IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

STATE OF TEXAS *Plaintiff*, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants*.	)	CIVIL ACTION Case No. 6:12-cv-62

Original Complaint

1. This lawsuit challenges the decision of the Secretary of the Department of Health and Human Services to terminate federal funding for the Texas Women's Health Program, solely because Texas law prohibits taxpayer dollars from being allocated to entities that perform or promote elective abortions. The Secretary's action violates the Administrative Procedure Act because it is arbitrary, capricious, an abuse of discretion, and "not in accordance with law." *See* 5 U.S.C. § 706(2)(A). It also violates the Constitution of the United States by seeking to commandeer and coerce the

States' lawmaking processes into awarding taxpayer subsidies to elective-abortion providers.

I. Jurisdiction and Venue

2. Texas brings this suit under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., and the Declaratory Judgment Act, 28 U.S.C. § 2201.
3. The Court has jurisdiction under 5 U.S.C. § 701 et seq., and 28 U.S.C § 1331.
4. Venue is proper under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e).

II. Parties

5. The State of Texas established and administers Medicaid programs within the State, and receives federal reimbursement for these programs under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.
6. Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services (the Secretary or HHS). HHS administers the federal Medicaid law through a division called the Centers for Medicare & Medicaid Services (CMS).

III. Facts and Background

7. The Texas Women's Health Program (WHP) is a state program, administered by the Texas Health and Human Services Commission (HHSC), that provides family planning and related healthcare services for women who do not qualify for healthcare coverage under the ordinary Medicaid program. The Women's Health Program was established by the Legislature to provide these healthcare services to women ages 18 through 44 with incomes at or below

185 percent of the federal poverty level. Expanding eligibility levels for WHP participants serves two goals: (1) increasing access to preventive healthcare services in an effort to reduce long-term costs, and (2) reducing elective abortions.

8. The State of Texas pays 10% of the cost of the family-planning services offered by the Women's Health Program, and 50% of the administrative costs. The federal government pays the remaining 90% and 50% shares. *See* WHP Waiver Special Terms and Conditions (STCs) at 2 (Ex. 3).

9. By all accounts, the Women's Health Program has been a success. By the end of 2010, 292,680 Texas women were enrolled in the Women's Health Program. WHP Renewal App. at 3 (Oct. 25, 2011) (Ex. 5). HHSC estimated that between 2007 and 2009 Medicaid savings totaled $121 million. Of that, federal taxpayer savings totaled an estimated $63 million. *Id*. By expanding family-planning services to low-income women who do not qualify for Medicaid, the Women's Health Program has saved state and federal taxpayers tens of millions of dollars annually in avoided Medicaid expenditures.

10. When the Texas Legislature created the Medicaid Women's Health Program in 2005, it established a five-year Medicaid research and demonstration project "to expand access to preventive health and family planning services" for uninsured women who do not otherwise qualify for Medicaid. S.B. 747, 79th Leg., R.S. (2005), codified at TEX. HUM. RES. CODE § 32.0248. The

program allowed qualifying women to receive preventive-care and family-planning services such as contraception, physical exams, and health screenings for cervical cancer, breast cancer, and sexually transmitted diseases. *Id.*

11. From the outset of the Women's Health Program, the Texas Legislature has explicitly prohibited taxpayer funds from going to entities that perform or promote elective abortions. The Legislature also prohibited taxpayer dollars from funding affiliates of entities that perform or promote elective abortions. *See id.* § 32.0248(h) ("The department shall ensure that the money spent under the demonstration project, regardless of the funding source, is not used to perform or promote elective abortions. The department, for the purpose of the demonstration project, may not contract with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions."). This restriction was necessary to secure legislators' approval of the program, as many state legislators were adamantly opposed to establishing any new program that would provide taxpayer money to organizations—such as Planned Parenthood—that promote or provide elective abortions. Without this statutory restriction on abortion subsidies, the Women's Health Program would not exist because the Texas Legislature would not have authorized its creation.

12. Because the Women's Health Program was created as a Medicaid demonstration project, its implementation requires a Medicaid waiver under Title XI, § 1115(a) of the Social Security Act (SSA). *See* 42 U.S.C. § 1315(a).

13. Normally, to receive funding, a State must comply with statutory criteria for federal Medicaid reimbursement. Section 1315, however, authorizes the Secretary to provide federal Medicaid funding for state demonstration projects—even if those programs do not meet the statutory criteria for federal Medicaid reimbursement—if the Secretary determines that the project is "likely to assist in promoting the objectives of" the federal Medicaid system. 42 U.S.C. § 1315(a). The terms of § 1315 waivers are negotiated between the State and CMS.

