validity as applied in the context of state programs not governed by the Medicaid Act.

> 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) (emphasis added). " '[A]ny means all" except to the extent that "Congress . . . add[s] language limiting the breadth of that word." *Merritt v. Dillard Paper Co.,* 120 F.3d 1181, 1186 (11th Cir.1997) (internal quotation marks and citation omitted). So a state Medicaid plan must allow any given Medicaid recipient to seek family planning care from any and all providers, subject only to two limitations: (1) the provider is "qualified to perform the service or services required" and (2) the provider "undertakes to provide [the patient] such services." We agree with the Seventh Circuit that "[r]ead in context, the term 'qualified' as used in § 1396a(a)(23) unambiguously relates to a provider's. . . . capab[ility] of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *Planned Parenthood of Ind.,* 699 F.3d at 978. Our reasons for so concluding are several.

First, the term "qualified" is not specially defined within the Medicaid Act. We therefore read that term, as it appears in § 1396a(a)(23), as conveying its ordinary meaning, which is: "having an officially recognized qualification to practice as a member of a particular profession; fit, competent." Oxford English Dictionary (3d ed.2007); *see also* Black's Law Dictionary (9th ed.2009) ("[p]ossessing the necessary

qualifications; capable or competent"). And, as the overall context of the Medicaid Act is the provision of medical services, the pertinent professions which providers must be "qualified" to practice are the various medical professions.

Second, were there any doubt as to how we should read the word "qualified" in § 1396a(a)(23), Congress removed it by adding the further specification "qualified *to perform the service or services required*." 42 U.S.C. § 1396a(a)(23)(A) (emphasis added). We must "give effect, if possible, to every ... word of a statute." United States v. Menasche, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (internal quotation marks omitted). Here, the words "to perform the service or services required" modify the adjective "qualified," telling us that Congress meant for that adjective not to refer to a Medicaid Act-specific authorization, but to denote the capability to carry out a particular activity—"perform[ing] the [medical] service" that a given Medicaid recipient requires. The provision thus indexes the relevant "qualifications" not to any Medicaid-specific criteria (whether imposed by the federal government or the states), but to factors external to the Medicaid program; the provider's competency and professional standing as a medical provider generally. The verb "perform" here is key: It confirms that the relevant question is not whether the provider is qualified in some sense specific to Medicaid patients, but simply whether the provider is qualified in a general sense to perform, i.e., carry out, the service in question, whether for Medicaid patients or for any other patients. See "perform," Oxford English Dictionary (9th

ed. 2009) (I.1.a: "to carry out in action, execute, or fulfil"; I.2.b: "To do, carry out, execute, or accomplish ... an action, operation, process, function ...").

Arizona urges us to read § 1396a(a)(23) as having the opposite meaning from the one we ascribe to it: Rather than guaranteeing patient choice, Arizona contends in its briefs, the provision empowers states to restrict patient choice to a limited list of providers "for any reason supplied by State law." Arizona's argument hinges on construing the statutory term "qualified" not according to its ordinary meaning, but instead as a Medicaid-specific term of art conferring upon the states plenary authority to withhold Medicaid funds on any policy grounds they prefer to pursue. Under Arizona's reading, states can determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider is otherwise legally qualified, through training and licensure, to provide the requisite medical services within the state.

There are three fatal flaws with Arizona's reading of the statute. The first, to restate the obvious, is that "[i]n determining the scope of a statute," we do "giv[e] the words used their ordinary meaning," *Moskal,* 498 U.S. at 108, 111 S.Ct. 461 (internal citation and quotation marks omitted), unless the statute directs us to do otherwise. As a court, "we are not vested with the power to rewrite" the Medicaid Act, "but rather must construe what Congress has written." *See Ariz. State Bd. of Educ. for Charter Sch. v. U.S. Dep't of Educ.,* 464 F.3d 1003, 1007 (9th Cir.2006) (internal quotation marks omitted). No-

where in the Medicaid Act has Congress given a special definition to "qualified," much less indicated that each state is free to define this term for purposes of its own Medicaid program however it sees fit.

Second, as a court, we have a "duty to give effect, if possible, to every ... word of a statute." *Menasche,* 348 U.S. at 538–39, 75 S.Ct. 513 (internal quotation marks omitted); *see also United States v. LKAV,* 712 F.3d 436, 440 (9th Cir.2013). "It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *Ariz. State Bd.,* 464 F.3d at 1007 (quoting *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,* 340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed. 566 (1951)). Arizona's reading detaches the word "qualified" from the phrase in which it is embedded; "qualified to perform the service or services required" (and from the overall context of the Medicaid statute, which governs *medical* services).

Additionally, "[w]e must avoid an interpretation that would produce absurd results." *LKAV,* 712 F.3d at 444 (internal quotation marks omitted). Read as Arizona suggests, the free-choice-of-provider requirement would be self-eviscerating. "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 Ind.,* 699 F.3d at 978.

