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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Planned Parenthood Arizona, Inc.; Jane
Doe #1; Jane Doe #2, Jane Doe #3; Eric
Reuss, M.D.,

Plaintiffs,

v.

Tom Betlach, Director, Arizona Health
Care Cost Containment System; Tom
Horne, Attorney General,

Defendants.

No. 2:12-cv-01533-NVW

**FIRST AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

1 Plaintiffs Planned Parenthood Arizona (“PPAZ”), Jane Doe #1, Jane Doe #2, and
2 Jane Doe #3, and Eric Reuss, M.D., by and through their attorneys, bring this Complaint
3 against the above-named Defendants, their employees, agents, delegates, and successors
4 in office, and in support thereof state the following:

5 **INTRODUCTORY STATEMENT**

6 1. This civil action is brought pursuant to 42 U.S.C. § 1983 and the United
7 States Constitution to vindicate rights secured by the federal Medicaid statutes as well as
8 the Supremacy, Due Process, Equal Protection and Contract Clauses of the United States
9 Constitution.

10 2. On May 4, 2012, Arizona Governor Jan Brewer signed into law Arizona
11 Assembly HB 2800, 2nd Regular Session, 50th Legislature (2012), codified at Ariz. Rev.
12 Stat. § 35-196.05 (“the Act”). The Act disqualifies from eligibility to participate in
13 Arizona’s Medicaid program any “person” who provides abortions except in narrowly
14 defined circumstances. On or about June 25, 2012, the Arizona Health Care Cost
15 Containment System (AHCCCS), the Medicaid agency in Arizona, issued implementing
16 instructions requiring all AHCCCS medical providers to attest that they do not provide
17 abortions outside the limited circumstances indicated in the Act by August 2, 2012.
18 Failure to provide this attestation will result in the medical provider no longer being
19 eligible to provide and receive reimbursement for medical services to patients enrolled in
20 Medicaid.

21 3. Plaintiff Planned Parenthood Arizona (PPAZ) has been a provider of
22 Medicaid services in Arizona for decades. Among the many reproductive health medical
23 services that PPAZ provides is abortion, including abortions that will disqualify PPAZ
24 from continued eligibility to participate in the Medicaid program. Plaintiffs Jane Doe #1,
25 Jane Doe #2, and Jane Doe #3 are patients of PPAZ who are enrolled in the Medicaid
26 program. Plaintiff Eric Reuss, M.D., is a physician specializing in Obstetrics and
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1 Gynecology who treats patients who are Medicaid beneficiaries. Dr. Reuss also provides
 2 abortions to some of his patients that will disqualify him from continued eligibility to
 3 participate in the Medicaid program.

4 4. Plaintiffs seek declaratory and injunctive relief. The Act violates Section
 5 1396a(a)(23) of Title 42 of the United States Code (“Medicaid freedom of choice
 6 provision”) because, by barring PPAZ and Dr. Reuss from the Medicaid program, it
 7 prevents their patients from receiving services from the qualified, willing provider of their
 8 choice. It violates the Supremacy Clause because it imposes restrictions on eligibility for
 9 Medicaid funds that are in excess of and inconsistent with restrictions and requirements
 10 established by the federal government for receipt of these funds. The Act imposes an
 11 unconstitutional condition in violation of the Due Process Clause because it disqualifies
 12 PPAZ and Dr. Reuss from participation in the Medicaid program based on their provision
 13 of abortion outside the program. It violates the Equal Protection Clause because it
 14 distinguishes, without adequate justification, between family planning providers who
 15 provide abortion outside the Medicaid program and those who do not. Finally, the Act
 16 violates the Contracts Clause because it impairs PPAZ’s and Dr. Reuss’s contractual
 17 relationships with the State’s managed care contractors and the contractual obligations
 18 contained therein.

19 5. The Act is scheduled to take effect on August 2, 2012. Unless enjoined by
 20 this Court, the Act will cause significant and irreparable harm to Dr. Reuss and his
 21 Medicaid patients, and to PPAZ and to its Medicaid patients, including Plaintiffs Jane Doe
 22 #1, Jane Doe #2, and Jane Doe #3, who will lose their provider of choice, will find their
 23 family planning services interrupted, and—particularly in certain underserved areas—will
 24 be left with few or no alternative providers.

25 **JURISDICTION AND VENUE**

26 6. Subject-matter jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331
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1 & 1343.

