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No. 11-2464

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**United States Court of Appeals for the Seventh Circuit**

PLANNED PARENTHOOD OF INDIANA, INC., *ET AL.*,  
*Plaintiffs-Appellees,*

v.

COMMISSIONER OF INDIANA STATE DEPT OF HEALTH, *ET AL.*,  
*Defendants-Appellants,*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF INDIANA, CIVIL ACTION  
NO. 1:11-CV-630, HON. TANYA WALTON PRATT

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

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Appellate Court No: 11-2464

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## **IDENTITY, INTEREST AND AUTHORITY TO FILE**

*Amicus curiae* Eagle Forum Education & Legal Defense Fund (“Eagle Forum”), a nonprofit Illinois corporation, files this *amicus* brief with all parties’ consent.<sup>1</sup> Founded in 1981, Eagle Forum has consistently defended federalism and supported states’ autonomy from the federal government in areas – like public health – that are of traditionally local concern. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

## **STATEMENT OF THE CASE**

This section outlines the relevant legal and factual background.

### **Constitutional Background**

Under Article III, appellate courts review jurisdictional issues *de novo*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), and “presume that federal courts lack jurisdiction unless the

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<sup>1</sup> Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief’s preparation or submission.

contrary appears affirmatively from the record.” *Renne v. Geary*, 501 U.S. 312, 316 (1991). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), “[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect” and “the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co.*, 523 U.S. at 94 (interior quotations omitted).

Under the Spending Clause, U.S. CONST. art. I, §8, cl. 1, courts analogize federal programs to contracts between the government and recipients (here, states), with the public as third-party beneficiaries. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002); *Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin.*, 603 F.3d 365, 386 (7th Cir. 2010). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman*, 536 U.S. at 186. With that required notice, recipients *potentially* face enforcement for violating the conditions of federal spending. *Id.* at 187-89. But “[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause

of action for noncompliance but rather action by the Federal Government to terminate funds to the State.” *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981).

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

### **Statutory Background**

Established in 1965, Medicaid is a cooperative federal-state

program that provides medical care to needy individuals. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). State participation is voluntary under the Spending Clause, but participating states agree to comply with Medicaid requirements under the statute and the implementing regulations of the Department of Health & Human Services (“HHS”).

To qualify for Medicaid funds, states must submit and HHS must approve “a plan for medical assistance” on the scope of that state’s Medicaid program. 42 U.S.C. §1396a(a). After the initial approval, states may submit “State plan amendments” or “SPAs” to revise the state plan. 42 C.F.R. §430.12. When HHS denies SPAs, states may seek reconsideration, which initiates an administrative process – with a formal hearing and opportunity for public participation – and the eventual opportunity for judicial review directly in the appropriate U.S. Court of Appeals. 42 C.F.R. §§430.18, 430.60, 430.76, 430.102(c); 42 U.S.C. §§1316(a)(3), 1396c.

Under its “free-choice” provision, Medicaid requires that “[a] State plan for medical assistance must – ... provide that (A) any individual eligible for medical assistance (including drugs) may obtain such

assistance from any institution, agency, community pharmacy, or person, *qualified* to perform the service or services required ... who undertakes to provide him such services, and (B) an enrollment of an individual eligible for medical assistance in [various programs] shall not restrict the choice of the *qualified* person from whom the individual may receive services under section 1396d(a)(4)(C) of this title.” 42 U.S.C. §1396a(a)(23) (emphasis added).

Section 1396a(p)(1) defines the “[e]xclusion power of [a] State” as follows: “*In addition to any other authority*, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title.” 42 U.S.C. §1396a(p)(1) (emphasis added). Consistent with the foregoing, the legislative history indicates not only that states can exclude entities to avoid “fraud and abuse,” “incompetent practitioners,” and “inappropriate or inadequate care” (*i.e.*, the same bases on which HHS may exclude entities), S. REP. NO. 100-109, at 2 (1987), but also that Medicaid “is not intended to preclude

a State from establishing, *under State law, any other bases* for excluding individuals or entities from its Medicaid program.” *Id.* at 20 (emphasis added).

If, after reasonable notice and opportunity for hearing, HHS finds that an approved Medicaid plan has “so changed that it no longer complies with the provisions of [§1396a]” or that the plan’s administration fails to comply with those provisions, HHS must either terminate Medicaid funding or “in [its] discretion, ... limit[] [payments] to categories under or parts of the State plan not affected by such failure” until HHS determines “that there will no longer be any such failure to comply.” 42 U.S.C. §1396c. Medicaid does not include any authority for HHS to compel states to comply with §1396a.