For instance, were Arizona free to define "quali-

fied" for § 1396a(a)(23) purposes to mean doctors who do not perform elective abortions, then another state might be equally free to extend Medicaid funds only to doctors who *do* perform such abortions. If a state wished to interpret "qualified" to mean only osteopaths (or only M.D.'s), or only non-smokers (or only smokers), or only affiliates of the state university medical school, on the grounds that only doctors within that category are worthy of receiving Medicaid funds, then, on Arizona's reading of § 1396a(a)(23), it would be free to do so. Giving the word "qualified" such an expansive meaning would deprive the provision within which it appears of any legal force. Moreover, that interpretation would permit states freely to erect barriers to Medicaid patients' access to family planning medical providers others in the state are free to use. Such a result would eliminate "the broad access to medical care that § 1396a(a)(23) is meant to preserve." *Planned Parenthood of Ind.,* 699 F.3d at 978. "When a natural reading of [a statute] leads to a rational, commonsense result, an alteration of meaning is not only unnecessary, but also extrajudicial." *Ariz. State Bd.,* 464 F.3d at 1008.

Finally, the free-choice-of-provider provision appears in a list of *mandatory* requirements that apply to all state Medicaid plans. On Arizona's reading, however, the free-choice-of-provider provision does not set any requirement at all for state plans. Instead, it permits states self-referentially to impose for Medicaid purposes whatever standards for provider participation it wishes.

For all these reasons, the free-choice-of-provider provision unambiguously requires that states participating in the Medicaid program allow covered patients to choose among the family planning medical practitioners they could use were they paying out of their own pockets.

2. While we could perhaps stop there, we recognize that "a section of a statute should not be read in isolation from the context of the whole Act." Richards v. United States, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Taking that broader approach, we conclude that our reading of § 1396a(a)(23) is bolstered rather than undermined by considering its statutory context. Even if the word "qualified" within the free-choice-of-provider requirement were ambiguous in isolation—which, for all the reasons we have surveyed, it is not—it would lose all trappings of ambiguity when considered within the Medicaid Act as a whole.

Elsewhere in the Act, Congress has enumerated specific circumstances under which the HHS Secretary may waive a state's compliance with the free-choice-of-provider requirement enunciated in § 1396a(a)(23). For example, § 1396n(b) authorizes the HHS Secretary to grant "[w]aivers to promote cost-effectiveness and efficiency." Under that subsection, the Secretary may waive the free-choice-of-provider requirement so that a state may implement a managed-care system, 42 U.S.C. § 1396n(b)(1), or limit Medicaid recipients' choice of providers to those "who meet, accept, and comply with [state] reimbursement, quality, and utilization standards," id. §

1396n(b)(4). As another example, § 1315 authorizes the Secretary to waive the free-choice-of-provider requirement to the extent necessary for a state to carry out an approved "demonstration project." Id. §§ 1315(a)-(a)(1).

If Arizona's reading of § 1323a(a)(23) were correct, these waiver provisions would be unnecessary. After all, it is Arizona's position that states can preclude Medicaid beneficiaries from choosing otherwise appropriate service providers by defining certain classes of providers as "unqualified," for § 1323a(a)(23) purposes, "for any reason supplied by State law." If that were so, then states would not need to go to the trouble of requesting waivers of § 1323a(a)(23) from HHS to implement managed-care systems or hold providers to state efficiency standards. They could simply define all non-preferred providers as "unqualified" for the purposes of § 1323a(a)(23).

Arizona agrees that we must read § 1396a(a)(23) within its statutory context, but points instead to a different provision of the Medicaid Act, the authority-to-exclude provision at § 1396a(p)(1). That component of the Act provides:

> In addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan ... for any reason for which the Secretary could exclude the individual or entity ... under section 1320a–7, 1320a–7a, or 1395cc(b)(2) of this title.

42 U.S.C. § 1396a(p)(1). Arizona reads the phrase "[i]n addition to any other authority" to mean that states have plenary authority to exclude providers from their Medicaid plans. Just as Indiana did in defending its similar law, Arizona "reads the phrase for more than it's worth." *Planned Parenthood of Ind.,* 699 F.3d at 979. This standard savings clause "signals only that what follows is a non-exclusive list" and "does not imply that the states have an unlimited authority to exclude providers for any reason whatsoever." *Id.*[8]

Moreover, to the extent that § 1396a(p)(1) sheds light on § 1396a(a)(23), it does so in a way that undermines, rather than aids, Arizona's argument. The language refers to "any *other* authority" (emphasis added), followed by a provision providing states with authority to exclude providers on specified grounds. This sequence indicates that the Medicaid Act itself must provide that "other" authority, just as it supplies the "authority" covered by the rest of the subsection. Were it otherwise—were states free to exclude providers as they see fit—then the bulk of §

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[8] Arizona also cites the regulation implementing § 1396a(p)(1). That regulation provides, "Nothing 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." 42 C.F.R. § 1002.2 (emphasis added). That provision is only a limitation on interpretation of the referenced "part" of the regulations—Title 42, Chapter V, Subchapter B, Part 1002—which does not encompass the free-choice-of-provider requirement. See 42 C.F.R. § 1002.1 (listing statutory provisions providing authority for the regulations in Part 1002).

1396a(p)(1) itself would be unnecessary, as the "authority" it supplies would be superfluous.

Further, the bases for excluding a provider from a state Medicaid plan cross-referenced by § 1396a(p)(1) all refer to "various forms of malfeasance such as fraud, drug crimes, and failure to disclose necessary information to regulators." *Planned Parenthood of Ind.,* 699 F.3d at 979. Read in context, the § 1396a(p)(1) savings clause empowers states to exclude individual providers on such grounds directly, without waiting for the Secretary to act, while also reaffirming state authority to exclude individual providers pursuant to analogous state law provisions relating to fraud or misconduct. It does not suggest that states may categorically exclude a class of providers on grounds unrelated to medical competency *or* legal and ethical propriety.