14. The State of Texas submitted the State's § 1315 waiver application on December 28, 2005. WHP Waiver App. (Ex. 1). The State's Medicaid waiver application expressly stated that "no funds may be used to perform or promote elective abortions or abortion services, or to contract with entities that perform or promote elective abortions or abortion services." *Id*. at 19.

15. CMS granted the waiver application and approved the five-year demonstration project on December 21, 2006. CMS stipulated that its waiver would expire on December 31, 2011. WHP Waiver Approval Letter (Dec. 21, 2006) (Ex. 2). Although the Texas Legislature enacted § 26.0248 in 2005, when CMS granted the waiver in 2006 neither the WHP waiver nor CMS's related Special Terms and Conditions raised objections to § 32.0248(h)'s

restriction on funding elective-abortion providers. Nor did the WHP Waiver indicate that it was necessary to waive any provision of § 1396a to accommodate the State's policy of withholding taxpayer funds from abortion-performing entities. *See* WHP Waiver Approval Letter at 2 (listing the Medicaid requirements waived by the WHP Waiver). Texas began operating the Women's Health Program on January 1, 2007.

16. The State's enabling legislation for the Women's Health Program expired on September 1, 2011. *See* TEX. HUM. RES. CODE § 32.0248. The Legislature, however, enacted a rider in the General Appropriations Act that instructed HHSC to continue to "provide Women's Health Program services under Medicaid to women," "contingent on receiving a waiver under Section 1115 of the Social Security Act." HB 1, HHSC Rider 62 (Ex. 4). In a separate bill, the Legislature re-enacted its elective-abortion-provider funding restrictions contained in former § 32.0248(h), and extended those restrictions to any future program similar to the Women's Health Program. *See* SB 7, Sec. 1.19, codified at TEX. HUM. RES. CODE § 32.024(c-1) ("The department shall ensure that money spent for purposes of the demonstration project for women's health care services under former Section 32.0248, Human Resources Code, or a similar successor program is not used to perform or promote elective abortions, or to contract with entities that perform or promote elective abortions or affiliate with entities that perform or promote elective abortions.").

17. On October 25, 2011, Texas applied for a renewal of the WHP's Medicaid waiver. WHP Waiver Renewal App. (Ex. 5). The State's application resembled the original waiver application, although it added a new request to expand the waiver to cover the treatment of sexually transmitted diseases. *Id*. at 3.

18. The renewal application also *conditionally* requested an exemption from 42 U.S.C. § 1396a(a)(23), which is known as the "any qualified provider" requirement. Section 1396a(a)(23) limits federal Medicaid reimbursement to state programs that permit "any individual eligible for medical assistance (including drugs) [to] obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23).

19. The State of Texas maintained that the Secretary need not waive § 1396a(a)(23) because nothing in that provision requires a State's Medicaid program to give taxpayer money to elective-abortion providers such as Planned Parenthood—so the Women's Health Program should therefore qualify for federal Medicaid funding even if the Secretary declined to waive § 1396a(a)(23). Section 1396a(a)(23) does not allow eligible Medicaid recipients to obtain services from *any* healthcare provider, but only from a "qualified" provider. Because the State of Texas has a public policy

preventing taxpayer funds from directly or indirectly subsidizing elective abortions, elective-abortion providers are not "qualified" to provide the services offered in the Women's Health Program at taxpayer expense. In addition, the Attorney General of Texas and the U.S. Court of Appeals for the First Circuit have concluded that 42 U.S.C. § 1396a(p) "permit[s] a state to exclude an entity from its Medicaid program for any reason established by state law." Tex. Att'y Gen. Op. No. GA-0844 (Feb. 17, 2011) (quoting *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007)). And in all events, the Woman's Health Program does not prohibit its enrollees from "obtain[ing]" family-planning services from Planned Parenthood and other elective-abortion providers. It limits only the *providers'* ability to receive taxpayer money in exchange for providing those services. Nevertheless, out of an abundance of caution, the State requested the exemption "in the event that CMS believes a waiver [of section 1396a(a)(23)] is necessary" to accommodate the laws that withhold taxpayer funds from elective-abortion providers. *Id.*

20. On December 12, 2011, CMS declined to grant the State's waiver renewal request. *See* WHP Waiver Renewal Denial Letter (Dec. 12, 2011) (Ex. 6). In a letter explaining its decision, CMS made clear that the State's refusal to extend taxpayer subsidies to elective-abortion providers was the sole reason for the denial. *Id.* Despite recognizing "the value of the State's demonstration to women throughout Texas," CMS concluded, "after

consultation with the Secretary, that nonapplication of the ["any qualified provider"] provision to the Demonstration is not likely to assist in promoting the statutory purposes" of Medicaid. *Id.* at 1. CMS did not address Texas's contention that the State's prohibition on taxpayer subsidies for elective-abortion providers satisfied the requirements of section 1396a(a)(23) and therefore did not require a waiver under § 1315(a).