Indiana’s House Enrolled Act 1210 (“HEA 1210”) became law on May 10, 2011, which prompted this lawsuit. In pertinent part, HEA 1210 prohibits entities – other than hospitals and ambulatory surgical centers – that perform abortions from receiving state funding for non-abortion health services. *See* IND. CODE §5-22-17-5.5(b) to 5.5(d). HEA 1210’s defunding provisions also apply to the Preventative Health Services Block Grant Program, 42 U.S.C. §247c, under which states

distribute federal funds (hereinafter, the “Block Grants”).

### **Federal Common Law**

“[F]ederal law governs questions involving the rights of the United States arising under nationwide federal programs.” *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). Although “[f]ederal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract,” *Boyle v. United Tech. Corp.*, 487 U.S. 500, 519 (1988), a uniform federal rule of decision is not required in *private enforcement* of a federal contract or program if the claim “will have *no direct effect upon the United States or its Treasury*.” *Boyle*, 487 U.S. at 520 (*quoting Miree v. DeKalb County*, 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). Thus, federal common law does not necessarily apply to private enforcement of federal contracts like this litigation.

“Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules.” *Kimbell Foods*, 440 U.S. at 727-28. Instead, “when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.” *Kimbell Foods*, 440 U.S. at 728. Indeed, “[t]he prudent course ... is often to

adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.” *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691-92 (2006) (internal quotation omitted). In other words, notwithstanding that federal law applies, the federal rule of decision could be “*See the state rule.*” For example, under *Miree*, 433 U.S. at 28, federal courts can look to state law for third-party beneficiaries’ standing to enforce obligations under federal contracts. Accordingly, Section I.B, *infra*, looks not only to federal common law but also to Indiana law for third-party beneficiaries’ standing to enforce federal contracts.

### **Factual Background**

Planned Parenthood of Indiana (with its co-plaintiffs, collectively, “PPIN”) performs both elective abortions and other, non-abortion medical services. PPIN does not segregate its abortion and non-abortion funds. Appellants’ App. at 63-64. Even if PPIN ceases to provide its non-abortion services to Medicaid patients, those services will remain available in Indiana from hundreds of other Medicaid providers who perform those non-abortion medical services. *See* Appellants’ App. at 60-61. In addition to losing Medicaid revenues, PPIN stands to lose the

unexpended portions of its Indiana grant agreements under the federal Block Grants.

Indiana sought HHS approval of an SPA for HEA 1210, which HHS tentatively and cursorily denied on June 1, 2011, on the basis that HEA 1210 conflicts with §1396a(a)(23). Appellants' App. at 142. Indiana requested a hearing under §1396c, which has not yet occurred.

### **SUMMARY OF ARGUMENT**

Neither the United States nor third-party beneficiaries can enforce Medicaid without the conditions precedent to Medicaid enforcement, which undermines PPIN's standing and ability to state a claim for relief (Sections I.A-C, II.A-B, IV.A.3). Under both Indiana and federal common law, third-party beneficiaries lack standing to enforce promisees' non-vested rights (Section I.B-C). Moreover, because PPIN cannot cite an ongoing violation of federal law, *Ex parte Young* provides no exception to Indiana's sovereign immunity (Section I.D).

Medicaid and *a fortiori* the Block Grants neither provide a private cause of action nor create individual rights that support causes of action under 42 U.S.C. §1983 (Section II.A). Similarly, because Medicaid gives Indiana every right to run its medical programs in non-compliance with

Medicaid, PPIN cannot assert the ongoing *violation* of federal law necessary to bring a cause of action under *Ex parte Young* (Section II.B).

Because it operates within a field traditionally occupied by the states, Medicaid is subject to the presumption against preemption, which PPIN cannot surmount because Medicaid does not “clearly and manifestly” prohibit what Indiana has done (Section III.A). Moreover, the HHS finding that HEA 1210 does not comply with §1396a(a)(23) warrants no deference because it is non-final, conclusory, and inconsistent with Medicaid, especially when interpreted in light of both the Spending Clause and the presumption against preemption (Section III.B).

On the merits, Medicaid’s “free-choice” provision expressly allows state exclusion of non-qualified providers (Section IV.A.1), and Medicaid plainly allows states to adopt exclusion criteria such as HEA 1210 (Section IV.A.2). Similarly, the Block Grants do not prohibit Indiana’s actions under HEA 1210 (Section IV.B), and HEA does not impose unconstitutional conditions on the acceptance of federal funds (Section IV.C). Finally, because PPIN’s contracts expressly allow Indiana to terminate those contracts for any reason, HEA 1210 cannot violate the

Contract Clause (Section IV.D).