3. Both § 1396a(a)(23) itself and other provisions of the Medicaid Act admit of some exceptions to the free-choice-of-provider rule, but none apply to this case.

First, various provisions of the Medicaid Act allow states, as Arizona has done, to seek permission from HHS to limit recipients' choice to the extent necessary to implement cost-effectiveness standards or a demonstration project, *see, e.g.,* 42 U.S.C. § 1315 (describing waivers for demonstration projects); § 1396n(b) (describing waivers for efficiency), or, without a waiver, to exercise a statutory option to implement a managed-care system for Medicaid recipients, *see id.* § 1396u–2(a). These exceptions have no bearing on this case. Even if a state otherwise exer-

cises its option to implement a managed-care system, § 1396a(a)(23)(B) makes clear that as to family planning services, state Medicaid plans must afford recipients the full range of free choice of provider. Similarly, efficiency waivers provided under § 1396n may never be used to "restrict the choice of the individual in receiving [family planning services]." *Id.* §§ 1396n(b), 1396d(a)(4)(C). And while Arizona's waiver is pursuant to § 1315, for demonstration projects—a type of waiver that can perhaps extend to family planning services if the Secretary so provides—the Secretary has not so provided for Arizona. Rather, as the district court determined, Arizona's waiver extends to the general free choice guarantee in § 1396a(a)(23)(A) only to the extent necessary to enroll recipients in managed care, and does not extend at all to the family planning services guarantee in § 1396a(a)(23)(B).

Second, § 1396a(a)(23) itself enumerates several exceptions to its scope. For example, it does not apply in Puerto Rico, Guam, or the Virgin Islands, nor does it interfere with states' separate statutory authority to subject new providers to a temporary moratorium under § 1396a(kk)(4). *See id.* § 1396a(a)(23)(B). The provision also specifies that it shall not be construed to require states to allow persons or entities "convicted of a felony ... for an offense ... inconsistent with the best interests of beneficiaries" to participate in their Medicaid programs. *Id.* Again, none of these exceptions apply here; Arizona is not a territory exempt from the requirement, plaintiffs are not new providers being excluded pursuant to a temporary moratorium, and Arizona does

not contend that any of the plaintiffs have been convicted of felonies.

Finally, several provisions of the Medicaid Act in addition to § 1396a(p)(1) recognize both federal and state authority to exclude individual providers from public health care programs on grounds related to fraud, patient abuse, criminal activity, improper billing or record-keeping, and the like. The Secretary is required to exclude providers convicted of certain crimes related to health care fraud, patient abuse, or controlled substances, *see* 42 U.S.C. § 1320a–7(a), and is also permitted to exclude providers for certain other enumerated reasons, including certain types of convictions, license revocations, failures to disclose, false representations, and defaults on loans, *see id.* § 1320a–7(b); *see also id.* § 1395cc(b)(2) (listing grounds on which Secretary may refuse to enter into or terminate a provider agreement). Another provision, the authority-to-exclude provision mentioned above, empowers states to exclude providers on any of these same grounds. *Id.* § 1396a(p)(1). Again, these exceptions do not apply here. HB 2800 does not set out grounds for excluding *individual* providers from Arizona's Medicaid program demonstrated to have engaged in some type of criminal, fraudulent, abusive, or otherwise improper behavior. Rather, it preemptively bars a *class* of providers on the ground that their scope of practice includes certain perfectly legal medical procedures.

For the same reason, none of the cases cited by Arizona in which courts have upheld the exclusion of particular providers from state Medicaid programs

supports the proposition that states may exclude classes of providers from their Medicaid programs because of legislative disapproval of those providers' scope of services.

Guzman v. Shewry, 552 F.3d 941 (9th Cir.2009), affirmed the denial of a preliminary injunction to a physician suspended from California's Medicaid program because he was the subject of a fraud investigation, pursuant to a state law requiring the temporary suspension of any provider under such an investigation. *Id.* at 950 (citing Cal. Welf. & Inst.Code § 14043.36(a)). In affirming the district court's denial of the injunction, *Guzman* held only that the Medicaid Act does not preempt state laws providing for suspension of providers in cases of possible fraud or abuse, as well as for other reasons having to do with "professional competence, professional performance, or financial integrity." *Id.* at 949 (quoting 42 U.S.C. § 1320a–7(b)(5)). *Guzman* did not address the free-choice-of-provider provision, and its holding is fully consistent with ours, as the Arizona statute here challenged restricts provider participation on none of the bases mentioned in *Guzman.*

Similarly, *Plaza Health Laboratories, Inc. v. Perales,* 878 F.2d 577 (2d Cir.1989), affirmed the denial of a preliminary injunction to a medical laboratory challenging its suspension from the New York Medicaid program because it was subject to a felony indictment in New Jersey for dumping hazardous waste. A New York state law authorized the suspension of any provider indicted for "an act which would be a felony under the laws of New York." *Id.* at 579

