No. 11-3235

United States Court of Appeals for the Tenth Circuit

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI,
Plaintiff-Appellee,

v.

ROBERT MOSER, M.D., SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, CIVIL ACTION NO. 11-2357-JTM-DJW, HON. J. THOMAS MARTEN

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

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund

CORPORATE DISCLOSURE STATEMENT

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

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

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

Dated: October 11, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit corporation, moves for leave to file this *amicus* brief.[1] Founded in 1981, Eagle Forum has consistently defended federalism and states' autonomy from the federal government in areas – like public health – that are of traditionally local concern, as well as Article III and separation-of-powers doctrines on judicial restraint. For the reasons set forth in the accompanying motion, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

This section outlines the relevant legal and factual background.

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501

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

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 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." 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 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). Like jurisdiction, immunity may be raised at any time, even on appeal. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). Officer

suits for *prospective* injunctive relief against ongoing violations of federal law provide limited exceptions to sovereign immunity, *Ex parte Young,* 209 U.S. 123 (1908), but do not allow money damages or even "retroactive payment of benefits … wrongfully withheld." *Edelman,* 415 U.S. at 678.

Under the Spending Clause, courts analogize federal programs to contracts between the government and recipients (here, states), with the public as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously, *Gorman,* 536 U.S. at 186, especially for state recipients with sovereign immunity. *Sossamon v. Texas,* 131 S.Ct. 1651, 1661 (2011). With that required notice, recipients *potentially* face enforcement for violating the conditions of federal spending, *Gorman,* 536 U.S. at 187-89, although the barrier is higher for state recipients: "Without such a clear statement from Congress and notice to the States, federal courts may not step in and abrogate state sovereign immunity." *Sossamon,* 131 S.Ct. at 1661. Moreover, "[i]n legislation enacted pursuant to the spending power, the typical remedy for noncompliance

with federal 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).

Statutory Background

Title X of the Public Health Services Act provides federal subsidies for family-planning services to low income individuals. Family Planning Services & Population Research Act of 1970, Pub. L. 91-572, 84 Stat. 1504 (1970). As Kansas explains, Congress intended Title X to augment family-planning services available through public and nonprofit private entities, Appellant's Br. at 6 (*quoting* Pub. L. 91-572, §2, 84 Stat. 1504), without any indication of either preempting state law or providing a private cause of action. As with all Spending-Clause legislation, participation is voluntary, but participating entities agree to comply with Title X requirements under the statute and the implementing regulations of the Department of Health & Human Services ("HHS").

Title X authorizes HHS "to make grants to and enter into contracts with public or nonprofit private entities to assist in the

establishment and operation of voluntary family planning projects." 42 U.S.C. §300(a). To guide HHS in exercising that authority, Title X provides several criteria for HHS to consider and protects the rights of local and regional entities to apply for direct grants and contracts. *See* 42 U.S.C. §300(a).

Although Title X grantees may delegate their duties under their Title X grants to "delegate/contract agencies," the grantee (here, Kansas) is the party that "assumes legal and financial responsibility and accountability for the awarded funds and for the performance of the activities approved for funding." U.S. Dep't of Health & Human Services, Office of Public Health & Science, Office of Population Affairs, Office of Family Planning, *Program Guidelines for Project Grants for Family Planning Services,* at 1 (Jan. 2001) (hereinafter, "*Title X Program Guidelines*").[2] Nothing in the Title X statute, the implementing regulations, and the *Title X Program Guidelines* limits a grantee's ability to delegate performance of its grant obligations, but both grantees and any delegate agencies remain bound by certain

[2] Available at http://www.hhs.gov/opa/pdfs/2001-ofp-guidelines.pdf (last visited October 11, 2011).

constraints on federal-funding recipients (*e.g.*, non-discrimination on the basis of race under Title VI of the Civil Rights Act of 1964) enumerated in the regulations. 42 C.F.R. §59.10 (incorporating various federal regulatory regimes into Title X's regulatory regime). No party disputes Kansas' compliance with these incorporated federal provisions.

When an applicant receives a multi-year grant (usually three or five years), the initial grant covers the first year and the grantee must re-apply for continuation funding annually throughout the grant's term. 42 C.F.R. §59.8(b). Neither the initial award nor any subsequent one-year continuation award obligates HHS to continue the grant in subsequent years. 42 C.F.R. §59.8(c).