## ARGUMENT

### **I. FEDERAL COURTS LACK JURISDICTION OVER PPIN'S CLAIMS**

Under Medicaid's plain terms, HHS can terminate or curtail Indiana's funding – which is Medicaid's exclusive remedy – only after providing an opportunity for a hearing. Whether jurisdictionally or on the merits, both the failure to meet that regulatory precondition to an enforcement remedy and PPIN's seeking a specific-performance remedy that Medicaid lacks doom PPIN's challenge here. *See, e.g., Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (distinguishing statutory and constitutional standing); *Frey v. E.P.A.*, 270 F.3d 1129, 1136 (7th Cir. 2001) (“both Article III and statutory standing requirements must be satisfied”) (*citing Ragsdale v. Turnock*, 941 F.2d 501, 509 (7th Cir. 1991)); *cf. Davis v. Ball Memorial Hospital Ass'n*, 640 F.2d 30, 41-42 (7th Cir. 1980) (an “enforceable interest is ‘akin’ to the requirement of standing”).<sup>2</sup> Either way, PPIN cannot

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<sup>2</sup> Although the failure to satisfy regulatory conditions precedent negates both constitutional standing and statutory standing, this Court may address statutory standing first. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999); *Norfolk Southern Ry. Co. v. Guthrie*, 233 F.3d 532, 534 (7th Cir. 2000). Moreover, because this standing argument

prevail. Moreover, because Medicaid allows Indiana to elect non-compliance – with the possible termination or curtailment of federal funding – whatever fault HHS could find in Indiana’s implementation of Medicaid nonetheless could not support federal-court jurisdiction over Indiana’s Eleventh-Amendment immunity.

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

As indicated, courts analogize Spending-Clause programs to contracts struck between the federal government and recipients, with the public as third-party beneficiaries. *Gorman*, 536 U.S. at 186; *Indiana Protection & Advocacy Services*, 603 F.3d at 386. When a statutory scheme under the Spending Clause defines recipients’ obligations, the *entire* scheme constitutes the bargain that the United States (or its agencies or any third-party beneficiaries) can enforce. *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 59 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Because not even the United States could bring this action as the promisee, PPIN cannot bring this action as an alleged

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overlaps with the merits, *Eagle Forum* reprises this issue as a merits argument in Section IV.A.3, *infra*.

beneficiary.

Under “traditional principles of contract interpretation,” third-party beneficiaries cannot “cherry-pick” the specific provisions that they wish to enforce. *In re United Airlines, Inc.*, 368 F.3d 720, 725 (7th Cir. 2004) (“[d]ebtors in bankruptcy can’t cherry-pick favorable features of a contract to be assumed”); *Thompson v. Goetzmann*, 337 F.3d 489, 501 (5th Cir. 2003) (“litigants cannot cherry-pick particular phrases out of statutory schemes simply to justify an exceptionally broad – and favorable – interpretation of a statute”). Moreover, third-party beneficiaries “generally have no greater rights in a contract than does the promise[e].” *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 375 (1990); *Holbrook v. Pitt*, 643 F.2d 1261, 1273 n.24 (7th Cir. 1981) (“tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts”); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 318 (5th Cir. 1991) (“[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee’s] rights”). Here, not even HHS could enforce Medicaid to compel Indiana to provide funding to PPIN. *What agencies cannot do directly, plaintiffs cannot do indirectly as third-party-beneficiaries.*

## **B. PPIN Lacks Standing to Enforce Indiana’s Non-Vested Obligations**

As explained in Section I.A, *supra*, and Section IV.A.3, *infra*, lack of conditions precedent affects both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). But even if lack of conditions precedent implicated only Rule 12(b)(6) *for federal agencies*, it nonetheless implicates jurisdiction for third-party beneficiaries. Under Indiana law, third-party beneficiaries lack standing to enforce non-vested claims. *OEC-Diasonics, Inc. v. Major*, 674 N.E.2d 1312, 1314-15 (Ind. 1996) (“intent of the contracting parties to bestow rights upon a third party must affirmatively appear from the language of the instrument when properly interpreted and construed”) (internal quotations omitted); *Fowler v. Perry*, 830 N.E.2d 97, 105 (Ind. App. 2005) (rights do not vest until conditions precedent satisfied); *Wedel v. American Elec. Power Service Corp.*, 681 N.E.2d 1122, 1134 (Ind. App. 1997) (same). If federal common law applied, the result would be the same. *Palma v. Verex Assur., Inc.*, 79 F.3d 1453, 1458 (5th Cir. 1996); *Karo v. San Diego Symphony Orchestra Ass’n*, 762 F.2d 819, 822-24 (9th Cir. 1985); *Peabody v. Weider Publications, Inc.*, 260 Fed.Appx. 380, 383 (2d Cir. 2008) (“[b]ecause the condition precedent never came to