(quoting N.Y. Comp.Codes R. & Regs. tit. 18, § 515.7(b) (1988)). Arizona reads *Plaza Health* to mean that states have "plenary . . . authority" to disqualify providers from Medicaid "for many reasons that advance State law and policy," such as a state policy against "engaging in industrial pollution." But the medical lab in *Plaza Health* was not categorically disqualified from New York's Medicaid program because of a generic policy disfavoring pollution; it was individually excluded because it had been indicted for a felony. No one questions Arizona's authority to exclude individual providers from its Medicaid program on the basis of criminal or fraudulent activity. Rather, Arizona seeks with HB 2800 to bar a class of providers from Medicaid not because of misconduct by particular providers, but because of blanket disapproval of those providers' *legal* scope of services. [9]

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[9] Arizona also relies on *First Medical Health Plan, Inc. v. Vega–Ramos,* 479 F.3d 46, 53 (1 st Cir.2007), which upheld the exclusion of a provider from Puerto Rico's Medicaid program on the basis of a Puerto Rico law against self-dealing. Puerto Rico is exempt from the free-choice-of-provider requirement, *see* 42 U.S.C. § 1396a(a)(23)(B), so *Vega–Ramos* has no bearing on the Medicaid Act's applicability in states subject to that requirement.

In addition, Arizona invokes *Kelly Kare, Ltd. v. O'Rourke,* 930 F.2d 170 (2d Cir.1991). *Kelly Kare* held that the free-choice-of-provider requirement does not give individual Medicaid recipients a liberty or property interest in continued care from a particular provider, so that a provider can therefore be excluded without due process for the recipients. *Id.* at 177–78. Here, the question is not the procedures due patients but the substantive protections provided by the statute. *Cf. Planned Parenthood of Ind.,* 699 F.3d at 977.

4. Arizona makes three final arguments in defense of HB 2800. First, Arizona contends that HB 2800 "does not offend" the free-choice-of-provider re requirement because Planned Parenthood "remains able to create a separate entity to provide nonfederally qualified abortion services ... and thereby remain eligible to provide Medicaid family planning services." Even assuming Arizona's separate entity interpretation of HB 2800 is viable—which is far from clear to us [10]—the separate entity argument is irrelevant. The Medicaid Act's free-choice-of-provider requirement does not include an exception allowing states to violate it so long as providers can spin off affiliates.

Second, Arizona argues that "implementation of [HB 2800] would result only in an incidental loss of family planning services" because Arizona has "approximately 2,000 Medicaid providers" of family planning services in addition to Planned Parenthood. Even if true—which Planned Parenthood contests—

Finally, Arizona cites *Triant v. Perales,* 112 A.D.2d 548, 548, 491 N.Y.S.2d 486 (N.Y. App. Div. 1985), in which an intermediate New York state court upheld a physician's exclusion from the New York Medicaid program because of "completely and utterly deficient" record-keeping, pursuant to a state regulation requiring Medicaid providers to maintain adequate records. *Triant* rested solely on New York state law and did not consider its interaction with the federal Medicaid Act.

[10] The most natural reading of the Arizona statute precludes Planned Parenthood from providing Medicaid-covered family planning services in clinics it "maintains or operates" if abortions are provided there, whether by itself or by separate entities. *See* Ariz.Rev.Stat. § 35–196.05(B).

this fact is immaterial to whether HB 2800 violates the free-choice-of-provider requirement. As the Seventh Circuit noted in rejecting a similar argument made by Indiana, the free-choice-of-provider requirement "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." *Planned Parenthood of Ind.,* 699 F.3d at 979. There is no exception to the free-choice-of-provider requirement for "incidental" burdens on patient choice.

Finally, Arizona invokes the Tenth Amendment, urging this court to respect its "sovereign police power authority to regulate the health and welfare of its citizens." Whatever the scope of Arizona's Tenth Amendment powers to regulate health care, this case does not implicate them. Nothing in either the Medicaid Act's free-choice-of-provider requirement or the district court's order casts any doubt on Arizona's authority to regulate the practice of medicine within its borders. HB 2800 is a public funding statute, conditioning the receipt of state monies on the range of services that a health care provider offers; it does not have any effect on whether a provider is authorized to practice medicine in Arizona.

To the contrary, HB 2800's purpose is to exclude concededly qualified medical providers from eligibility for public funds unless they decline to perform elective abortions. Arizona has never claimed that Planned Parenthood's staff doctors are unqualified to perform gynecological exams or STD testing. Quite the opposite; the HB 2800 implementation letter

made clear that if Planned Parenthood agreed to stop performing privately funded, elective abortions, it could continue providing all of its other services at public expense.

5. The parties have directed the court's attention to various agency interpretations of § 1396a(a)(23). Because "the term 'qualified' as used in § 1396a(a)(23) unambiguously refers to the provider's fitness to render the medical services required," *Planned Parenthood of Ind.,* 699 F.3d at 980, we need not and do not consider those interpretations. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

CONCLUSION

For the reasons explained above, the district court's summary judgment order and permanent injunction (Case No. 13–15506) are **AFFIRMED.** Arizona's appeal of the preliminary injunction (Case No. 12–17558) is **DISMISSED** as moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Planned Parenthood Arizona, Inc.; Jane Doe # 1; Jane Doe # 2; Jane Doe # 3; Eric Reuss, M.D., Plaintiffs, v. Tom Betlach, Director, Arizona Health Care Cost Containment System; Tom Horne, Attorney General, Defendants.	No. CV–12–01533–PHX–NVW. **ORDER** February 8, 2013

Before the Court is Plaintiffs' Motion for Summary Judgment (Doc. 85) and Statement of Undisputed Material Facts (Doc. 86), Defendants' Response (Doc. 101) and Statement of Facts (Doc. 100), and the Reply (Doc. 102). For the following reasons, Plaintiffs' Motion will be granted.