HHS can terminate or curtail Title X funding – which is Title X's exclusive "enforcement" remedy – only after attempting to resolve any adverse issues informally and providing an opportunity for a hearing. 42 C.F.R. §§50.404(a)(1), (4), 406(a), (f); 45 C.F.R. §74.90(a); *cf.* 42 C.F.R. §59.10 (incorporating *inter alia* 42 C.F.R. Part 50, Subpart D and 45 C.F.R. Part 74). Final agency decisions are appealable to the

"Department Grant Appeals Board" under 45 C.F.R. pt. 16,[3] *see* 42 C.F.R. §59.10, and the final decision there is reviewable in district court. *See, e.g., Bowen v. Massachusetts,* 487 U.S. 879, 909-10 (1988); *Colorado Dep't of Social Serv. v. Dep't of Health & Human Serv.,* 771 F.2d 1422, 1423 (10th Cir. 1985).

The Kansas law at issue here – referred to as "Section 107(1)" – was enacted on June 9, 2011, 30 Kan. Reg. No. 23, at 793 (June 9, 2011) ("§107(1)"), immediately prompting this lawsuit. In pertinent part, §107(l) prioritizes Title X funds available to Kansas first to "public entities (state, county, local health departments and health clinics)" and "if any moneys remain" second to "nonpublic entities which are hospitals or federally qualified health centers ["FQHCs"] that provide comprehensive primary and preventative care." *Id.* Section 107(1)'s priorities are "subject to any applicable requirements of federal statutes, rules, regulations or guidelines." *Id.* As Kansas explains, the state's Legislature enacted the spending bill of which §107(1) is a small

[3] The Department Grant Appeals Board can allow real parties in interest to participate in these intra-agency appeals. *See* 45 C.F.R. §16.16(a) ("for example, where the major impact of an audit disallowance would be on the grantee's contractor, not on the grantee").

part in a challenging economic climate that requires government "to do more with less." Appellant's Br. at 34.

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 Kansas law for third-party beneficiaries' standing to enforce federal contracts.

Factual Background

Planned Parenthood of Kansas and Mid-Missouri ("Planned Parenthood") provides non-abortion family-planning services in Wichita and Hays, Kansas, and is affiliated with Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri ("Comprehensive Health"), which provides abortions in Overland Park, Kansas. Appellant's App. 12 (¶8). Prior to §107(1)'s enactment, Planned Parenthood received the largest single portion (approximately 12%) of

KDHE's delegated work under Title X. Of KDHE's fifty-five delegates, only two (Planned Parenthood and one other) were private entities.

After §107(1)'s enactment, KDHE advised Planned Parenthood that Planned Parenthood no longer would be eligible to delegate KDHE's implantation of Title X. Planned Parenthood sued the Secretary of the Kansas Department of Health and Environment ("KDHE"), Dr. Robert Moser (hereinafter, "Kansas"), in his official capacity to impose a delegate relationship under KDHE's Title X grant from HHS. Although KDHE was in the process of seeking a continuation of its Title X project with the new, post-§107(1) array of services and delegates, the district court's preliminary injunction arrested that process by compelling KDHE to contract with Planned Parenthood for the continuation years.

SUMMARY OF ARGUMENT

Neither the United States nor third-party beneficiaries can enforce Title X without satisfying the conditions precedent to Title X enforcement, which undermines Planned Parenthood's standing and ability to state a claim for relief (Sections I.A-C, II.A-B, III.A.3). Under both Kansas and federal common law, third-party beneficiaries lack

standing to enforce the promisees' non-vested rights (Section I.B-C). Moreover, because Planned Parenthood cannot cite an ongoing violation of federal law, *Ex parte Young* provides no exception to Kansas' sovereign immunity (Section I.D).

Title X neither provides a private cause of action nor creates individual rights that support causes of action under 42 U.S.C. §1983 (Section II.A). Similarly, because Title X gives Kansas every right to run its family-planning project as it had proposed, Planned Parenthood cannot assert the ongoing *violation* of federal law necessary to bring a cause of action under *Ex parte Young* (Section II.B). Finally, Planned Parenthood cannot bring an action in contract, which in essence is what Planned Parenthood's suit proposes.