2 7. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28
3 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and
4 by the general legal and equitable powers of this Court.

5 8. Venue in this judicial district is proper under 28 U.S.C. § 1391.

6 **THE PARTIES**

7 **A. Plaintiffs**

8 9. Plaintiff PPAZ is a not-for-profit corporation organized under the laws of
9 Arizona. PPAZ brings this action on behalf of itself, its patients, and the physicians it
10 employs to provide services to its patients.

11 10. PPAZ, the largest provider of reproductive health services in Arizona,
12 operates 13 health centers throughout the state. For more than twenty years, PPAZ has
13 participated in the Medicaid program, providing medical services to low-income
14 enrollees.

15 11. Each year, PPAZ provides more than 66,000 patient visits, approximately
16 3,000 of which are for Medicaid patients. For example, last year, during these visits,
17 PPAZ provided over 9,400 pap smears, over 16,200 tests and treatments for sexually
18 transmitted diseases, over 33,700 breast exams, 136 HPV immunizations, and over 85,400
19 contraceptives.

20 12. At five of its 13 health centers, PPAZ also provides abortions.

21 13. Plaintiffs Jane Doe #1 and Jane Doe #2 are a mother and daughter who are
22 Arizona residents and Medicaid patients. They have sought family planning services at
23 PPAZ's Yuma Center and desire to continue to do so. They are due back for their next
24 appointments in September 2012. They sue on their own behalf.

25 14. Plaintiff Jane Doe #3, an Arizona resident and Medicaid patient, has been a
26 patient of PPAZ since 1997. She regularly seeks family planning services at PPAZ's
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1 Flagstaff Center and desires to continue to do so. She is due back for her next
2 appointment in September 2012. She sues on her own behalf.

3 15. Plaintiffs Jane Doe #1, Jane Doe #2, and Jane Doe #3 appear anonymously
4 because of the private and personal nature of the medical care that they receive at PPAZ,
5 and their desire not to have that information become public in order for them to assert
6 their legal rights.

7 16. Plaintiff Eric Reuss, M.D., is a physician with a private practice, Scottsdale
8 Obstetrics & Gynecology, P.C., in Scottsdale, Arizona. Dr. Reuss is a Diplomate of the
9 American College of Obstetrics and Gynecology, and his practice is limited to Obstetrics
10 and Gynecology. At any given time, approximately 20% of his Obstetrics patients are
11 Medicaid beneficiaries. In his gynecology practice, Dr. Reuss provides a small number of
12 abortions each year. Dr. Reuss is also a member of the Board of Directors of PPAZ. Dr.
13 Reuss sues on his own behalf and on behalf of his patients.

14 **B. Defendants**

15 17. Defendant Tom Betlach is the Director of the Arizona Health Care Cost
16 Containment System (AHCCCS), the agency that administers the state Medicaid program,
17 and which, in the absence of the Act, would disburse the funds at issue to PPAZ and Dr.
18 Reuss through the managed care contractors with which they currently contracts.
19 Defendant Betlach is sued in his official capacity.

20 18. Defendant Tom Horne is the Attorney General of Arizona, and is authorized
21 by the Act to bring an action to enforce its terms. Defendant Horne is sued in his official
22 capacity.

23 **THE ACT AND ITS IMPLEMENTATION**

24 19. The Act provides that “[t]his state or any political subdivision of this state
25 may not enter into a contract with or make a grant to any person that performs
26 nonfederally qualified abortions or maintains or operates a facility where nonfederally
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1 qualified abortions are performed for the provision of family planning services.” The Act
 2 defines “nonfederally qualified abortion” as an “abortion that does not meet the
 3 requirements for federal reimbursement under Title XIX of the Social Security Act,” i.e.,
 4 any abortion except where the pregnancy is the result of rape or incest or threatens the life
 5 of the patient. Ariz. Rev. Stat. § 35-196.05(B).