I. Procedural Background

Plaintiffs brought this action to enjoin enforcement of Arizona Legislature HB 2800, 2nd Regular Session, 50th Legislature (2002) ("the Arizona Act" or "the Act"), which prohibits any health care provider who performs elective abortions from receiving Medicaid funding. A.R.S. § 35–196.05. Plaintiffs contend that the Act violates the Medicaid Act (Count

I), and that the Act is unconstitutional (Counts II–V). The Arizona Act was scheduled to take effect on August 2, 2012, but the parties stipulated to a temporary restraining order that delayed implementation and enforcement of the Act pending the Court's ruling on Plaintiffs' Motion for Preliminary Injunction. On October 19, 2012, 899 F.Supp.2d 868, 2012 WL 5188009, the Court entered its Findings of Fact and Conclusions of Law (Doc. 78), concluding that Plaintiffs were likely to succeed on their Medicaid Act claim, and issued a Preliminary Injunction (Doc. 79) that enjoined Defendants from enforcing the Arizona Act with respect to Plaintiffs. After the Court issued its injunction, the parties stipulated that while the Preliminary Injunction was in force, Defendants would be enjoined from taking any action to implement or enforce the Act (Doc. 88). The parties then stipulated to stay all discovery in this case pending the Court's ruling on Plaintiff's Motion for Summary Judgment and agreed that the Motion does not rely on any facts that would require any discovery (Doc. 97).

II. Statutory Structure

In this Motion, Plaintiffs contend that they are entitled to summary judgment on their claim that the Arizona Act violates the Medicaid Act as a matter of law. The statutory scheme underlying that claim is described in detail in the Court's previous Order (Doc. 78), so only a brief synopsis will be provided here. The Medicaid program, established by Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.,* is a cooperative federal-state program created

to provide medical assistance to needy families and individuals. State participation in Medicaid is voluntary, but once a State elects to participate, it must meet the program's federal requirements. 42 U.S.C. §§ 1396a(a)(1)–(83); *Frew ex rel. Frew v. Hawkins,* 540 U.S. 431, 433 (2004).

At issue here is the Medicaid Act's requirement that a state Medicaid 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. . . ." 42 U.S.C. § 1396a(a)(23)(A). Section 1396a(a)(23) (the "freedom of choice provision") therefore confers upon 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). A state participating in Medicaid retains the power to establish "reasonable standards relating to the qualifications of providers. . . ." 42 C.F.R. § 431.51(c)(2). A state can also exclude health care providers from participation in Medicaid "for any reason for which the Secretary could exclude the [provider] from participation," "[i]n addition to any other authority." 42 U.S.C. § 1396a(p)(1).

The Arizona Act prohibits any person or entity that performs abortions—except when the pregnancy is the result of rape or incest, or threatens the life or health of the mother—from participating in Arizona's Medicaid program. A.R.S. § 35–196.05. Plaintiffs argue that they are entitled to judgment as a matter of law that the Arizona Act violates Medicaid

beneficiaries' right under § 1396a(a)(23) to receive care from any qualified provider they choose.

III. Legal Standard

Summary judgment is proper if the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The movant has the burden of showing the absence of genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). An issue of fact is material only if it "might affect the outcome of the suit under the governing law." *Chevron USA, Inc. v. Cayetano,* 224 F.3d 1030, 1039 (9th Cir.2000) (quoting *Moreland v. Las Vegas Metro. Police Dep't,* 159 F.3d 365, 369 (9th Cir.1998)). At the summary judgment stage, courts view all evidence in the light most favorable to the non-moving party. *Rohr v. Salt River Project Agric. Imp. & Power Dist.,* 555 F.3d 850, 864 (9th Cir.2009).

IV. Analysis

Both the relevant legal principles and the factual circumstances of this case remain unchanged since the Court issued its Preliminary Injunction Order. As a result, the analysis of Plaintiffs' claim that the Arizona Act violates the Medicaid Act is substantially the same as that set forth in more detail in the Preliminary Injunction Order (Doc. 78). The analysis in the Preliminary Injunction Order was reinforced when, after the Order was issued, the Seventh Circuit affirmed an injunction against a substantively

identical state statute from Indiana. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health,* 699 F.3d 962 (7th Cir.2012). In that case, the Court of Appeals also concluded that the state statute violated the Medicaid Act, for reasons that largely mirror this Court's reasoning in the Preliminary Injunction Order. Rather than repeat all of the analysis in the Preliminary Injunction Order, this Order incorporates it by reference and will summarize and expand its findings of fact and conclusions of law below.

A. Plaintiffs Have a Right to Sue Under 42 U.S.C. § 1983.

In order to have a private right of action to enforce federal statutory rights under 42 U.S.C. § 1983, a plaintiff must establish that Congress intended the statute to create an enforceable individual right. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283–84 (2002). In their Response in Opposition to Summary Judgment, Defendants argue that Plaintiffs have failed to meet that burden and so are not entitled to judgment as a matter of law.