On the merits, §107(l) complies with Title X's plain language (Section III.A.1), even without considering the presumption against preemption in fields – such as public health – traditionally occupied by the states (Section III.A.2). Because it does not limit Planned Parenthood's rights, §107(l) does not impose unconstitutional conditions on the acceptance of federal funds (Section III.B). Finally, because Planned Parenthood's contracts expressly allow Kansas to terminate

Planned Parenthood's funding in continuation years, §107(l) would not violate the Contract Clause even if Planned Parenthood could bring a contract action (Section III.C).

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION AND AUTHORITY TO AWARD PLANNED PARENTHOOD'S REQUESTED RELIEF AGAINST KANSAS

Contrary to Title X's elaborate dispute-resolution process, Planned Parenthood's race to court short-circuited the opportunity both for Kansas to be heard in an informal setting and for HHS to apply its expertise. Both jurisdictionally and on the merits, Planned Parenthood's failing to meet the conditions precedent to enforcement and seeking a specific-performance remedy which Title X lacks) doom its challenge here. *See, e.g., Robey v. Shapiro, Marianos & Cejda, L.L.C.,* 434 F.3d 1208, 1211 (10th Cir. 2006) (distinguishing statutory and constitutional standing); *Carolina Cas. Ins. Co. v. Pinnacol Assur.,* 425 F.3d 921, 926-28 (10th Cir. 2005).[4] Either way, Planned Parenthood cannot prevail.

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[4] Although failure to meet Title X's 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). Moreover, because this standing argument overlaps with the merits, Eagle Forum reprises this issue as a merits argument in Section III.A.3, *infra.*

Moreover, because Title X allows Kansas to proceed as §107(l) proposes – with the possible termination or curtailment of federal funding – the adoption of §107(l) cannot support federal-court jurisdiction over Kansas' Eleventh-Amendment immunity.

A. HHS Lacks a Vested Right to Enforce Title X 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. Courts analyze statutes as a whole. *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). Thus, when Spending-Clause legislation defines recipients' obligations, the *entire* scheme constitutes the bargain that the United States (or any third-party beneficiaries) can enforce. Not even the promisee has standing to enforce a non-vested right. *Hughes & Zeek v. Wiley,* 36 Kan. 731, 14 P. 269, 271 (Kan. 1887). If not even the United States could bring this action as the promisee, Planned Parenthood obviously cannot bring it as an alleged 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"); *cf. Gallagher v. Continental Ins. Co.,* 502 F.2d 827, 833 (10th Cir. 1974) ("[r]ecognition of the third-party beneficiary theory would open the doors to attack on every highway construction contract by any disgruntled taxpayer"). Here, not even HHS could enforce Title X to compel Kansas to delegate to Planned Parenthood. Instead, after

providing the required process, HHS could curtail or terminate Kansas' Title X funding. *What agencies cannot do directly, plaintiffs cannot do indirectly as third-party-beneficiaries.*

B. Planned Parenthood Lacks Standing to Enforce Non-Vested Obligations

As explained in Section I.A, *supra,* and Section III.A.3, *infra,* failure to meet the conditions precedent affects both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). But even if it implicated only Rule 12(b)(6) *for federal agencies,* failure to meet the conditions precedent nonetheless would implicate jurisdiction for third-party beneficiaries. Under Kansas law, third-party beneficiaries lack standing to enforce non-vested claims. *Byers v. Snyder,* 44 Kan.App.2d 380, 390-91, 237 P.3d 1258 (Kan. App. 2010); *State ex rel. Stovall v. Reliance Ins. Co.,* 278 Kan. 777, 793-95, 107 P.3d 1219 (2005) ("[c]ontracting parties are presumed to act for themselves and therefore an intent to benefit a third person must be clearly expressed in the contract"); *cf. Bevill Co., Inc. v. Sprint/United Management Co.,* 77 Fed.Appx. 461, 462-63, 2003 WL 22285682, 1 (10th Cir. 2003) ("Kansas follows the general rule that one who is not a party to a contract lacks standing to sue for its breach, absent a special status such as that of a

third-party beneficiary") (unpublished).[5] Planned Parenthood therefore lacks standing.