21. Although it declined to renew the waiver, CMS nevertheless extended the previous waiver through March 31, 2012 to provide time for Texas and CMS to negotiate a renewal. *Id.* at 2.

22. No agreement was reached, and on Thursday, March 15, 2012, CMS informed the State of Texas that it would terminate federal funding for the Women's Health Program. WHP Waiver Termination & Phase-Out Letter (March 15, 2012) (Ex. 7).

23. The Secretary's denial of the State's waiver renewal application for the Women's Health Program represents a final agency action subject to judicial review under the APA. 5 U.S.C. § 702; *see also Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994) (holding that the Secretary's decision under § 1315 is subject to judicial review).

24. The Secretary's denial of the State's waiver renewal application has harmed the State of Texas by forcing it to choose between funding the Women's Health Program entirely with state tax dollars or else shutting down the

program. Each of these options imposes significant financial burdens on the State and its taxpayers.

25. Even though CMS recognized that the Women's Health Program "has been essential to ensuring that women in Texas have access to important preventive care services," it nonetheless concluded that Texas's refusal to provide taxpayer subsidies to elective-abortion providers justified CMS's decision to terminate all federal funding for the Women's Health Program. *See* WHP Waiver Termination & Phase-Out Letter at 1 (Ex. 7). That decision was arbitrary, capricious, an abuse of discretion, and not in accordance with law.

IV. Claims for Relief

First Claim for Relief

26. The allegations in paragraphs 1-25 are incorporated herein.

27. The Secretary's denial of Texas's waiver renewal application was arbitrary, capricious, an abuse of discretion and not in accordance with law because the Secretary based her decision on an erroneous interpretation and application of the Social Security Act.

28. The Secretary believes that 42 U.S.C. § 1396a(a)(23) *requires* every State to give taxpayer subsidies to elective-abortion providers—so long as those providers offer *any* form of health care covered by the State's Medicaid plan. But section 1396a(a)(23) says no such thing, and it most assuredly does not

impose this requirement with the unmistakably clear language that the Supreme Court requires for statutory conditions on the receipt of federal funds. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

29. Section 1396a(a)(23) does not allow eligible Medicaid recipients to obtain services from *any* healthcare provider, but only from a "qualified" provider. Because the State of Texas has a public policy preventing taxpayer funds from directly or indirectly subsidizing elective abortions, elective-abortion providers are not "qualified" to provide the services offered in the Women's Health Program at taxpayer expense. Because money is fungible, taxpayer money is used to support elective abortions whenever the State awards grants to entities or affiliates of entities that perform or promote elective abortions, even when the taxpayer funds are designated exclusively for non-abortion-related purposes. The CMS letter refuses to acknowledge this statutory language restricting Medicaid beneficiaries to "qualified" providers, and falsely asserts that the statute "assure[s] free choice of family planning providers" without regard to state-established qualifications.

30. The First Circuit has also recognized that the Social Security Act permits a State to exclude healthcare providers from its Medicaid program for any reason established by state law. *See First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (holding that the Medicaid exclusion

statute, 42 U.S.C. § 1396a(p)(1), permits "a state to exclude an entity from its Medicaid program for any reason established by state law").

31. In addition, Congress has persistently forbidden the use of federal taxpayer money to subsidize elective abortions. *See* H.R. 2055, Consol. Appropriations Act 2012 § 613, Pub. L. No. 112-74 (Hyde Amendment). It is not reasonable for the Secretary to insist that Congress would simultaneously *forbid* federal officials to subsidize elective abortions with *federal* tax dollars, yet *compel* the States to indirectly subsidize elective abortions with *state* tax dollars.

32. And in all events, § 1396a(a)(23) requires only that a State Medicaid plan "provide that . . . 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." Yet no provision of Texas law prevents individuals who enroll in the Women's Health Program from seeking "medical assistance" from Planned Parenthood or any other abortion-performing entity. It restricts only the ability of those elective-abortion providers (and their affiliates) to obtain taxpayer money for providing those services.

33. The abortion-funding restrictions in the Women's Health Program therefore do not contravene section 1396a(a)(23) and do not require a waiver under 42 U.S.C. § 1315(a). The Secretary's determination that the Women's Health Program fails to comply with § 1396a(a)(23), and her refusal to grant the

waiver renewal based on her assertion that a waiver of § 1396a(a)(23) would not promote the objectives of the Medicaid statute, were therefore arbitrary, capricious, an abuse of discretion, and contrary to law. *See* WHP Waiver Renewal Denial Letter at 1 (Dec. 12, 2011) (Ex. 6).