When Congress legislates pursuant to its spending power, it may only create mandatory federal requirements that are binding on the states when it speaks with a "clear voice" and manifests an "unambiguous" intent to confer individual rights. *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981); *Gonzaga,* 536 U.S. at 280. Because Congress enacted the Medicaid Act pursuant to the spending power, a plaintiff seeking to enforce a pro-

vision of the Medicaid Act under § 1983 has the burden to show that the provision unambiguously confers an individual right. *Gonzaga,* 536 U.S. at 280; *see also Ball v. Rodgers,* 492 F.3d 1094, 1104–05 (9th Cir. 2007).

In order to establish that a Medicaid Act provision creates such an enforceable right, then, a plaintiff must show that: (1) Congress intended the provision in question to benefit the plaintiff; (2) the right allegedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute unambiguously imposes a binding obligation on the state, such that the provision is couched in mandatory, rather than precatory terms. *Blessing v. Freestone,* 520 U.S. 329, 340 (1997). The Supreme Court further clarified the first prong of this three-prong *Blessing* test by instructing courts to examine whether Congress used "rights-creating" language to establish individual rights that were "unambiguously conferred." *Gonzaga,* 536 U.S. at 283–84.

In the Preliminary Injunction Order, the Court found that the Medicaid freedom of choice provision satisfies each prong of the *Blessing* test and creates an individual right enforceable under § 1983. There have been neither factual developments nor changes in the law that could support a different conclusion at the summary judgment stage. First, Congress evinced its intent that § 1396a(a)(23) benefit individuals by using paradigmatic "rights-creating terms." The freedom of choice provision includes language focused squarely on individuals eligible for

Medicaid and provides clear instructions for what the states must do to ensure that eligible individuals receive services to which they are entitled. 42 U.S.C. §§ 1396a(a)(23)(A)-(B). Second, largely because of those clear instructions, the right of a Medicaid-eligible individual to select from among a range of qualified providers without government interference is not so vague and amorphous that it would be difficult for courts to enforce. Third, the language of the freedom of choice provision is unambiguously framed in mandatory terms: all states "must provide" that their state plans protect the right of Medicaid beneficiaries to have their choice of provider. "In sum, the [freedom of choice provision] explicitly refers to a specific class of people—Medicaid-eligible patients—and confers on them an individual entitlement—the right to receive reimbursable medical services from any qualified provider." *Planned Parenthood of Ind.,* 699 F.3d at 974.

Resisting this conclusion, Defendants again contend that § 1396a(a)(23) does not confer a private right of action under § 1983. Defendants advance two arguments, both raised in their briefing on the Preliminary Injunction but expanded in this Response. First, they argue that the freedom of choice provision is too vague for the court to enforce, and so fails to meet the second prong of the *Blessing* test. Second, they argue that the Court's interpretation of the freedom of choice provision—finding that it imposes a mandatory obligation on the states to ensure the right to receive medical services from any qualified provider—would violate the clear statement rule of *Pennhurst.*

Defendants' first argument remains unpersuasive for the same reason that it failed at the Preliminary Injunction stage: the right created by § 1396a(a)(23) "is administrable and falls comfortably within the judiciary's core interpretive competence." *Planned Parenthood of Ind.,* 699 F.3d at 974. A court could "readily determine whether a state is fulfilling these statutory obligations by looking to sources such as a state's Medicaid plan, agency records and documents, and the testimony of Medicaid recipients and providers." *Ball,* 492 F.3d at 1115.

The core of Defendants' argument is that the use of the term "qualified" in the freedom of choice provision creates such ambiguity in the provision that it would be difficult for courts to enforce the requirement. But there is nothing vague about the ordinary meaning of the word qualified in the provision: a "qualified" provider is one "[p]ossessing the necessary qualifications; capable or competent, [e.g.] a qualified medical examiner." Black's Law Dictionary (9th ed. 2009). The statute itself reflects this ordinary meaning. The plain language of § 1396a(a)(23) connects the limitation on an individual's free choice of "qualified" providers to the ability of the provider "to perform the service or services required." 42 U.S.C. § 1396a(a)(23)(A). States retain the authority to set qualification standards, 42 C.F.R. § 431.51(c)(2), but they can only adopt reasonable standards related to the ability of the provider to perform the Medicaid services in question. Indeed, far from introducing ambiguity that would render the provision unenforceable, the term "qualified" in §

1396a(a)(23) "unambiguously refers to the provider's fitness to render the medical services required." *Planned Parenthood of Ind.,* 699 F.3d at 980.

Defendants' second argument fares no better. Because the freedom of choice provision meets all three prongs of the *Blessing* test, it also complies with the *Pennhurst* clear statement rule. The Supreme Court reconsidered whether federal legislation enacted pursuant to the spending power can confer enforceable rights under § 1983 in *Gonzaga,* and it did so expressly in light of the restrictive *Pennhurst* clear statement rule. *Gonzaga,* 536 U.S. at 279–81, 283. The *Blessing* test, as modified by *Gonzaga,* therefore incorporates and develops the clear statement requirement of *Pennhurst. Id.* at 280–83. As a result, a provision of the Medicaid Act that satisfies the *Blessing* test, as clarified by *Gonzaga,* necessarily meets the requirement of the *Pennhurst* clear statement rule. *See Ball,* 492 F.3d at 1104–05; *see also Planned Parenthood of Ind.,* 699 F.3d at 972–73.