fruition, Peabody’s rights ... never vested”) (non-precedential summary order).<sup>3</sup> Without the conditions precedent to Medicaid enforcement, PPIN lacks a legally protected interest in that enforcement and thus lacks standing. Significantly, *plaintiffs* always bear the burden of proving jurisdiction, *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1150 (2009), and their claim’s non-vested nature goes to their standing to enforce Medicaid.

To the extent other courts have assumed jurisdiction without addressing this issue, “drive-by jurisdictional rulings” that reach merits issues without considering a particular jurisdictional issue “have no precedential effect” on that jurisdictional issue. *Steel Co.*, 523 U.S. at 94-95; *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (“cases [cited by PPIN] cannot be read as foreclosing an argument that they never dealt with”). “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as

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<sup>3</sup> Whatever federal agencies may say, the states plainly never signed up for private Medicaid enforcement, especially without the administrative conditions precedent to federal Medicaid enforcement. If the states did not agree to such enforcement, then that enforcement is not part of the agreement. *Holbrook*, 643 F.2d at 1271 (courts construe third-party beneficiaries’ rights by looking to intent of promisee and promisor); *Price v. Pierce*, 823 F.2d 1114, 1122 (7th Cir. 1987) (same).

having been so decided as to constitute precedents.” *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Courts that never *considered* a jurisdictional issue plainly never *decided* it.

### **C. The Relevant Statutes Do Not Confer Protected Interests – *i.e.*, Standing – on PPIN**

Indiana and the United States have entered a contract that requires Indiana to meet certain Medicaid criteria or run the risk of termination or curtailment of its Medicaid funding. That arrangement does not confer any protected interests on PPIN. At most, consistent with Medicaid, a reviewing court conceivably could order HHS to reduce or eliminate the Medicaid funding that otherwise would go to Indiana. That creates two problems for standing. First, because it does not benefit PPIN, the funding remedy simply cures a general grievance – such as an interest in proper government operation or in getting the “bad guys” – that cannot establish standing. *FEC v. Akins*, 524 U.S. 11, 23 (1998). Moreover, terminating or curtailing Indiana’s Medicaid funding does absolutely nothing to redress PPIN’s injuries, which is an even more fundamental failure of PPIN’s standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (standing requires cognizable

injury, causation, and redressability).

#### **D. The Eleventh Amendment Precludes PPIN's Suit**

Indiana may assert its immunity from suit both on appeal and as the district court case proceeds, which makes immunity relevant to PPIN's likelihood of prevailing. *Ex parte Young* is a limited exception to sovereign immunity, and that exception applies only to ongoing *violations* of federal law. Thus, for example, the *Ex parte Young* exception was unavailable in *Green v. Mansour*, 474 U.S. 64 (1985), where, after "Respondent ... brought state policy into compliance," the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Mansour*, 474 U.S. at 66-67. Here, it is undisputed that Medicaid allows Indiana the option of electing to field a non-compliant Medicaid program, leaving to HHS the decision whether to curtail or eliminate Indiana's Medicaid funding. This is the nature of the Medicaid contract that Indiana and the United States entered. Indiana's alleged breach of that contract is simply not a "violation" of "federal law" that triggers the *Ex parte Young* exception to immunity.

## II. PPIN LACKS A CAUSE OF ACTION TO ENFORCE THE RELEVANT STATUTES AGAINST INDIANA

At the outset, it is both clear and undisputed that Medicaid does not provide a private right of action for recipients to enforce Medicaid's perceived requirements. *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 456 (7th Cir. 2007). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman*, 536 U.S. at 186. Medicaid says nothing about private causes of action:

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

*Astra USA, Inc. v. Santa Clara County, Cal.*, 131 S.Ct. 1342, 1347-48 (2011) (quoting 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). Instead, PPIN proposes to “spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries],” *Astra*, 131 S.Ct. at 1349. The states never agreed to that as part of Medicaid, and federal law does not sanction it.