In assenting to the Title X funding, states do not sign on to private enforcement, without the administrative conditions precedent to federal enforcement. As such, that private enforcement is not part of the federal-state agreement, even if HHS would now disagree. *Holbrook,* 643 F.2d at 1271 (courts construe third-party beneficiaries' rights by looking to intent of promisee *and promisor*). Significantly, however, the United States appearing as *amicus curiae* at oral argument in a related context argued that the Medicaid statute forecloses private enforcement by third-parties, outside of Medicaid's enforcement procedures:

> Our basic point is the Spending Clause is a contractual relationship between the Federal Government and the State, and the Respondents here are in the position of the people asserting rights as third-party beneficiaries to the bilateral relationship between the United States and the -- and the States. Under standard contract law

[5] 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).

> principles -- … the third-party can sue only if the parties intended him to be.
>
> …
>
> I think it also goes to the question whether the parties to the contract intended third-party beneficiary-type rights to be able to sue under -- under a -- what is really analogous to a contract.

Douglas v. Independent Living Ctr. of California, Inc., Nos. 09-958, 09-1158, 10-283, transcript at 25-27 (U.S.) (Oct. 3, 2011) (Edwin S. Kneedler, Deputy Solicitor General).[6] In essence, then, parties to the Title X contract do not view Planned Parenthood as having the right to enforce Planned Parenthood's interpretation of the contract, outside the parties' process for resolving disputes.

Without the conditions precedent to Title X enforcement, Planned Parenthood 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 Title X. To the extent other courts have assumed jurisdiction

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[6] The transcript is available on the Supreme Court's website at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-958.pdf (last visited Oct. 11, 2011).

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 Planned Parenthood] cannot be read as foreclosing an argument that they never dealt with"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Courts that never *considered* a jurisdictional issue plainly never *decided* it.

C. Title X Does Not Confer a Protected Interest – *i.e.*, Standing – on Planned Parenthood

The Kansas-HHS agreement requires Kansas to meet certain Title X criteria or run the risk of termination or curtailment of its Title X project in the annual continuation phases. That arrangement does not confer any protected interests on Planned Parenthood. At most, consistent with Title X, a reviewing court conceivably could order HHS to reduce or eliminate the Title X funding that otherwise would go to Kansas. That creates two problems for standing. First, because it does

not benefit Planned Parenthood, the funding remedy simply cures a general grievance – *e.g.,* 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 Kansas' Title X funding does nothing to redress Planned Parenthood's injuries, which presents an even more fundamental failure to Planned Parenthood'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 Planned Parenthood's Suit against Kansas

Kansas may assert its immunity from suit both on appeal and as the district court case proceeds, which makes immunity relevant to Planned Parenthood's likelihood of prevailing. *Ex parte Young* presents a limited exception to sovereign immunity, but only against 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 Title X allows Kansas the option of proposing its revised slate of delegates to meet its Title X project, leaving to HHS the decision whether to curtail or eliminate Kansas' Title X funding or whether to continue the grant for the additional year(s). This is the nature of the Title X contract between Kansas and HHS. Kansas' alleged breach of that contract simply would not constitute a "violation" of "federal law" sufficient to trigger the *Ex parte Young* exception to immunity, even accepting *arguendo* that Kansas breached anything.

II. PLANNED PARENTHOOD LACKS A CAUSE OF ACTION TO ENFORCE TITLE X AGAINST KANSAS

At the outset, it is clear Title X itself does not provide a private right of action for either beneficiaries or delegates to enforce Title X's perceived requirements. To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186; *Sossamon,* 131 S.Ct. at 1661. Title X 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, Planned Parenthood 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 Title X, 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, Planned Parenthood 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. Planned Parenthood Cannot Enforce Title X via §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 do so, 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. Planned Parenthood cannot establish any of these three prerequisites to enforcing Title X under §1983.