The Court has already concluded that the freedom of choice provision meets each prong of the *Blessing* test, and reaffirms that conclusion in this Order. Congress clearly expressed its intent that the freedom of choice provision create a specific, individual federal right by phrasing the provision "with an *unmistakable focus* on the benefited class;" here, individual patients eligible for Medicaid. *Gonzaga,* 536 U.S. at 284 (quoting *Cannon v. Univ. of Chicago,* 441 U.S. 677, 691 (1979)). Further, Congress expressly imposed an obligation on the states to guarantee this federal right. The states "must [ ] provide" individual

freedom of choice among qualified providers, 42 U.S.C. 1396a(a)(23)(A), and "shall not restrict the choice" among qualified providers of family planning services, 42 U.S.C. 1396a(a)(23)(B). The right § 1396a(a)(23) creates is explicit and the states' obligation to provide for that right is unambiguous. The *Pennhurst* clear statement rule, as developed in *Blessing* and *Gonzaga,* is therefore satisfied. Individuals who are eligible for Medicaid thus have a right to receive medical assistance from the qualified provider of their choice under § 1396a(a)(23), and can enforce that right through a § 1983 cause of action.

B. The Arizona Act Violates the Freedom of Choice Provision as a Matter of Law.

The remaining dispositive question in this Motion is purely a question of law: whether Arizona can limit the range of qualified Medicaid providers for reasons unrelated to a provider's ability to deliver Medicaid services without violating a beneficiary's right to have free choice of qualified providers. As the Court found in the Preliminary Injunction Order, the language of the Medicaid Act, canons of statutory construction, and the relevant legislative history all compel the conclusion that Arizona lacks that authority. A state may not restrict a beneficiary's right to select any qualified provider for reasons wholly unrelated to the provider's ability to deliver Medicaid services. There have been no changes of law or fact since the Preliminary Injunction Order that would alter that conclusion. Plaintiffs are therefore

entitled to judgment as a matter of law that the Arizona Act violates § 1396a(a)(23).

As before, Defendants present a strained interpretation of the word "qualified" that would include any reasonable criteria a state sees fit to impose, regardless of whether the criteria relates to the ability to provide Medicaid services. That interpretation contradicts the plain meaning of the phrase "[providers that are] qualified to perform the service or services required," which describes qualified providers as those providers that are competent to provide the needed services. 42 U.S.C. § 1396a(a)(23).

Defendants' interpretation also is foreclosed in light of the narrow and specific exceptions Congress provided to the freedom of choice requirement. *See, e.g.,* 42 U.S.C. § 1396n(b)(4). Congress would not have included a broad guarantee of free choice among qualified providers, subject to enumerated and well-defined exceptions, and then vested in the states the authority to circumvent that guarantee for nearly any reason. Section 1396a(p)(1), which allows states to exclude providers for a number of enumerated reasons "[i]n addition to any other authority," is merely one such exception to the freedom of choice guarantee. Defendants argue that § 1396a(p)(1) grants states the authority to define, for any reason supplied by state law, what makes a provider "qualified." Such an interpretation would render the remainder of the exceptions to the freedom of choice provisions, in which Congress carefully set forth the circumstances in which a provider can be excluded from the program, redundant. *See, e.g.,* 42 U.S.C. §

1396n(b)(4) (granting the Secretary authority to allow states to restrict choice of providers for Medicaid beneficiaries only when the restriction "does not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing those services"). Congress would not have drafted the Medicaid Act to make the specific instances in which the Secretary and a state could restrict choice of providers redundant. Section 1396n(b)(4) does not, therefore, give the states plenary authority to disqualify an entire class of providers for any reason supplied by state law.

Defendants cite *Guzman v. Shewry,* 552 F.3d 941 (9th Cir. 2009), to support their contention that a state retains the authority to set any reasonable standards for participation in Medicaid. *Guzman* does not support Defendants' argument. In *Guzman,* the Ninth Circuit found 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." *Id.* at 949. As a result, *Guzman* held that a state has the authority to exclude a provider based on a pending criminal investigation as part of its authority to exclude providers from participating in Medicaid "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity." *Id.* (quoting 42 U.S.C. § 1320a–7(b)(5)). That holding is entirely consistent with the Court's interpretation of § 1396a(a)(23). States retain the authority to set standards for participation in the Medicaid program, but only reasonable standards related to the ability

of the provider to perform Medicaid services. A state may not restrict a beneficiary's right under § 1396a(a)(23) to select any qualified provider for reasons that have nothing to do with Medicaid services. Nothing in *Guzman* suggests otherwise. *See Planned Parenthood of Ind.,* 699 F.3d at 980.

As in the Preliminary Injunction Order, this conclusion is based on the language of the Medicaid Act and related regulations, basic canons of statutory construction, and the legislative history of the involved provisions. In the Preliminary Injunction Order, the Court further found that consistent agency interpretations were persuasive independent of the level of deference owed and therefore resolved any remaining doubt about the meaning of § 1396a(a)(23) in light of § 1396a(p)(1). Because the interpretation of those provisions in this Order and in the Preliminary Injunction Order is independent of the agency's interpretation, it is unnecessary to resolve the question of the level of deference to accord the agency in order to resolve this case. The Court's conclusion that Plaintiffs are entitled to judgment as a matter of law does not depend at all on deference to agency interpretations. Those interpretations, which are persuasive because they were thoroughly considered, carefully reasoned, and consistent, simply confirm the Court's independent conclusion.