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

two alternate paths, 42 U.S.C. §1983 and the *Ex parte Young* exception to sovereign immunity:

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

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

#### **A. PPIN Cannot Sue under §1983**

By its terms, “§1983 permits the enforcement of ‘rights, not the broader or vaguer ‘benefits’ or ‘interests.’” *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-20 (2005) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasis in *Gonzaga*)). As such, “[i]n order to seek redress through §1983, ... a plaintiff must assert the violation of a federal right, not merely a violation of federal law.” *Blessing v. Freestone*, 520 U.S. 337, 340 (1997) (emphasis in original). To meet this test, §1983 plaintiffs must establish an enforceable federal right under

a three-part test: (1) Congress must have intended the provision in question to benefit the plaintiff; (2) the alleged right is not so “vague and amorphous” that enforcing it would “strain judicial competence;” and (3) the rights-creating provision is stated in mandatory, rather than precatory, terms. *Blessing*, 520 U.S. at 340-41. PPIN cannot establish any of these three prerequisites to enforcing Medicaid under §1983.

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

Although *Wilder*, 496 U.S. at 522-23, held that Medicaid’s Boren

Amendment constituted rights-creating language that enabled the plaintiff there to avoid Medicaid’s enforcement remedies, *Gonzaga* – consistent with *Sandoval* – narrowed *Wilder* by mooring it to its facts, including that the “statutory provisions explicitly conferred specific monetary entitlements upon the plaintiffs.” *Gonzaga*, 536 U.S. at 274. Here, the statute neither focuses on the individual protected nor explicitly entitles PPIN to *anything*, monetary or otherwise. Under *Sandoval* and *Gonzaga*, such group-based *benefits* and *systemic* requirements do not create *rights*. Similarly, *O’Bannon v. Town Court Nursing Center*, 447 U.S. 773, 786-88 (1980), distinguished between direct Medicaid benefits like financial assistance and indirect benefits like freedom of choice, finding only direct benefits protected by the Due Process Clause. Given those differences with *Wilder* (*i.e.*, §1396a(a)(23)’s not explicitly conferring benefits on PPIN and its conferring only indirect benefits on Medicaid patients), nothing authorizes §1983’s circumventing Medicaid’s exclusive review procedures and remedies. *Rancho Palos Verdes*, 544 U.S. at 122-23.

Second, the only Medicaid remedies that Indiana agreed to under the Spending Clause and the relevant statutes are fund termination

and fund curtailment, after an administrative process now underway. 42 U.S.C. §1396c. Under the circumstances, it would indeed “strain judicial competence” either to interfere in or to circumvent that administrative process before HHS acts. In addition to the second *Blessing* criterion, this Court also could rely on the doctrines of non-justiciable political questions<sup>4</sup> or the primary jurisdiction of a federal agency to reject PPIN’s claims.<sup>5</sup>

Third, and notwithstanding that §1396a(a) uses the word “must,” §1396a(a)(23) is not mandatory in the way that the *Blessing* test uses the term. The answer to Medicaid’s critical “*or what?*” question is not sufficiently concrete for §1396a(a) to qualify as mandatory for purposes

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<sup>4</sup> “The political-question doctrine identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts’ capacity to gather and weigh, ... or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative-the so-called ‘political’-branches of the federal government.” *Judge v. Quinn*, 624 F.3d 352, 358 (7th Cir. 2010).

<sup>5</sup> “Primary jurisdiction ... sometimes involves reference of an issue to an agency that has exclusive jurisdiction to resolve it. If the issue is dispositive and its resolution by the agency is reviewable in another court, the case will never return to the referring court and therefore a stay of the initial judicial proceeding to permit the reference would have the same effect as a dismissal.” *Schering-Plough Healthcare Products, Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 507-08 (7th Cir. 2009); *see also* *Arsberry v. Illinois*, 244 F.3d 558, 563-64 (7th Cir. 2001).

of creating a federal right. Assuming *arguendo* that HEA 1210 conflicts with §1396a(a)(23), Indiana’s Medicaid plan would be noncompliant, and HHS could terminate or curtail Indiana’s Medicaid funding. 42 U.S.C. §1396c. Because not even the United States could compel Indiana to comply with §1396a(a)(23), that provision cannot be considered “mandatory” for purposes of creating an individual right to specific enforcement of that provision.