First, Congress could not have intended Title X generally to benefit Planned Parenthood because Planned Parenthood is not a Title X beneficiary and because Title X allows Kansas to submit its revised

implementation plan for continuation years under its Title X project, hampered only by the potential to lose some or even all Title X funding. Nothing in Title X or the implementing rules even applies to Kansas' relationship with delegates like Planned Parenthood: "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) (internal quotations omitted, emphasis added); *accord Gonzaga,* 536 U.S. at 286 (applying the *Sandoval* reasoning to §1983 actions). To be sure, 42 U.S.C. §300(a) protect entities like Planned Parenthood: "Local and regional entities shall be assured the right to apply for *direct* grants and contracts *under [42 U.S.C. §300],*" 42 U.S.C. §300(a) (emphasis added), but that protection is limited to applying for "*direct* grants and contracts" from HHS, with nothing to do with delegation from grantees. *See* Section III.A.1, *infra.* Under the circumstances, nothing authorizes §1983's circumventing Title X's exclusive review procedures and remedies. *Rancho Palos Verdes,* 544 U.S. at 122-23.

Second, the only Title X remedies that Kansas agreed to under the Spending Clause and Title X are fund termination and fund curtailment

(*i.e.,* if HHS declined to continue the grant for the next year), after an administrative process that Planned Parenthood and the district court have now short-circuited. Under the circumstances, it would indeed "strain judicial competence" either to interfere in or to circumvent that administrative process without HHS first acting. In addition to the second *Blessing* criterion, this Court also could rely on the doctrines of non-justiciable political questions[7] or the primary jurisdiction of a federal agency to reject Planned Parenthood's claims.[8]

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[7] "'The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decision, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Schroder v. Bush,* 263 F.3d 1169, 1175-76 (10th Cir. 2001) (*quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 (1986)).

[8] "The doctrine of primary jurisdiction ... is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. In essence, the doctrine represents a determination that administrative agencies are better equipped than the courts to handle particular questions, and that referral of appropriate questions to an agency ensures desirable uniformity of results." *Williams Pipe Line Co. v. Empire Gas Corp.,* 76 F.3d 1491, 1496 (10th Cir. 1996) (citations and interior quotations omitted). "[C]ourts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency." *Id.* (interior quotations omitted).

Third, other than setting criteria for applications made *directly* to HHS, nothing in Title X even addresses the rights of entities like Planned Parenthood to which grantees like Kansas may delegate implementation of Title X projects. As such, Title X fails the third *Blessing* criterion entirely

B. Planned Parenthood Cannot Enforce Title X via *Ex parte Young*

In *Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258, 1266 (10th Cir. 2004), and *Chamber of Commerce of U.S. v. Edmondson,* 594 F.3d 742, 756 (10th Cir. 2010), this Court recognized that plaintiffs may proceed to enforce a purportedly preemptive federal statute through the officer-suit exception of *Ex parte Young,* even where they lack a private right of action under either the federal statute or §1983. While that may be true enough as a general matter, as signaled in the prior paragraph and as indicated in Section I.D, *supra,* Planned Parenthood – 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 statutes and ordinances at issue in *Qwest* and *Edmondson* were (at least partially) inconsistent with federal law and thus was preempted. Here, by contrast, §107(l) is not inconsistent with federal law. Instead,

§107(l) represents an entirely permissible exercise not only of Kansas' sovereignty but also of its options as a grantee under Title X, regardless of whether HHS elects to eliminate or curtail Kansas' Title X funding.

The mistake here – which is a common one – is to assume that *Ex parte Young* simply allows naming an officer (Dr. Moser) instead of the office (KDHE Director) or the state (KDHE or Kansas). That rule would glibly flout the Eleventh Amendment. Properly understood, however, the *Ex parte Young* exception is not so broad. For example, leaving aside suits where "the officer purports to act as an individual and not as an official," suits against government officers provide an exception to sovereign immunity only where (1) "the officer's powers are limited by statute, [so that] his actions beyond those limitations are considered individual and not sovereign actions," or (2) "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90 (1949). Neither is present here.

Significantly, a "claim of error in the exercise of [delegated] power is … not sufficient" to avoid "impleading the sovereign" under the first prong. *Larson,* 337 U.S. at 690. Similarly, other than its fanciful claim

that Title X's criteria *for direct grants from HHS* preempts §107(l)'s priorities for a grantee's delegation of that grantee's Title X obligations, Planned Parenthood's claim here is simply one to "honor … contracts," Appellant's App. 22 (¶4), which does not rise to the level of "illegality" needed to evade sovereign immunity. *Larson,* 377 U.S. at 692 ("normal concomitant of such [contract-related] powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell"). On balance, Planned Parenthood lacks a credible basis on which to haul Dr. Moser into federal court on its preemption theories.