C. There Are No Genuine Issues of Material Fact.

There are no material issues of fact in dispute in this case, only questions of law. Defendants contend

that two issues of fact bear on this Motion: 1) Plaintiff Planned Parenthood Arizona, Inc. ("Planned Parenthood") provides only a small portion of the total Medicaid family planning services in Arizona; and 2) Planned Parenthood would be able to create a separate entity to provide elective abortion services and thereby avoid disqualification from the Medicaid program under the Arizona Act. Even assuming these facts to be true, these issues are not material because they could not affect the outcome of this case under governing law. *Chevron USA, Inc. v. Cayetano,* 224 F.3d 1030, 1039 (9th Cir.2000). The freedom of choice provision "guarantees to every Medicaid beneficiary the right to choose *any* qualified provider," unless an exception to the provision applies. *Planned Parenthood of Ind.,* 699 F.3d at 979. It is the Medicaid beneficiaries who enjoy this right. The Arizona Act would disqualify otherwise qualified providers from participation in the state's Medicaid program for impermissible reasons and thereby limit the choice of qualified providers for Medicaid beneficiaries. As a matter of law, the Arizona Act would therefore violate § 1396a(a)(23). That some providers may be able hypothetically to restructure themselves to avoid disqualification under the Arizona Act does not change the fact that the Act impermissibly impinges on the rights of Medicaid beneficiaries. The number of those beneficiaries a provider serves, or the quantity of Medicaid services for which a provider is responsible, is similarly irrelevant. These issues of fact may mitigate the extent to which a Medicaid beneficiary's right is violated, but the violation nevertheless remains. The Arizona Act violates the freedom of choice provision of the

Medicaid Act precisely because *every* Medicaid beneficiary has the right to select *any* qualified health care provider.

Because A.R.S. § 35–196.05(B) impermissibly disqualifies a class of providers from the state's Medicaid program for reasons unrelated to provider qualifications, the Arizona Act violates 42 U.S.C. § 1396a(a)(23) as a matter of law. As a result, Plaintiffs are entitled to summary judgment on Count I, which is sufficient to resolve the case in their favor and grant them all the relief they seek. It is therefore unnecessary for the Court to address any of Plaintiffs' other claims.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. 85) is GRANTED.

IT IS FURTHER ORDERED that the Parties file by February 14, 2013, a Joint Proposed Form of Permanent Injunction, or separate proposed forms.

Dated this 8th day of February, 2013.

s/Neil V. Wake
Neil V. Wake
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Planned Parenthood Arizona, Inc.; Jane Doe # 1; Jane Doe # 2; Jane Doe # 3; Eric Reuss, M.D., Plaintiffs, v. Tom Betlach, Director, Arizona Health Care Cost Containment System; Tom Horne, Attorney General, Defendants.	No. CV–12–01533–PHX–NVW. **FINAL JUDGMENT AND PERMANENT INJUNCTION** February 21, 2013

The Court having granted summary judgment in favor of Plaintiffs (Doc. 103),

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Ariz. Rev. Stat. §35-196.05(B) violates the freedom of choice provision of the Medicaid Act, 42 U.S.C. §1396a(a)(23), as a matter of law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants Tom Betlach, Director, Arizona Health Care Cost Containment System, and Tom Horne, Attorney General, their officers, agents, servants, employees, successors, attorneys, and other persons who are in active concert or participation with any of them, are permanently enjoined from taking any action to implement or enforce Ariz. Rev.

Stat. § 35-196.05(B) against Plaintiff and all entities or persons acting by and/or through them.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants are permanently enjoined from disqualifying otherwise qualified providers from receiving Medicaid reimbursement for medical services covered by Medicaid on the basis that these providers provide otherwise legal abortions.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants are permanently enjoined from requiring providers to sign the attestation form issued by the Arizona Health Care Cost Containment System in furtherance of Ariz. Rev. Stat. § 35-196.05(B) , and are enjoined from enforcing any previously signed attestation forms.

Dated this 21st day of February, 2013.

s/Neil V. Wake
Neil V. Wake
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Planned Parenthood Arizona, Inc.; Jane Doe # 1; Jane Doe # 2; Jane Doe # 3; Eric Reuss, M.D., Plaintiffs, v. Tom Betlach, Director, Arizona Health Care Cost Containment System; Tom Horne, Attorney General, Defendants.	No. CV–12–01533–PHX–NVW. **EXCERPTS FROM THE STATUTES AND CONSTITUTIONAL PROVISIONS**

Arizona House Bill 2800, as codified at A.R.S. § 35-196.05(B)

This State or any political subdivision of this State may not enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1396a(a)(23)

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 (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, and (B) an enrollment of an individual eligible for medical assistance in a primary care case-management system (described in section 1396n(b)(1) of this title), a medicaid managed care

organization, or a similar entity 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(p)(1)

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.

U.S. Const. Art. 1, § 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; -- And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Const. Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.