**B. PPIN Cannot Sue under *Ex parte Young***

In *Illinois Ass’n of Mortg. Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002), this Court held that “[i]t is not necessary ... to determine whether the” federal statute “create[s] rights enforceable under §1983” because a court’s general jurisdiction suffices to enter injunctive relief under *Ex parte Young*. While that remains true as a general matter, as signaled in the prior paragraph and as indicated in Section I.D, *supra*, PPIN – and the federal courts – lack an ongoing violation of federal law sufficient to trigger the *Ex parte Young* exception to sovereign immunity. Simply put, the Illinois statute in *Illinois Ass’n of Mortg. Brokers* was inconsistent with federal law and thus was preempted. Here, by contrast, HEA 1210 is not inconsistent

with federal law. Instead, HEA 1210 represents an entirely permissible exercise of Indiana’s sovereignty, regardless of whether HHS elects to eliminate or curtail Indiana’s Medicaid funding.

### **III. THE RULES OF STATUTORY CONSTRUCTION FAVOR INDIANA’S INTERPRETATION OF MEDICAID**

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

First, because this action concerns a field of traditional state regulation (public health) into which the federal government only recently appeared, this Court must apply the presumption that Congress would not have preempted Indiana law without a “clear and manifest” intent to do so. Here, “clear and manifest” evidence of preemptive intent is lacking, and Indiana’s powerful brief, the district court’s own admission that Indiana’s arguments have force (Appellants’ Short App. at 14), and the supporting precedents from other circuits all counsel for finding that PPIN cannot overcome the presumption against preemption.

Second, the preliminary (and conclusory) HHS finding that HEA 1210 is inconsistent with §1396a(a)(23) is not entitled to any deference under *Chevron* or *Skidmore*. With *Chevron*, this Court can decide the issue using traditional tools of statutory construction, which obviates deference to HHS altogether. With *Skidmore*, the HHS finding lacks the power to persuade through any thoroughness in reasoning. Moreover, as a non-final agency action already under intra-agency appeal, the tentative HHS finding cannot command any deference.

**A. The Presumption against Preemption Applies**

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When this “presumption against preemption” applies, courts will not assume preemption “unless that was the *clear and manifest purpose* of Congress.” *Id.* (emphasis added). Even if a court finds that Congress expressly preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, “[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts

ordinarily ‘accept the reading that disfavors pre-emption.’” *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 540 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). Because the public health field here is one traditionally occupied by state government, the presumption applies. In essence, PPIN must establish that no plausible reading of Medicaid and the Block Grants supports Indiana.

**B. This Court Owes No Deference to Tentative HHS Rulings or Final HHS Interpretations**

The district court improperly deferred to the HHS finding that HEA 1210 is inconsistent with §1396a(a). Appellants’ Short App. at 18. At the outset, of course, it does not matter what Congress and federal agencies believe about the Constitution: the “power to interpret the Constitution ... remains in the Judiciary.” *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). Accordingly, on constitutional issues, only prior holdings of this Court or the Supreme Court bind the panel here. But even on Medicaid, this Court owes no deference to the federal regulatory actions cited by PPIN.

The HHS finding would not warrant any deference under the *Skidmore* standard, which judges an agency’s interpretation by the “thoroughness evident in the [agency’s] consideration, the validity of its

reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). A politically expedient, conclusory determination from a recess-appointed administrator lacks any power to persuade. Instead, PPIN argues for *Chevron* deference, in which courts owe deference to an agency’s plausible construction of an interstitial gap in a statute under that agency’s administration (*Chevron* prong two), unless the Court can interpret the statute’s requirements using tools of traditional statutory construction (*Chevron* prong one). *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44, 865-66 (1984). But agencies axiomatically lack authority not expressly delegated to them, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and judicial deference applies only to actions within agencies’ delegations. *Chevron*, 467 U.S. at 865. Under the circumstances, neither the relevant statutes nor the tentative HHS finding justify deference, even under the generous *Chevron* standard.

*First*, while notice-and-comment rulemaking is not required for *Chevron* deference to apply, *Chevron* deference simply does not apply to tentative, non-final decisions. *Matter of Appletree Markets, Inc.*, 19 F.3d

969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (citing *Public Citizen Health Research Group v. Commissioner, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000). By the express terms of Medicaid, the tentative HHS finding is not final for purposes of judicial review because Indiana has sought intra-agency review of it. 42 U.S.C. §1396c; see also 5 U.S.C. §704 (agency action not final if subject to intra-agency appeal). If a court cannot even *review* an agency action, it plainly cannot *defer* to it.

*Second*, and consistent with the first argument against deference, the judicial decisions on which the district court relied involved *final* agency action. See, e.g., *West Virginia v. Thompson*, 475 F.3d 204, 206 (4th Cir. 2007); *State of Ga., Dept. of Medical Assistance v. Shalala*, 8 F.3d 1565, 1567 (11th Cir. 1993). As indicated, final agency action is an entirely different issue, and final agency action here will follow judicial review under an entirely different process.

*Third*, and most importantly, assuming *arguendo* that the relevant statutes conferred any deference or delegated any authority, *Chevron* prong one directs reviewing courts to assess the question using

traditional tools of statutory construction before deferring to an agency interpretation. *Chevron*, 467 U.S. at 842-43. Under that test and the presumption against preemption, the law here is clear, without the need for an administrative gloss. Medicaid shows no clear and manifest congressional intent to preempt Indiana’s approach. Moreover, any latter-day HHS conclusion to the contrary – without notice and the opportunity for comment – would be entitled to *no* deference. *Wyeth v. Levine*, 129 S.Ct. 1187, 1201-04 (2009).<sup>6</sup> Simply put, HHS warrants no deference here.

#### **IV. PPIN CANNOT PREVAIL ON THE MERITS**

Although PPIN made four merits arguments against HEA 1210, the district court did not reach all of those arguments. *Amicus Eagle Forum* addresses all four of PPIN’s arguments to assure this Court that PPIN has no basis on which to succeed on the merits.

##### **A. HEA 1210 Does Not Violate Medicaid**

Assuming *arguendo* that federal courts have jurisdiction over

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

PPIN’s claims and that PPIN has a cause of action against Indiana on PPIN’s preemption theories, PPIN can prevail on its Medicaid-based claims only if HEA 1210 violates Medicaid’s free-choice provision *and* if Indiana lacks authority to exclude providers like PPIN on the basis of state-law criteria not included in Medicaid. Because HEA 1210 does not violate the free-choice provision and Indiana may exclude PPIN on the basis of state laws like HEA 1210, PPIN cannot prevail on the merits of its Medicaid claims.

**1. HEA 1210 Complies with “Free Choice”**

By its own terms, the free-choice provision expressly allows states to limit Medicaid access to *qualified* entities. 42 U.S.C. §1396a(a)(23). Although it does not expressly define the contours of provider qualification, Medicaid does recognize states’ right to exclude entities on the basis of state law beyond the bases on which HHS may exclude entities. *See* Section IV.A.2, *infra* (*discussing* 42 U.S.C. §1396a(p)(1)). Thus, provided HEA 1210 lawfully disqualifies PPIN, HEA 1210 does not conflict with §1396a(a)(23) by §1396a(a)(23)’s express terms.

**2. HEA 1210 Lawfully Defines “Qualified” Providers**

As indicated in the Statutory Background, *supra*, Medicaid provides states the authority to exclude entities not only based on HHS

criteria but also based on “any other authority.” 42 U.S.C. §1396a(p)(1); *see also* 42 C.F.R. §1002.2 (“[n]othing contained in this part should be construed to limit a State’s own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law”). The legislative history provides that Medicaid “is not intended to preclude a State from establishing, *under State law, any other bases* for excluding individuals or entities from its Medicaid program.” S. REP. NO. 100-109, at 20 (emphasis added). Citing that legislative history, the First Circuit held that “this ‘any other authority’ language was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law.” *First Medical Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (emphasis in original); *Kelly Kare, Ltd. v. O’Rourke*, 930 F.2d 170, 178 (2d Cir. 1991) (freedom-of-choice provision does not apply to providers where government has properly cancelled a provider’s contract). Even without resort to canons of statutory interpretation under the Spending and Supremacy Clauses, the state has the better *textual* reading of Medicaid’s free-choice requirements and entity-exclusion authority.

But the constitutional setting of the Spending Clause and the

Supremacy Clause make it *contextually* impossible for PPIN to prevail. First, courts must construe Spending-Clause agreements to provide clear notice before finding recipients like Indiana to have violated them. Second, Medicaid regulates in the field of public health – a field traditionally occupied by the states – and PPIN cannot overcome the presumption against preemption, which requires only that Indiana have a plausible non-preemptive interpretation to support HEA 1210. By preserving state authority to regulate alongside the federal act, clauses like §1396a(p)(1) undermine preemption claims like PPIN’s by negating congressional intent to preempt, making it virtually impossible for plaintiffs like PPIN to make the required showing of a clear and manifest congressional intent *to preempt*. *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1978 (2011). As such, §1396a(p)(1) makes PPIN’s preemption claims untenable.