C. Planned Parenthood Cannot Enforce Title X as a Contract

Even if it had vested rights in the Kansas-HHS contract under Title X, Planned Parenthood still could not enforce the contract – as a contract – in federal court against a non-consenting state:

> The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.

Lynch v. U.S., 292 U.S. 571, 580–81 (1934) (*quoting* THE FEDERALIST,

No. 81, at 511 (A. Hamilton)); *Sossamon,* 131 S.Ct. at 1661 (same). Significantly, *Sossamon* clarifies that this contract-law analogy for Spending-Clause legislation is not an open-ended invitation to interpret such agreements broadly but rather – consistent with the clear-notice rule – applies "only as a potential *limitation* on liability." *Sossamon,* 131 S.Ct. at 1661 (emphasis in original). For that reason, private parties cannot enforce federal agreements against non-consenting states as though they were simply private contracts. *Astra,* 131 S.Ct. at 1347-49. Although Planned Parenthood has not pressed a direct contract argument, it is important to realize that it cannot.

III. PLANNED PARENTHOOD CANNOT PREVAIL ON THE MERITS

This section counters Planned Parenthood's merits arguments for preemption and unconstitutional conditions, as well as a brief argument under the Contract Clause that Planned Parenthood *does not make.* Although it likely would be inappropriate to award Planned Parenthood relief on a theory that Planned Parenthood did not raise, *amicus* Eagle Forum respectfully submits that the contract-based analysis helps reach the conclusion that Planned Parenthood cannot prevail here on any theory.

A. §107(l) Does Not Violate Title X

Assuming *arguendo* that federal courts have jurisdiction over Planned Parenthood's claims and that Planned Parenthood has a cause of action against Kansas on Planned Parenthood's preemption theories, Planned Parenthood cannot prevail for three reasons. First, Title X's plain language about direct grants simply does not preempt a grantee's latitude to delegate in the manner of §107(l). Second, 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 Kansas law without a "clear and manifest" intent to do so (*i.e.,* Kansas would prevail even if Title X's plain language did not foreclose Planned Parenthood's arguments). Third, the failure to begin this process with HHS under Title X renders this action void for failure to meet a precondition to relief.

1. Planned Parenthood Cannot Prevail under Title X's Plain Language

The gravamen of Planned Parenthood's preemption argument is that the enumeration of criteria in 42 U.S.C. §300(a) – *i.e.,* "the number of patients to be served, the extent to which family planning services

are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance" – for grants or contracts issued by HHS somehow limits the criteria that grantees may use to select their delegates. Even without resort to narrowing canons of statutory interpretation such as the presumption against preemption in fields traditionally occupied by the states, this argument is meritless.

First, the cited section applies only to grants or contracts issued *by HHS*. A statutory limit on one federal actor simply does not infer a similar limit on all private and non-federal public entities. *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1985 (2011) ("[t]hat provision limits what the Secretary … may do—nothing more"). Thus, nothing requires this Court to carry the HHS criteria wholesale into every grantee's agreement with its delegates. Indeed, the HHS criteria will still apply to the grantee, who must win continuation grants annually, thereby assuring that the HHS criteria will continue to be met *by the project*. The question, then, is not whether the HHS criteria will be met but whether other criteria also can be met. Plainly, nothing in Title X prohibits that. Indeed, by its own terms, Title X's enumerated criteria are *not exclusive*. As such, nothing in the text would expressly

preclude *even HHS* from using additional criteria to evaluate grants or contracts. Clearly, nothing there precludes grantees' doing so.

In the absence of express preemption or actual conflict, Planned Parenthood would have this Court find preemption in §107(l)'s "*prevent[ing] or frustrat[ing]* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). *Amicus* Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth v. Levine,* 129 S. Ct. 1187, 1205 (2009) (characterizing this prong as "'purposes and objectives' pre-emption") (Breyer, J., concurring). Instead, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the

> Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth,* 129 S.Ct. at 1205 (interior quotations and citations omitted) (Breyer, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Nothing in Title X indicates otherwise.