6 20. On June 25, 2012, AHCCCS posted an attestation form and a form letter on
 7 its website, along with a warning that “providers or facilities qualified to perform
 8 abortions within the scope of their license will be required to complete and return the
 9 attestation.” See [http://www.azahcccs.gov/reporting/legislation/sessions/2012/](http://www.azahcccs.gov/reporting/legislation/sessions/2012/SecondReg.aspx)
 10 [SecondReg.aspx](http://www.azahcccs.gov/reporting/legislation/sessions/2012/SecondReg.aspx). These forms require these providers to attest, by August 2, 2012, that
 11 they no longer provide abortions except where the pregnancy is a result of rape or incest,
 12 where the pregnancy endangers the woman’s life, and for Medicaid patients only, certain
 13 situations where the pregnancy endangers the woman’s health. The letter makes clear that
 14 providers who fail to sign the attestation form will have their provider agreement
 15 terminated and will no longer be eligible to receive Medicaid reimbursements. A true and
 16 correct copy of this letter is attached and incorporated herein as Exhibit 1.

17 **THE MEDICAID PROGRAM**

18 **1. The Medicaid Statute**

19 21. The Medicaid program, established under Title XIX of the Social Security
 20 Act of 1935, 42 U.S.C. § 1396 *et seq.*, pays for medical care provided to eligible needy
 21 people. A State may elect whether or not to participate; if it chooses to do so, it must
 22 comply with the requirements imposed by the Medicaid statute and by the Secretary of the
 23 U.S. Department of Health and Human Services (“HHS”) in her administration of
 24 Medicaid. *See generally* 42 U.S.C. § 1396a(a)(1)-(83).

25 22. To receive federal funding, a participating State must develop a “plan for
 26 medical assistance” and submit it to the Secretary of HHS for approval. 42 U.S.C. §
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1 1396a(a).

2 23. Among other requirements, the State plan must provide that: “[A]ny
3 individual eligible for medical assistance . . . may obtain such assistance from any
4 institution, agency, community pharmacy, or person, qualified to perform the service or
5 services required . . . who undertakes to provide him such services.” 42 U.S.C. §
6 1396a(a)(23)(A).

7 24. Congress has singled out family planning services for special additional
8 protections to ensure freedom of choice, specifically providing that, with respect to these
9 services and with certain limited exceptions not applicable here, “enrollment of an
10 individual eligible for medical assistance in a primary care case-management system . . . ,
11 a medicaid managed care organization, or a similar entity shall not restrict the choice of
12 the qualified person from whom the individual may receive services.” § 1396a(a)(23)(B).

13 25. For decades, Congress has attached a rider to HHS’s appropriations
14 blocking the use of Medicaid funds for abortion, except in limited circumstances. *See,*
15 *most recently,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, §§ 613-14,
16 125 Stat. 786, 925-26 (2011). However, the Medicaid Act does not prohibit entities that
17 provide abortion services from receiving Medicaid funds.

18 **2. Implementation of the Medicaid Act**

19 26. For decades, HHS has repeatedly interpreted the “qualified” language in
20 Section 1396a(a)(23) to prohibit states from denying access to a provider for reasons
21 unrelated to the ability of that provider to perform Medicaid-covered services or to
22 properly bill for those services, including reasons such as the scope of the medical
23 services that the provider chooses to offer.

24 27. Most recently, the Centers for Medicare and Medicaid Services (“CMS”)
25 rejected an Indiana plan that, just like the Arizona Act, barred state agencies from
26 contracting with or making grants to any entities that perform abortion. Specifically, CMS
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1 found that Indiana's plan violated the Medicaid freedom of choice provision.

2 28. HHS has explained that "[t]he purpose of the free choice provision is to
3 allow [Medicaid] recipients the same opportunities to choose among available providers
4 of covered health care and services as are normally offered to the general population."
5 State Medicaid Manual § 2100, CMS Manuals Publication #45.

6 29. Consistent with this understanding, HHS has a long history of rejecting state
7 plans to limit the type of provider that can provide particular services. *See, e.g.*, 53 Fed.
8 Reg. 8699 (Mar. 16, 1988) (rejecting plan that would limit providers to "private
9 nonprofit" organizations).

10 **3. PPAZ and Dr. Reuss's status as providers in Arizona's Medicaid Program**

11 30. Arizona does not directly reimburse providers. Rather, it contracts with
12 private managed care providers (collectively, "AHCCCS managed care contractors"), who
13 in turn contract with medical care providers to reimburse those providers for providing
14 care to Medicaid beneficiaries who are enrolled with the respective managed care
15 contractors. PPAZ and Dr. Reuss have entered into fee-for-service agreements with
16 several of the AHCCCS managed care contractors. Under the terms of their contracts,
17 PPAZ and Dr. Reuss agreed to provide health and medical services to the contractors'
18 members, and the contractor agreed to reimburse them for these services. PPAZ and its
19 physicians, and Dr. Reuss, must maintain their provider participation agreements with
20 AHCCCS in order to be reimbursed for providing services to the AHCCCS managed care
21 contractors.