### **3. PPIN Fails to State Vested Medicaid Claims**

As indicated in Section I.A, *supra*, Medicaid imposes conditions precedent on Medicaid enforcement – namely, the process under 42 U.S.C. §1396c – that remain unmet here. Under federal common law, failure to meet conditions precedent can render third-party beneficiaries

unable to state a claim for relief. *See, e.g., Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 540 & n.15 (5th Cir. 2004); *Kane Enterprises v. MacGregor (USA) Inc.*, 322 F.3d 371, 375 (5th Cir. 2003). Alternatively, PPIN lacks standing as a third-party beneficiary to the federal contracts because Medicaid’s enforceability has not vested. *See* Section I.B, *supra*. Either way, PPIN cannot prevail on its Medicaid claims. Assuming *arguendo* that this defect – namely, the lack of a vested, enforceable interest – is *not* jurisdictional, it nonetheless precludes PPIN’s stating a claim for regulatory relief.

#### **B. HEA 1210 Does Not Violate the Block Grants**

The Block Grants provide even less basis for private enforcement than §1396a(a)(23). If federal agencies wish to terminate Indiana’s federal grants, they may do so, consistent with the terms of the relevant statutes and grant documents. Typically, however, that is the Spending Clause’s *only* remedy. *Pennhurst*, 451 U.S. at 28. PPIN has shown nothing that would entitle it – more than any other member of the public – to interject itself between the United States and Indiana.

#### **C. HEA 1210 Does Not Impose Unconstitutional Conditions on State Funding**

PPIN also argues that HEA 1210 somehow unconstitutionally ties

eligibility for state funds to PPIN’s abortions. Because both the Indiana appellants and their legislative *amici* brief this critical issue extensively, *amicus* Eagle Forum addresses it only in summary. Indiana has *no federal obligation* to fund abortions with public funds. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989); *Harris v. McRae*, 448 U.S. 297, 318 (1980). Unquestionably, Indiana’s funding PPIN would at least indirectly subsidize PPIN’s abortion business – along with other, non-abortion services that PPIN provides – because money is fungible. *See* Appellants’ Br. at 5 (citing Appellants’ App. at 63). The Constitution does not require Indiana to fund PPIN.

#### **D. HEA 1210 Does Not Violate the Contract Clause**

Under the Contract Clause, “[n]o State shall enter into any ... Law impairing the Obligation of Contracts.” U.S. CONST. art. I §10, cl. 1. By their express terms, PPIN’s grant agreements with Indiana provide that the “Grant Agreement[s] may be terminated, in whole or in part, by the State whenever, for any reason, the State determines that such termination is in the best interest of the State.” Appellants’ App. at 21, 48. PPIN’s quarrel is with the grant agreements, not HEA 1210.

While terms could be too illusory even to qualify as a contract,

*Penn v. Ryan’s Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001) (“[a]n illusory promise, one which by its terms makes performance entirely optional with the promisor, cannot form the basis for a valid contract” under Indiana law), it does not violate the Contract Clause for Indiana to enforce the grant agreements’ *express* termination clauses. Nor do the termination clauses render the grant agreements illusory for *past* PPIN activities. *City of El Paso v. Simmons*, 379 U.S. 497, 514-15 (1965) (declining to interpret contract to render it illusory). For *prospective* PPIN activities, however, Indiana has every right – indeed a *contractual* right – to terminate the grant agreements, without impairing any contractual obligations.

### CONCLUSION

Although it reviews preliminary injunctions deferentially on factual and equitable issues, this Court reviews legal issues *de novo*. *United Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 563 F.3d 257, 269 (7th Cir. 2009). Put another way, a “court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Moreover, even preliminary injunctions require jurisdiction, *City of Los Angeles v.*

*Lyons*, 461 U.S. 95, 103 (1983), and courts may decide the merits at the jurisdictional stage “where... jurisdiction is dependent on ... the merits.” *Land v. Dollar*, 330 U.S. 731, 735 (1947). Finally, the “matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases,” *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici*. *Turner v. Rogers*, 131 S.Ct. 2507, 2519-20 (2011); *accord id.* at 2521 (Thomas, J., dissenting). Even where Indiana has not yet made the arguments that supporting *amici* make, Indiana may do so in the subsequent merits proceedings and at any time, even on appeal, for jurisdictional and immunity issues.

Because PPIN lacks standing and federal courts lack jurisdiction over the sovereign State of Indiana and because PPIN cannot possibly either state a claim or prevail on the merits, this Court *sua sponte* should vacate the preliminary injunction for this litigation’s pendency and then reverse and remand with instructions to dismiss this action.

Dated: August 6, 2011

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,996 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

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## CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users and that, on the same date, I served two copies of the foregoing brief by U.S. Mail, first class postage prepaid, on the following CM/ECF non-participants:

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