Second Claim for Relief

34. The allegations in paragraphs 1-33 are incorporated herein.

35. The Secretary abused her discretion and exceeded her statutory authority under § 1315(a) because her reason for refusing to renew the Women's Health Program waiver is not grounded in the statute. Section 1315 authorizes the Secretary to approve waivers that "in her judgment" will "likely assist in promoting the objectives of" the federal Medicaid law. It can hardly be disputed that the Women's Health Program has consistently promoted the objectives of the Medicaid law, and would continue to do so if the Secretary approved the waiver's renewal. A substantially similar waiver application—with the identical state law provider restrictions in place—was approved by CMS in 2006. *See* WHP Waiver Approval Letter (Ex. 2), and STCs (Ex. 3). Indeed, CMS even acknowledged "the value of the State's demonstration to women throughout Texas." *See* WHP Waiver Renewal Denial Letter at 1 (Dec. 12, 2011) (Ex. 6).

36. The Secretary's only reason for refusing to renew the waiver was because state law prohibits taxpayer funding of elective-abortion providers. *Id*. This decision was not based on a substantive assessment of whether the Women's

Health Program would likely "assist in promoting the objectives of" Medicaid. It cannot be denied that a renewal of the State's successful Women's Health Program will "assist in promoting the objectives of Medicaid," even if the State chooses to limit its taxpayer subsidies to providers that do not provide or promote elective abortions. Surely a Women's Health Program that withholds taxpayer subsidies from Planned Parenthood does more to "promot[e] the objectives of Medicaid" than a state in which the Women's Health Program does not exist at all. The Secretary denied the State's waiver renewal because she disapproved the abortion-funding restrictions as a matter of policy, and therefore her decision was an abuse of discretion and outside the bounds of her statutory authority. While § 1315(a) authorizes the Secretary to exercise "judgment" in approving applications for Medicaid waivers, that authority "is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

Third Claim for Relief

37. The allegations in paragraphs 1-36 are incorporated herein.

38. The Constitution of the United States forbids the federal government to "commandeer" or "coerce" a State's lawmaking processes. *See New York v. United States*, 505 U.S. 144 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987). The Secretary's decision to deny the waiver renewal represents an unconstitutional attempt to commandeer and coerce the State of Texas into

repealing its law that withholds taxpayer money from elective-abortion providers. The Secretary has made clear that she *would* approve the waiver if only Texas would repeal its law that withholds taxpayer funds from elective-abortion providers and their affiliates. She is therefore using her waiver decision to exert unconstitutional leverage over a State's abortion policies.

39. The Supreme Court's decision in *New York v. United States* invalidated a federal statute that required States to either: (a) enact legislation to dispose of radioactive waste; or (b) take title to that waste. The Secretary's decision to deny the waiver puts the State of Texas to a similar choice. Texas can either: (a) enact legislation repealing its abortion-funding restrictions; or (b) take full responsibility for providing family-planning services to women enrolled in the Women's Health Program. By expressing a willingness to grant waivers to States that provide taxpayer subsidies to abortion-performing entities, while withholding waivers from States (such as Texas) that do not, the Secretary is imposing the functional equivalent of a fine on Texas for its legislature's decision to withhold public money from elective-abortion providers.

40. *South Dakota v. Dole* establishes that the federal government may not threaten to withhold federal funds as a means of "coercing" the States into enacting legislation on matters that fall within the scope of their reserved powers. *Dole* permitted the federal government to withhold a mere five

percent of allotted federal highway funds from any State that failed to raise its drinking age to 21. Here, by contrast, the Secretary is threatening to withhold *all* federal funding from the Texas Women's Health Program, unless the State repeals its restrictions on funding elective-abortion providers. The Secretary's efforts to use federal Medicaid funding to shape state abortion policy are not germane to the federal interests embodied in the Medicaid Act.

41. In the alternative, even if this Court were to determine that these constitutional objections are not fatal to the Secretary's decision, they are sufficiently colorable to trigger the canon of constitutional avoidance. That is enough to preclude the Secretary from adopting any construction of the Medicaid Act that would condition federal funding on a State's willingness to provide taxpayer subsidies to elective-abortion providers. The Supreme Court has repeatedly held that the need to avoid resolving difficult constitutional issues must trump the deference that reviewing courts might otherwise extend to agency interpretations of statutes. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988); *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006); *Solid Waste Agency v. Army Corp of Eng'rs*, 531 U.S. 159, 174 (2001).

V. <u>Request For Relief</u>

The State respectfully requests the following relief:

42. A declaration that the restrictions on abortion funding in TEX. HUM. RES. CODE § 32.024(c-1) do not implicate 42 U.S.C. § 1396a(a)(23).

43. Vacatur of the Secretary's denial of Texas's request for a renewal of the § 1315 waiver for the WHP;

44. All other relief to which the State may be entitled.

Respectfully submitted.

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