22 31. AHCCCS re-credentials a provider every three years. AHCCCS has re-
23 credentialed PPAZ, without break or incident, at least since 1991, and has re-credentialed
24 Dr. Reuss without break or incident at least since 2001.

25 **THE IMPACT OF THE ACT ON PPAZ, DR. REUSS, AND THEIR PATIENTS**

26 32. Unless the Act is enjoined or unless PPAZ, its physicians, and Dr. Reuss
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1 were to cease providing abortions (except under the narrow circumstances allowed under
2 the Medicaid program), they will no longer be able to provide healthcare services to their
3 Medicaid patients, and they will lose the revenues from those services. PPAZ treats
4 approximately 3,000 Medicaid patients annually, and receives revenue of approximately
5 \$350,000 annually. At any given time, Dr. Reuss provides ongoing obstetrical care to
6 approximately 40-50 Medicaid patients.

7 33. Implementation of the Act will deprive PPAZ and Dr. Reuss's patients,
8 including Plaintiffs Jane Doe #1, Jane Doe #2, and Jane Doe #3, of access to the high-
9 quality, specialized care that PPAZ and Dr. Reuss provide.

10 34. Four of PPAZ's 13 medical centers are in areas that the federal government
11 has classified as "medically underserved" based on four variables: 1) the ratio of primary
12 medical care physicians per 1,000 population, 2) the infant mortality rate, 3) the
13 percentage of the population with incomes below the poverty level, and 4) the percentage
14 of the population age 65 or over. These are PPAZ's Flagstaff Health Center, Maryvale
15 Health Center, Yavapai Health Center, and Tempe Health Center. Five of PPAZ's centers
16 are in areas classified as "low provider," a designation based on similar criteria. *See*
17 Shortage Area Database, Health Resources and Services Administration, U.S. Dep't of
18 Health and Human Services, *available at* [http://datawarehouse.hrsa.gov/GeoAdvisor](http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx)
19 [/ShortageDesignationAdvisor.aspx](http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx) (last accessed June 29, 2012); Guidelines for MUA
20 and MUP Designation U.S. Dep't of Health and Human Services, *available at*
21 <http://bhpr.hrsa.gov/shortage/muaps/index.html> (last accessed July 10, 2012).

22 35. Many of the Medicaid patients in these areas have few or no alternative
23 options and will find it difficult or impossible to access the reproductive health care
24 services PPAZ provides if the Act goes into effect. Those who are unable to find an
25 adequate alternative will not receive the medical services they need, an effect that would
26 lead to higher rates of unintended pregnancies and transmission of sexual diseases.

1 36. Patients insured through Medicaid choose PPAZ based on a number of
2 factors that are generally not available at other providers. With its evidence-based
3 practices and up-to-date technology, PPAZ is known as a provider of high-quality medical
4 care. Many individuals who receive other health care through community care providers
5 or other Medicaid providers choose to have a separate provider such as PPAZ for their
6 reproductive health care because they are concerned about their privacy and because they
7 fear being judged by other providers.

8 37. In addition, many low-income patients have unique scheduling constraints
9 because they are juggling inflexible work schedules, childcare obligations, and lack of
10 childcare resources. To ensure that these patients have access to family planning services,
11 PPAZ offers extended hours. One PPAZ center is open seven days a week. All of PPAZ's
12 urban centers are open at least one night per week until seven or eight, and five of PPAZ's
13 centers have Saturday hours. In addition, PPAZ spaces patient appointments so as to
14 minimize wait times. Other providers of similar services often require long waits before
15 patients can be seen.

16 38. Medicaid patients generally have a hard time finding family planning and
17 related reproductive health care services in Arizona. Because Arizona reimburses
18 providers at exceptionally low levels, many health care providers refuse to take Medicaid.
19 For example, Medicaid reimburses PPAZ at 45% *less* than the cost PPAZ incurs by
20 providing the services.

21 39. One group at particular risk of losing necessary—and in some cases life-
22 saving—services is women who are legally entitled to a Medicaid-funded abortion
23 because their pregnancy either is the result of rape or incest or poses certain risks to their
24 health or life. On information and belief, there are few, if any, abortion providers in
25 Arizona who will be able to continue participating in Medicaid if the Act goes into effect.
26 Thus, should the Act take effect, Arizona women on Medicaid who otherwise would have
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1 been able to obtain a Medicaid-funded abortion will no longer be able to do so because
2 those physicians will have been disqualified from Medicaid.

3 40. Dr. Reuss also would be forced to cease providing obstetrical care to women
4 on Medicaid. A majority of these patients come to him on referral from prior patients who
5 were pleased with the care he provided. If Dr. Reuss is forced to stop treating Medicaid
6 patients, these women would be deprived of the physician of their choice, a highly
7 qualified specialist, to help them safely carry their pregnancies to term.

8 41. Plaintiff Jane Doe #1 is a single mother of four children (one of them Jane
9 Doe #2). They live in Yuma, Arizona, a “low provider area.” She works full time as a
10 restaurant manager. Plaintiff Jane Doe #3 lives in Flagstaff, Arizona, a “medically
11 underserved” area. She has a longstanding relationship with PPAZ as her main provider
12 for family planning and other reproductive health services, and chooses to receive her care
13 at PPAZ for any services Medicaid covers. She is a single parent, juggling work, school,
14 and childcare obligations. All three individual Plaintiffs rely on PPAZ as the place they
15 can turn to for urgent care and for prompt, efficient services. All three patients are due
16 back at Planned Parenthood for further treatment in September 2012. If the Act goes into
17 effect, they will be prevented from receiving services from their provider of choice, will
18 have their health care interrupted, and may encounter difficulties finding alternative care.

19 **CLAIMS FOR RELIEF**

20 **CLAIM I – MEDICAID ACT**

21 42. Plaintiffs hereby incorporate Paragraphs 1 through 41 above.

22 43. The Act violates Section 1396a(a)(23) of Title 42 of the United States Code
23 by denying PPAZ’s patients, including the Plaintiffs Jane Doe #1, Jane Doe #2, and Jane
24 Doe #3, and Dr. Reuss’s patients, the right to choose any willing, qualified healthcare
25 provider under the Medicaid program.

26 44. Therefore, pursuant to 42 U.S.C. § 1983, this Court should declare the Act
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1 illegal and preliminarily and permanently enjoin enforcement of the Act.

2 **CLAIM II – SUPREMACY CLAUSE**

3 45. Plaintiffs hereby incorporate Paragraphs 1 through 41 above.

4 46. The Act violates the Supremacy Clause of the United States Constitution by
5 placing impermissible eligibility restrictions on federal funds that are in excess of and
6 inconsistent with those established by the federal government.

7 47. Therefore, pursuant to 42 U.S.C. § 1983, as well as directly pursuant to the
8 Supremacy Clause, this Court should declare the Act to be unconstitutional and should
9 preliminarily and permanently enjoin enforcement of the Act.

10 **CLAIM III – FOURTEENTH AMENDMENT DUE PROCESS**

11 48. Plaintiffs hereby incorporate Paragraphs 1 through 41 above.

12 49. The Act imposes an unconstitutional condition on PPAZ's and Dr. Reuss's
13 eligibility to participate in Medicaid because it disqualifies them from Medicaid based on
14 their provision of abortion services outside the Medicaid program.

15 50. Therefore, pursuant to 42 U.S.C. § 1983, this Court should declare the Act
16 to be unconstitutional and should preliminarily and permanently enjoin enforcement of the
17 Act.

18 **CLAIM IV – FOURTEENTH AMENDMENT EQUAL PROTECTION**

19 51. Plaintiffs hereby incorporate Paragraphs 1 through 41 above.

20 52. The Act violates PPAZ's and Dr. Reuss's Fourteenth Amendment rights by
21 singling out abortion providers for unfavorable treatment without adequate justification.

22 53. Therefore, pursuant to 42 U.S.C. § 1983, this Court should declare the Act
23 to be unconstitutional and should preliminarily and permanently enjoin enforcement of the
24 Act.

25 **CLAIM V – CONTRACTS CLAUSE**

26 54. Plaintiffs hereby incorporate Paragraphs 1 through 41 above.

1 Dated: September 20, 2012.

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CERTIFICATE OF SERVICE

☒ I hereby certify that on September 20, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing.

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