2. The Presumption against Preemption Applies

Significantly, in fields traditionally occupied by state and local government, courts apply a presumption *against* preemption. *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)).

Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [them] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 129 S.Ct. at 1195 n.3 (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies. Because the public health field here is one traditionally occupied by state government, the presumption applies. In essence, therefore, Planned Parenthood must show that no plausible reading of Title X supports Kansas. Planned Parenthood cannot make that showing.

Amicus Eagle Forum will not reprise its plain-language argument here, under the presumption of preemption. Instead, it suffices that those arguments apply even more strongly here. While Title X's language seems to foreclose Planned Parenthood's interpretation, the

burden on Planned Parenthood under the presumption against preemption is to negative *even the possibility* that Kansas offers a plausible no-preemption reading of Title X. Otherwise, Planned Parenthood cannot show a clear and convincing congressional intent to preempt state law in this public-health field.

3. Planned Parenthood Fails to State a Claim that Has Vested under Title X

As indicated in Section I.A, *supra,* Title X imposes conditions precedent on enforcing Title X against grantees like Kansas and those conditions remain unmet. Under federal common law, failure to meet conditions precedent can render third-party beneficiaries unable to state a claim. *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, Planned Parenthood lacks standing as a third-party beneficiary to the federal contracts because Title X's enforceability has not vested. *See* Section I.B, *supra.* Either way, Planned Parenthood cannot prevail on its Title X claims. Assuming *arguendo* that the lack of a vested, enforceable interest is *not* jurisdictional, it nonetheless precludes Planned Parenthood's stating a claim for relief.

B. §107(l) Does Not Impose Unconstitutional Conditions on Receiving State Funding

Planned Parenthood argues that §107(l) unconstitutionally limits Planned Parenthood's eligibility for Title X funds because of Planned Parenthood's relationship with its abortion-providing affiliate entity or because of Planned Parenthood's advocacy for abortion rights. Because Kansas briefs this issue extensively, *amicus* Eagle Forum addresses it only in summary.

As Kansas explains, the states have every right to channel the limited resources available to them – including federal funds – to public rather than private entities. Moreover, given the smaller budgets available for public health, the states have every right to prefer facilities that can provide a greater range of services. Finally, as Kansas notes, §107(l) does not prevent Planned Parenthood from expanding its operations to compete with private FQHCs.

C. §107(l) Does Not Violate the Contract Clause

Assuming *arguendo* that Planned Parenthood *could* bring a contract action, Planned Parenthood could not prevail. Under the Contract Clause, "[n]o State shall enter into any … Law impairing the Obligation of Contracts." By its express terms, Planned Parenthood's

agreement with Kansas "reserves [Kansas'] right to modify in its sole discretion, the funding criteria used in the award process." Appellants' App. at 408 (¶23). Planned Parenthood's quarrel is with its agreement, not with §107(l).

While the terms could be too illusory even to qualify as a contract for continuation years, *Berryman v. Kmoch,* 221 Kan. 304, 309, 559 P.2d 790 (1977), it does not violate the Contract Clause for Kansas to enforce the delegate agreement's *express* terms. Nor does that render the delegate agreement illusory for *past* Planned Parenthood activities. *City of El Paso v. Simmons,* 379 U.S. 497, 514-15 (1965) (declining to interpret contract to render it illusory). For *prospective* Planned Parenthood activities, however, Kansas has every right – indeed a *contractual* right – to terminate the delegate agreements, without impairing any contractual obligations.

CONCLUSION

The Court should dissolve the preliminary injunction for lack of both standing and jurisdiction over the sovereign State of Kansas' implementation of Title X.

Dated: October 11, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF COMPLIANCE WITH RULE 32

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,992 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.

Dated: October 11, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF DIGITAL SUBMISSION

1. The foregoing brief complies with the privacy requirements of Tenth Cir. Rule 25.5 because the brief does not contain any private information that that rule would require to be redacted.

2. The foregoing brief and its attached certificates have been scanned for viruses with the most recent version of a commercial virus scanning program, Norton 360, and according to the program are free of viruses.

Dated: October 11, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund